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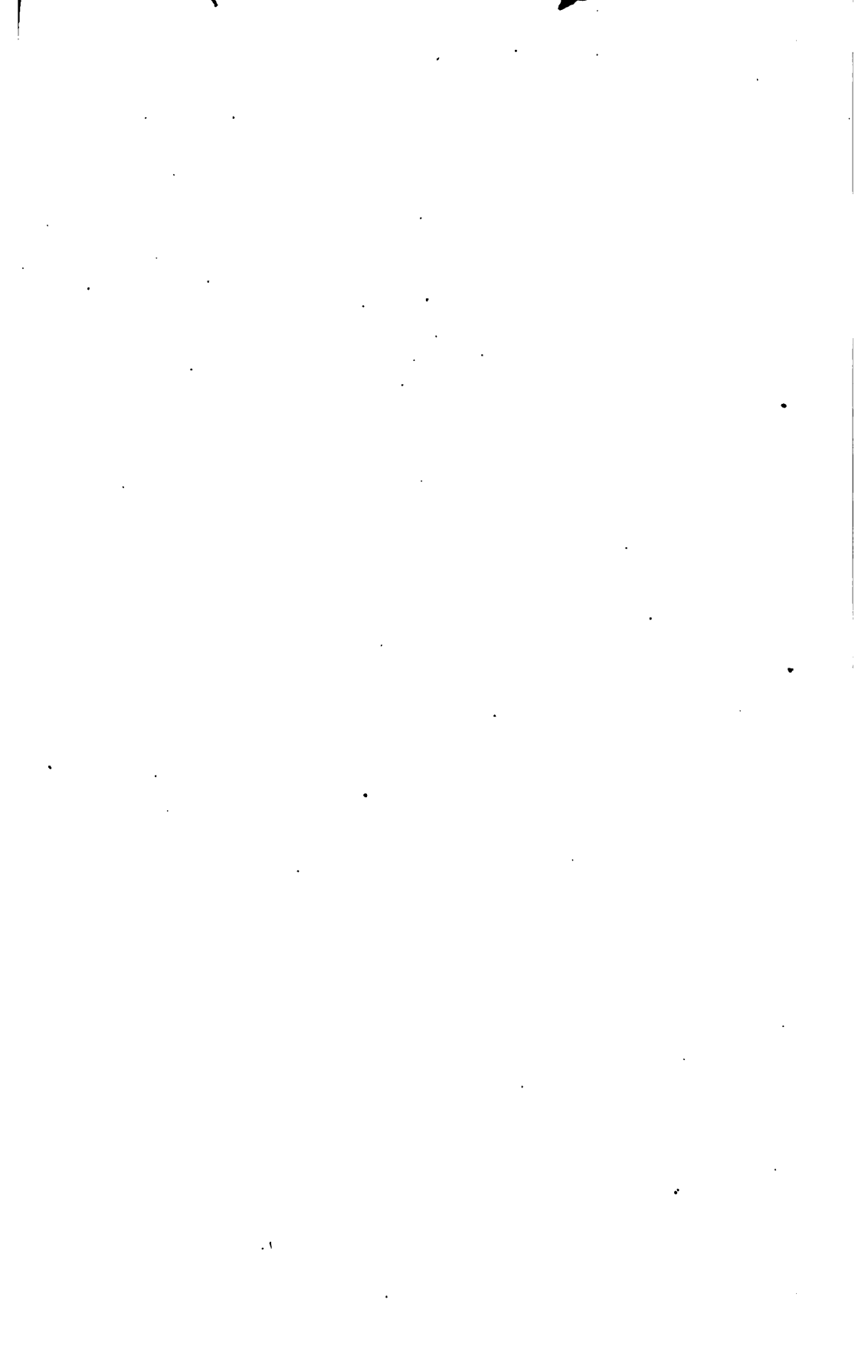


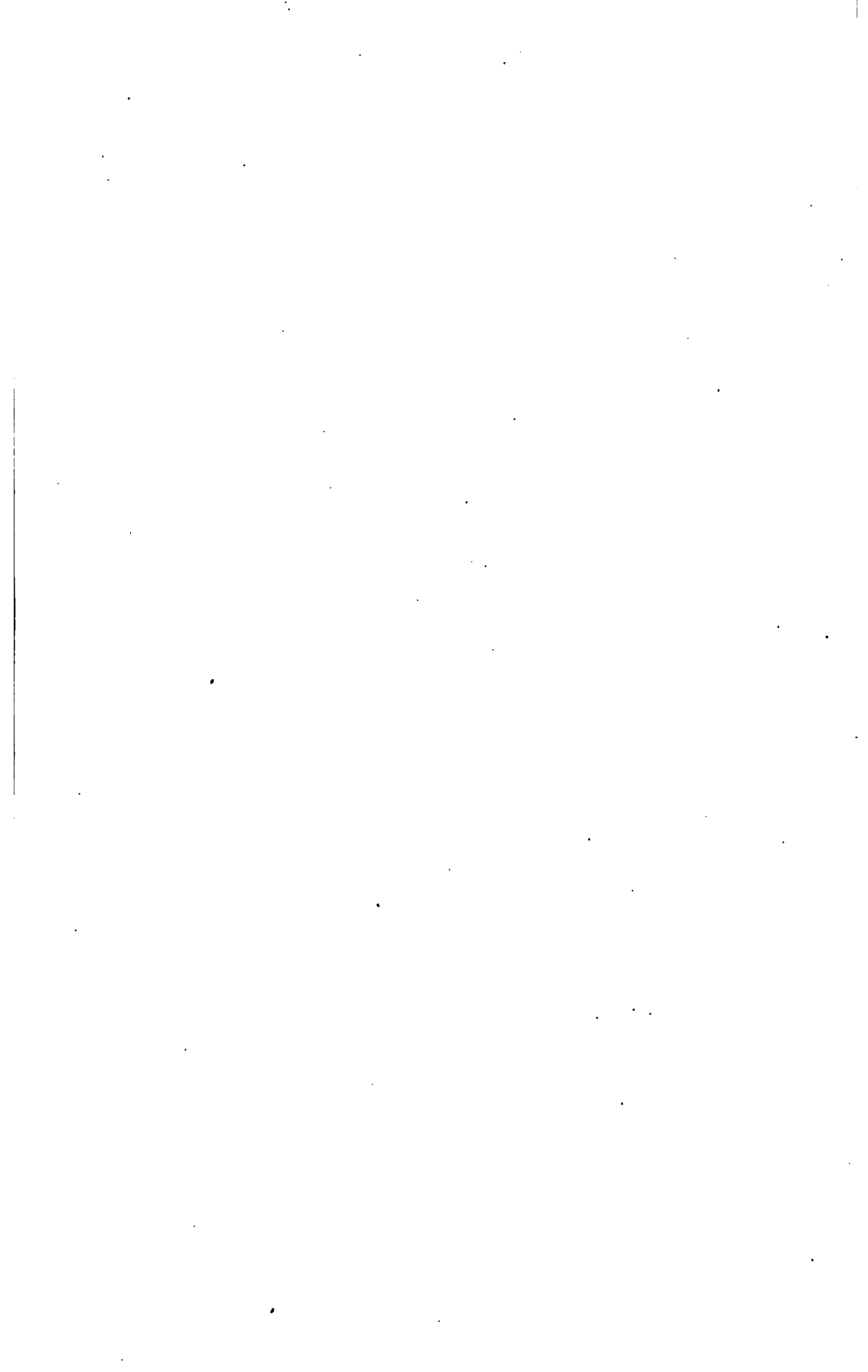
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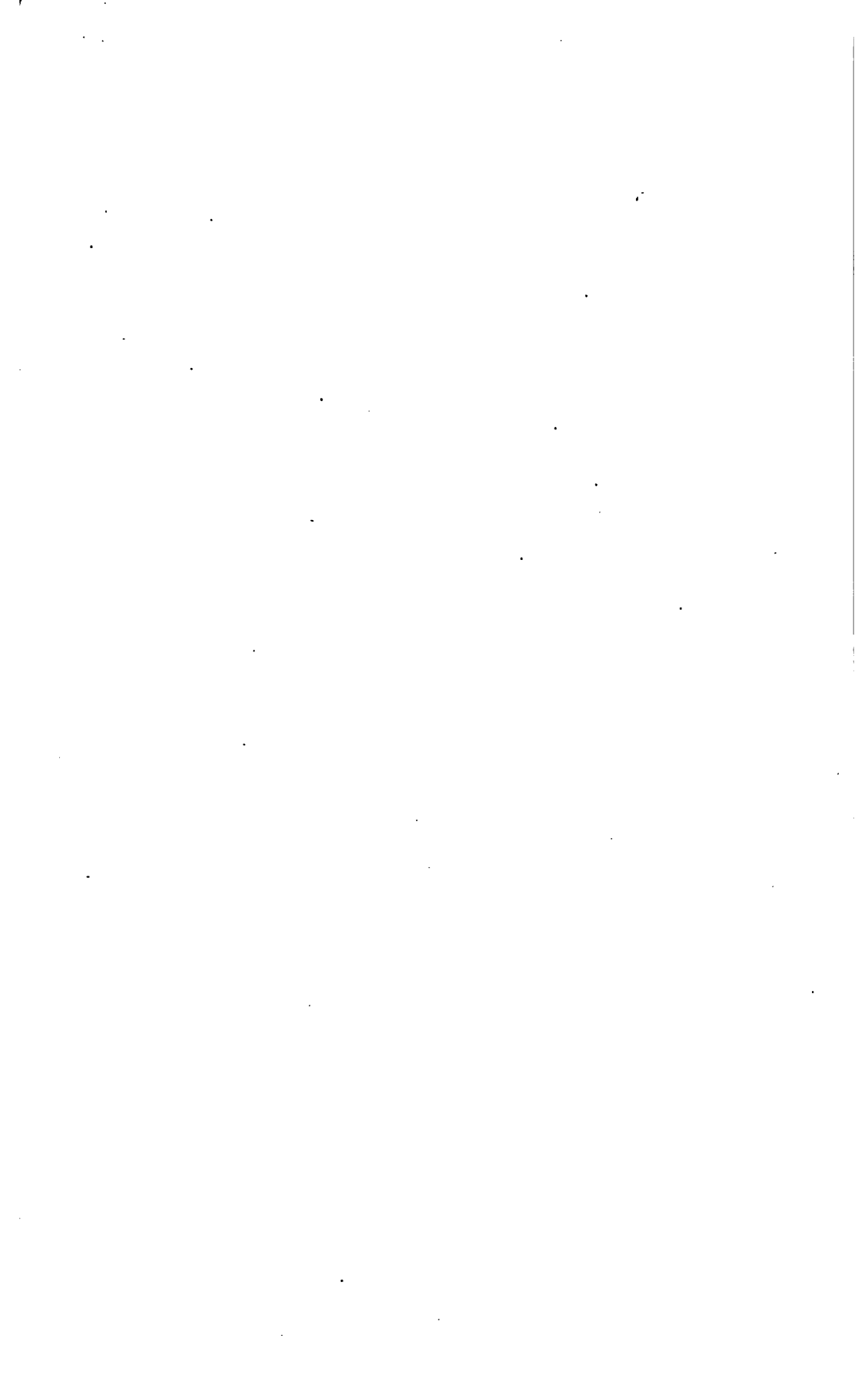
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THE LAWYERS REPORTS ANNOTATED

BOOK XL

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH, EDITOR, AND
HENRY P. FARNHAM, ASST.

ROCHESTER, N. Y.

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REPORT by the Supreme Judicial Court for Lincoln County for the opinion of the full bench of a suit brought to recover assets alleged to have belonged to plaintiff's intestate

and to have been appropriated by defendant's testator to his own use. *Bill dismissed.*

The facts are stated in the opinion.

Mr. T. P. Pierce for plaintiff.

authority of the administrator *de bonis non* extends only to such of the personality of his intestate as remains in specie, unaltered or unconverted by his predecessor, and so far only can be regarded as trustee for distributees and creditors.

But in *Whitworth v. Oliver*, 36 Ala. 288, the expressions in *Benton County Ct. Judge v. Price*, 6 Ala. 36, and *Willis v. Willis*, 9 Ala. 721, to the effect that the "authority of the administrator *de bonis non* extends only to such of the personality of his estate as remains in specie, unaltered or unconverted by his predecessor, and so far only can be regarded as trustee for distributees and creditors," were criticised. The court said that the real point in those cases was that, in the absence of the statute of 1846, the administrator *de bonis non* could maintain no action to recover from his predecessor any of the effects of the estate, except such as remained in specie, unaltered and unconverted by him. But when the court went further, and limited the authority of the administrator *de bonis non*, it was a question if it did not trench on other statutes of force in this state, as a voluntary payment by an administrator in chief to his successor would exonerate himself and his sureties, and fasten a liability on his successor to creditors and distributees.

Claims against predecessor for accounting, balance, conversion, or devastavit.

In the absence of statutory provisions an administrator *de bonis non* could not require of his predecessor a settlement of his administration, as such settlement could only be made between the administrator in chief and the creditors or distributees. *Nolly v. Wilkins*, 11 Ala. 372.

So, an administrator *de bonis non* was not entitled to recover in assumpsit from the administrator of his predecessor moneys collected by him and unaccounted for. It was said that for assets wasted or converted by the first administrator or executor, the action should be brought directly by the creditors, legatees, or distributees. *Chamberlain v. Bates*, 2 Port. (Ala.) 550, 27 Am. Dec. 667.

And an administrator *de bonis non* could not maintain an action on his predecessor's bond, for a conversion under Ala. act 1806, providing that if any administrator hath embezzled, wasted, or misapplied any part of the decedent's estate, the court may revoke his letters and grant letters of administration to other parties who may have actions of trover, detinue, account, and on the case for such goods or chattels as came to the possession of the former administrator and were withheld, wasted, embezzled, detained, or misapplied and no satisfaction made, as this act did not authorize an action on the bond for a conversion. *Benton County Ct. Judge v. Price*, 6 Ala. 36.

And in *Willis v. Willis*, 9 Ala. 721, it was said that under Ala. act 1806, neither of the actions provided by this statute, nor any other, was maintainable at common law where the assets had been wasted or converted, and the act only applied where letters had been revoked and granted to another for either of the causes mentioned in the act.

And a decree in favor of an administrator *de bonis non* against his predecessor for the balance found due to the estate was erroneous, where the decree was rendered prior to Ala. act Feb. 4, 1846, authorizing the orphan's court on a final settlement with the administrator in chief to render a decree against him, either in favor of the administrator *de bonis non* or of the heirs or distributees, as the court may see fit. *Price v. Simmons*, 18 Ala. 749.

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In *Willis v. Willis*, 9 Ala. 721, it was held that Ala. act 1843, amending the law in relation to insolvent estates, authorizing the orphan's court to render a decree in favor of the administrator *de bonis non* appointed pursuant to its provisions against his predecessors, for all moneys found due from him to the estate, and all such goods, chattels, choses in action, and other personal effects and deeds, and other evidences of title to realty as may be in his hands belonging to the estate, applied exclusively to insolvent estates.

And a decree of the orphan's court ascertaining a certain sum in the hands of a displaced administrator to which the estate of the intestate was entitled, and adjudging the same to be paid over to his successor, and directing an execution to issue for the collection thereof, was erroneous, under Ala. act 1830, Clay's Dig. § 42, providing that all decrees made by the orphan's court on final settlement of the account of executors, administrators, and guardians shall have the force and effect of judgments at law, and execution may issue thereon, and § 43, giving to each distributee, heir, or devisee a writ of execution or attachment when a distribution of real or personal estate is decreed, one or both in the case of personal estate, and in the case of real property a writ of *habere facias possessionem* against the executor, as the act of 1830 only applied to a distributee, heir, or devisee, and did not embrace an administrator *de bonis non*. *Willis v. Willis*, 9 Ala. 721.

In *Martin v. Ellerbe*, 70 Ala. 326; *King v. Smith*, 15 Ala. 264; and *Waring v. Lewis*, 53 Ala. 615,—it was said that at common law an administrator *de bonis non* could not recover of the administrator in chief for his delinquencies or devastavits, or compel a settlement of his devastavits.

Under the Alabama statutes the claim of the administrator *de bonis non* against the administrator in chief for a devastavit is a personal asset in the hands of the administrator *de bonis non*, and if he fails to use proper diligence to recover such assets, and protect the estate against loss, he renders himself accountable for the loss to those entitled to the estate. *Eubank v. Clark*, 78 Ala. 82; *Martin v. Ellerbe*, 70 Ala. 326; *Glenn v. Billingslea*, 64 Ala. 352; *Waring v. Lewis*, 53 Ala. 623; *Banks v. Speers*, 103 Ala. 436.

So, in *Eubank v. Clark*, 78 Ala. 73, it was said that at common law an administrator *de bonis non* was not authorized to have an account for assets converted, wasted, or misapplied by the administrator in chief; but this rule was abrogated by the act of 1846, and by the act of February, 1858.

And in *Hatchett v. Billingslea*, 65 Ala. 16, it was said that Ala. act Feb. 4, 1846 (Pamph. Acts, 14), 1 Brick. Dig. 919, § 82, was carried into the Code of 1852, and forms the subject of chapter 9, title 4, part 2, beginning with § 1876. That section provides "that whenever an executor or administrator is removed, resigns, or his letters are revoked, or his authority ceases from any cause, he must, within one month thereafter, file his account, vouchers, evidence, and statement of the heirs and legatees, as in the case of other settlements; and upon the same being duly advertised as other settlements, his account must be audited, stated, and a decree rendered thereon." Section 1877 provided that "if there is any remaining or succeeding executor or administrator on said estate, a decree must be rendered in his favor, for the amount found due on such settlement, or for the delivery of any personal property in the hands of the executor or administrator whose authority has ceased." Similar provisions are found in Rev.

Messrs. N. Morrill and John A. Morrill, for defendant:

This trust property, if it be a trust property, stands absolutely unidentified, and no trace of

it can be found. The plaintiff, then, stands simply in the position of a general creditor of the estate.

Fowler v. True, 76 Me. 43.

Code, §§ 2165-2169, 2232-2238; Ala. Code, §§ 1876-1881; Code 1876, § 2591.

In *Martin v. Ellerbe*, 70 Ala. 326, it was said that the common-law rule was changed by Ala. act 1846, and that under it the duty was imposed on the administrator *de bonis non* to compel a settlement with his predecessor, and that for any want of diligence in the performance of that duty he was responsible.

Where a sheriff by virtue of his office was appointed administrator, and collected moneys belonging to the estate, and afterwards was appointed administrator, and an action was brought on the bond given for the second administration to recover for effects and assets which had come to his hands as administrator in chief, it was held that under Ala. Code, § 1877, it was also the duty of the administrator *de bonis non* to collect such funds thus held from the resigned or removed administrator in chief, and that the sureties of the administrator *de bonis non* were liable for his failure to make such collection. *Whitworth v. Oliver*, 30 Ala. 286.

So, under Ala. Code, §§ 1876, 1881, where an administrator *de bonis non* had been administrator in chief, and under his second appointment ample time had elapsed to possess himself of the assets that he received as administrator in chief, his bond as administrator *de bonis non* was liable for the same. *Whitworth v. Oliver*, 30 Ala. 286.

And an administrator *de bonis non* would be liable for negligence in not compelling a settlement of the accounts of his predecessor, and for any actual loss occasioned thereby, under Ala. Code, § 2537-2540 (similar to act 1846 and act February, 1856), providing that the administrator *de bonis non* may obtain on such settlement a decree for assets converted, wasted, or misappropriated by his predecessor. *Eubank v. Clark*, 78 Ala. 73.

In *Waring v. Lewis*, 53 Ala. 615, it was said that under Ala. act 1846 the administrator *de bonis non* was the only one who had the right to call his predecessor to a settlement, and to recover of him for any waste or conversion of the assets of which he might have been guilty.

In *Waring v. Lewis*, 53 Ala. 615, it was said that under Ala. Pub. Laws, act 1846-1846, p. 14, Rev. Code, §§ 2232-2238, Rev. Code 1858, §§ 2165-2169, an administrator *de bonis non* was liable for not collecting assets unadministered, and also for such as may have been wasted or converted.

In *Glenn v. Billingslea*, 64 Ala. 345, it was said that under Ala. Code 1876, § 2591, if an administrator *de bonis non* failed to use proper diligence in recovering the assets of the estate he was liable for the loss.

In *Glenn v. Billingslea*, 64 Ala. 345, it was said: "The administrator *de bonis non* had the power and authority to receive from the administratrix in chief compensation for the alleged waste, and for the unauthorized keeping up and cultivation of the plantation. Such compensation, when received, will be assets in his hands, for the payment of debts, or for distribution."

Under Ala. act Feb. 4, 1846, the question whether the sureties of a sheriff acting as administrator were liable for a devastavit during the first administration, where the sheriff was reappointed as administrator *de bonis non* after his term of office as sheriff expired, was not decided; but the sureties on the first bond were liable by reason of a settlement made by their principal acting as sheriff and administrator, and were concluded by that decree. *Hagland v. Calhoun*, 36 Ala. 611.

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And an administrator *de bonis non* was chargeable with the amount in money which by the exercise of due diligence he might have collected or choses in action belonging to the estate which his predecessor was ordered to deliver up to him, and the burden of proof was on him to show that he had used due diligence. *Wilkinson v. Hunter*, 37 Ala. 268.

In *Taylor v. Benham*, 5 How. 233, 12 L. ed. 130, where a judgment had been rendered against an executor, and he was removed and an administrator *de bonis non* appointed, it was said that the objection that an administrator *de bonis non* was not liable for assets in the hands of a deceased executor, could not be sustained, as Ala. Stat. Sept. 1821, Clay's Dig. 227, provides that where any suit may have been commenced on behalf of or against the personal representative of any testator or intestate, the same may be prosecuted by any person who may afterwards succeed to the administration or executorship.

An administrator could discharge himself from liability by surrendering to his successor the assets in his hands to be administered, or by paying him money due from him. *Skinner v. Frierson*, 8 Ala. 915; *Willis v. Willis*, 16 Ala. 650; *Bogle v. Bogle*, 23 Ala. 544.

Choses in action.

Under Ala. Laws, pp. 326-334, providing that the administrator by order of the county court shall sell at public sale on a credit, the purchaser giving bonds, and that he shall not sell at private sale, an administrator *de bonis non* was entitled to collect a note payable to his predecessor in office, as bonds taken by an administrator on a sale for credit as required by law are assets. *Callier v. Boykin*, Minor (Ala.) 206.

So, a bond payable to an administratrix as such was assets in the hands of an administrator *de bonis non*, and he could recover upon such bond where the prior administratrix resigned after having married an obligor to the bond sued on, which she held as assets. *King v. Green*, 2 Stew. (Ala.) 183, 19 Am. Dec. 46.

So, where an administrator was removed after he had sold property of his intestate and had not received the price, he could not sue the purchaser for the same, but the right of action passed to the new administrator, under Ala. Stat. Clay's Dig. 270, § 30, providing that when any personal representative shall be displaced all moneys due to him or her in that right by execution or otherwise shall be paid to his or her successor. *Harbin v. Levi*, 6 Ala. 399.

And an administrator *de bonis non* was entitled to maintain an action in his own name on a note given to his predecessor which was not indorsed. It was held that Ala. act 1837, providing that notes payable to a person or bearer shall be sued on in the name of the payee, his indorser, or personal representative, did not interfere with the rights of an administrator *de bonis non* to take possession of the unadministered assets of the estate he represented, and to sue as such upon notes payable to his predecessor. *Barron v. Vandevent*, 13 Ala. 232.

In *King v. Griffin*, 6 Ala. 387, it was said that the administrator *de bonis non* became entitled to bonds, notes, etc., which his predecessor had in his hands when his representative functions ceased.

The administrator *de bonis non* should be held to account for all the assets and moneys which came to his hands as administrator, and, so far as he claimed to withhold them for debts due him from the estate, the burden rested on him to establish the

The time allowed for bringing suits at law against the executrix of William Hodge has expired, and this action can only be maintained, if maintainable at all, under the provisions of Rev. Stat. chap. 87, § 19.

Rockland v. Rockland Water Co. 86 Me. 55; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358; *Whitehead v. Shattuck*, 188 U. S. 146, 34 L. ed. 878.

Upon the allegations of the bill alone, and

validity of his claim; but this rule did not apply to moneys paid to him as a creditor on a claim by the former administrator. *Daughdrill v. Daughdrill*, 108 Ala. 321.

Avoiding sales or transfers made by his predecessor.

Under Ala. Code, § 1743, providing that the probate court shall have jurisdiction to order a sale of personal property on an application by the administrator for a sale to pay the debts, where the sale was made without the proper showing by the administrator, the court had no jurisdiction and the sale was void, and the administrator *de bonis non* could recover the property from the purchaser. It was held that the common-law power of an administrator to sell the property of his intestate without an order of court was taken away by the statute. *Ikelheimer v. Chapman*, 32 Ala. 676.

And where an administrator fraudulently sold slaves of the testator in collusion with the vendee, the administrator *de bonis non* could recover the slaves without bringing a suit in equity to have the sale adjudged void. *Swink v. Snodgrass*, 17 Ala. 653, 62 Am. Dec. 190.

So, where an administrator sold slaves at private sale contrary to law, it was held that no title passed, and an administrator *de bonis non cum testamento annexo* could recover the property, although it was said that the executrix could not. In this case it was said the question of the right of an administrator *de bonis non* to recover what his predecessor had thus converted or administered (a question which has elsewhere been settled in the negative very frequently) is not the same as it is in England and in states which have no such statute as that of Alabama, providing that private sales by an administrator shall be unlawful. *Hopper v. Steele*, 18 Ala. 523.

Where a sale of the personal property of the estate was made by an administrator without the authority of an order of court, or of a will, the purchaser obtained no title against an administrator *de bonis non*. *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 80.

And in *Woolfork v. Sullivan*, 23 Ala. 548, 58 Am. Dec. 306, the same was said to be the rule.

In *Elliott v. Branch Bank*, 20 Ala. 345, it was said that a fraudulent sale, or one made by an administrator without authority, is not an administration, unless the parties in interest choose so to consider it, and if they fail to do so their representative, the administrator *de bonis non*, can recover the property.

But proceeds of a void sale of land made by an administrator are not assets of the estate, and the administrator or his sureties are not liable for such to the administrator *de bonis non*. *Pettit v. Pettit*, 32 Ala. 289; *Woods v. Legg*, 91 Ala. 511.

And where the administrator without authority sold personal property belonging to his intestate's estate, and the parties interested received the benefit of the sale and treated it as an administration and not a wrongful conversion, the administrator *de bonis non* could not recover the property. *Elliott v. Branch Bank*, 29 Ala. 345.

And an administrator *de bonis non cum testamento annexo* having, with knowledge of the facts, treated the proceeds of a sale made by an executor as assets of the estate, and having caused them to be charged against the estate of the executor, and having received all the benefit which could have accrued from a regular valid sale, could not thereafter treat the sale as void, thereby receiving double
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compensation for the property in controversy. *Bell v. Craig*, 62 Ala. 215; *Sampey v. Sowell*, 93 Ala. 447.

Arkansas.

Most of the cases held under the common law that an administrator *de bonis non* could not call his predecessor to account for money, or wasted or converted assets, as the successor took only unadministered property. But now he can call his predecessor to account under the statute in force.

Property remaining in specie or unadministered.

The administrator *de bonis non* of C. was entitled to a decree against a guardian for the possession of a negro and for his hire, where the guardian had acquired the negro under a will of C. which will had been set aside. *Finn v. Hempstead*, 24 Ark. 111.

Where specific property belonging to an estate was left by an executor at his death undisposed of, and came to the hands of his administrator, who also collected rents from the real estate, and the will was set aside, the administrator of the executor was required to account to the administrator *de bonis non* of the first estate, and a decree was rendered against him as such administrator for the value thereof. *Finn v. Hempstead*, 24 Ark. 111.

And an administrator *de bonis non* was entitled to take and administer property and effects of the intestate or testator remaining unadministered. But he took such property subject to any proper charges or liens against the same. *Turner v. Tapscott*, 30 Ark. 312.

In *Finn v. Hempstead*, 24 Ark. 111, it was said that an administrator *de bonis non* is simply to collect and administer such property and effects of the deceased, not administered by the former representative, as remain in specie, and are capable of being ascertained and identified as the specific property or estate represented by him.

Claims against predecessor for accounting, balance, conversion, or devastavit.

An administrator *de bonis non* could not call the former administrator to account for money in his hands, as he was only responsible for that to the creditors, distributees, and legatees. *Green v. Byrne*, 46 Ark. 453; *Williams v. Cubage*, 36 Ark. 307; *Finn v. Hempstead*, 24 Ark. 117; *State, Oliver v. Rottaken*, 34 Ark. 144.

So, an administrator *de bonis non* could not call the administrator in chief to account for waste or conversion of the assets of the estate. *Brice v. Taylor*, 51 Ark. 75.

And he could not maintain an action for waste or loss occasioned by a former executor. But it was said that he might ask the court to remove clouds from the title of lands belonging to the estate in order that he might take and administer them by a sale and by the application of the proceeds to the debts. *Ludlow v. Flournoy*, 34 Ark. 451.

And he could not maintain an action to hold the representative or sureties of his predecessor accountable for property lost, wasted, mismanaged, or converted by him. It was further held that Ark. Stat. Gantt's Dig. § 44, providing that if an executor or administrator die or resign, or his letters be revoked, he or his legal representatives shall account for, pay, and deliver to his successor all money and personal property, and rights, credits, deeds, evidences of debts and papers belonging to the estate of the deceased, only applies to such as

further upon the facts offered in evidence by the plaintiff, the action clearly cannot be maintained.

Prentice v. Dehon, 10 Allen, 358; *Shillaber v. Wyman*, 15 Mass. 325; *Alvord v. Marsh*, 12 Allen, 604; *Hatch v. Proctor*, 102 Mass. 354; *Dearborn v. Mathes*, 128 Mass. 196;

remained in specie, as they could not account for, pay, and deliver to a successor any other assets. It was further held that Gantt's Dig. § 191, providing that the bond of any executor or administrator may be sued on at the instance of any legatee, distributee, creditor, or other "person interested" for any mismanagement, waste, or other breach of the condition of such bond, and providing for judgment against the executor or administrator and his securities for the whole value of the estate mismanaged or wasted, did not authorize an administrator *de bonis non* to recover, as he did not have any interest in the assets wasted or mismanaged. *State, Oliver, v. Rottaken*, 34 Ark. 144.

And an action by the administrator *de bonis non* of C. and his heirs, against the widow, heirs, and administrator of his predecessor, for the hire of slaves and value of goods, choses in action, rents, etc., wasted, converted, and appropriated by the executor to his own use, could not be maintained under Gould's (Ark.) Dig. chap. 4, §§ 43, 44, providing that an administrator *de bonis non* may invoke the aid of the probate court against his predecessor, or his legal representatives, to obtain possession of the effects unadministered, or he may bring suit upon the bond of the delinquent predecessor. *Finn v. Hempstead*, 24 Ark. 111.

And under Ark. Rev. Stat. chap. 4, §§ 37, 38, providing that if any executor or administrator dies or resigns, or his letters be revoked, he or his legal representatives shall account for, pay, and deliver to his successor, all money and personal property, and all the rights, credits, deeds, evidences of debts, and papers of any kind belonging to the estate of the deceased, at such time and in such manner as the court shall order, and the succeeding administrator may proceed at law against the delinquent and his securities, the administrator *de bonis non* could not maintain an action upon the bond of his predecessor without averring that the proper court of probate had made an order directing the payment of the same to the plaintiff, and that there was a failure to comply with such order. *State v. Ferguson*, 8 Ark. 172.

But an administrator *de bonis non* was entitled to require an account of the administrator of his predecessor for all money and property due the estate from the deceased administrator, under Ark. act March 13, 1890, providing that when an administrator to an estate dies his successor in office shall compel his personal representative to account for and pay over all moneys and property due such estate from the estate of the deceased administrator. *Wilson v. Hinton*, 63 Ark. 145.

Under *Manst. (Ark.) Dig.* § 199, authorizing a suit against an executor or administrator and his bondsmen by "any legatee, distributee, creditor, or other person interested," where the next of kin of a testator brought a suit to surcharge the accounts of a party who had been an executor, and to recover the value of assets which he had technically administered, but for the proceeds of which he had failed to account, and after judgment the administrator *de bonis non* of the first estate brought a suit to enjoin the payment until the debts were paid, it was held that in order to prevent a failure of justice, the balance recovered should be paid to the administrator *de bonis non* as assets, but if it could be ascertained from the records of the probate court that the fund was ripe for distribution it could be distributed in chancery. *Brice v. Taylor*, 51 Ark. 75.

Tyler v. Wheeler, 160 Mass. 206; *Brooks v. Brooks*, 11 Cush. 18; *Monroe v. Holmes*, 9 Allen, 244, 13 Allen, 109; *McLane v. Curran*, 133 Mass. 531, 43 Am. Rep. 535; *Murray v. Wood*, 144 Mass. 195; *Foster v. Bailey*, 157 Mass. 160.

The statute relied on provides that the credi-

Connecticut.

The common-law rule seems to prevail in this state in regard to calling a predecessor to account. Where there was trust property that should have come to his hands it was held that he could pursue it, but it was treated as unadministered.

Property remaining in specie or unadministered.

An administrator *de bonis non* of a wife could maintain an action against the administrator of the husband for the wife's property, where an express trust was created upon her property which the husband had mingled with his own funds, under Conn. Stat. 1866, providing that the property of the wife upon the death of the husband after the prior decease of the wife should vest in the same manner as if she had always been a *feme sole*. It was said that this was not an action on a devastavit or for an accounting, as the wife's estate was not taken or held by the husband as administrator and there was no actual administration of her estate, but it was a suit against the administrator of a person who, up to the time of his death, held personal property as the statutory trustee, and who had refused to deliver it upon demand to her administrator. *Connecticut Trust & S. D. Co. v. Security Co.* 67 Conn. 438.

Claims against predecessor for accounting, balance conversion, or devastavit.

An administrator *de bonis non cum testamento annexo* was not liable on his bond at the common law for any devastavit or default of his predecessor either of omission or commission, as there was no privity between an administrator *de bonis non* and the preceding executor or administrator. Also *op v. Mather*, 8 Conn. 584.

So, in *American Bd. of Comrs. for Foreign Missions*, 27 Conn. 344, it was said that an administrator *de bonis non* could not bring a suit for a devastavit or call the executor or first administrator to an account for money received for property sold. The remedy for this was an action on the predecessor's bond by the persons injured and to the extent of the injury averred and proved.

So, where an executrix having an absolute estate in the property had disposed of the same and had died without filing an inventory, an administrator *de bonis non* could not maintain an action for the technical breach of the bond in neglecting to file an inventory, where there was no remaining property to which the administrator had a rightful claim, and there were no debts to be paid. *State v. Smith*, 52 Conn. 557.

Delaware.

An administrator *de bonis non* may recover the balance shown by the settlement of his predecessor, and is entitled to follow choses in action taken by his predecessor for land sold under order of court.

Property remaining in specie or unadministered.

In *State, Burton, v. Tunnell*, 5 Harr. (Del.) 182, it was said that where an executor or administrator is removed from office, or dies before closing the estate, the succeeding administrator is entitled to the goods, chattels, rights, and credits which remain in specie, and money kept separate, which are therefore termed unadministered.

Claims against predecessor for accounting, balance, conversion, or devastavit.

An administrator *de bonis non* could recover on his predecessor's bond for all money and other

tor must not be chargeable with culpable neglect in not prosecuting his claim within the time limited for commencing an action at law. The plaintiff, Edward T. Hodge, has been

guilty of such neglect. This action is not commenced until long after the statute bar has become effectual.

Waltham Bank v. Wright, 8 Allen, 121;

assets, and all securities, books, and papers belonging to the estate of the intestate remaining in the hands of the deceased executor or administrator, or with which at the time of his removal or decease he was chargeable. The statute was not referred to, but evidently was based upon Del. Rev. Code 1852, p. 298 of the statute, providing that "whenever an executor, or administrator is removed or dies before he closes the estate of the deceased, his co-executor or administrator, or if there be none such, his successor, shall be entitled to receive all the unadministered effects, including books and papers, which, at the time of such removal or death, shall be in his hands, or for which he is answerable, just allowances being made;" and p. 299, providing that the condition of the bond of an executor or administrator shall be that he shall, without delay, deliver to the person or persons entitled to receive the same all the unadministered goods, chattels, rights and credits, money, securities, books, and papers belonging to the estate of said deceased with which the said shall be chargeable. *State, Burton, v. Tunnell*, 5 Harr. (Del.) 182.

Where an administrator *de bonis non cum testamento annexo* brought suit to recover the balance of money with which his predecessors had charged themselves in settling an account before the register, a plea that the amount charged was for judgments taken for the sale of the property, by mistake made in the name of the executors individually, and which they were ready to assign and turn over as assets, constituted no defense. It was said: "If the charge was of articles of property remaining in specie, or of credits uncollected, and which were contained in the account as such, and thus shown to be in the hands of the executor unconverted, and only estimated in Federal money as indicating their probable value, then he would not be absolutely chargeable for such estimated value in case of loss or failure to realize, without his default, but would be finally accountable for the sum actually received, and in every subsequent account would be entitled to have allowance of the loss as a credit." No statute was cited, but Rev. Code, chap. 89, § 12, providing the same as Rev. Code 1852, p. 298, was in force. *Peckard v. Price*, 5 Del. Ch. 239.

Choses in action.

Where a promissory note was taken by an administrator individually for the proceeds of land of his decedent A, sold under an order of court for the payment of debts, and the note showed on its face the purpose for which it was given, and such note was assigned by the administratrix of such administrator to pay his debts, the administrator *de bonis non* of A was entitled to the proceeds of the note claiming the same as a trust fund, as it was not in the power of the administratrix of his predecessor to change the trust character. *Barwick v. White*, 2 Del. Ch. 235.

District of Columbia.

Although the common-law rule applies here, a recovery was allowed on an additional bond required by a statute, where there was danger of the assets being wasted.

Property remaining in specie or unadministered.

In *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472, it was said that under the Maryland law, only property remaining in specie passed to the administrator *de bonis non*.

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Claims against predecessor for accounting, balance, conversion, or devastavit.

Where other sureties were called for by the orphans' court of the District of Columbia under U. S. Stat. at L. 4, act 1846, § 3, providing that whenever the orphan's court shall be satisfied that the security of an executor or administrator is insufficient, the court may call upon the executor or administrator to give additional security, and on failure may appoint another administrator instead of the first, and require, from him removed, to hand over to his successor the unadministered assets, sureties given under such an order were bound for the waste of their principal to the amount of the estate or funds with which he charged himself by his return to the orphans' court as administrator, where it called for additional security and for such funds as the administrator might afterwards receive. *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472.

Florida.

The administrator *de bonis non* cannot call the representative of his predecessor to an account for a devastavit or conversion. There is a statute authorizing him to call to an account the predecessor who has been removed. In other cases the common-law rule applies. The administrator *de bonis non* takes only unadministered property. He may set aside a void sale on proper pleading.

Property remaining in specie or unadministered.

An administrator *de bonis non* can only administer upon such of the estate as remained in specie unadministered upon by his predecessor. *Deans v. Wilcoxon*, 25 Fla. 980; *Gregory v. Harrison*, 4 Fla. 56.

Where an administrator *de bonis non cum testamento annexo* turned over to the board of trustees of the improvement fund of Florida coupons found amongst the papers of the decedent, supposing that they were the property of the board of trustees, the decedent having been its secretary and treasurer and salesman for its land, it was held that this was not such a change in the property therein as would have amounted to an administration so as to prevent a subsequent administrator *de bonis non* from asserting the claim for such coupons turned over by his predecessor, but it was held that under the evidence the coupons were never the property of the decedent. *Adams v. Internal Improvement Fund*, 37 Fla. 266.

Claims against predecessor for accounting, balance, conversion, or devastavit.

An administrator *de bonis non* cannot call to account a removed executor for a devastavit. *Gregory v. Harrison*, 4 Fla. 56.

In *Gregory v. Harrison*, 4 Fla. 56, it was said that an administrator *de bonis non* could assert no claim for money which came into the hands of an executor.

Florida act Feb. 19, 1870, chap. 1733, McClellan's Dig. p. 98, §§ 80-90, giving powers and rights of action not existing at common law to administrators *de bonis non* against executors or administrators who may have been removed by the court for cause, did not extend to the case of a delinquent deceased executor or administrator who had not been thus removed. *Deans v. Wilcoxon*, 25 Fla. 980.

Avoiding sales or transfers made by his predecessor.

In order for an administrator *de bonis non* to recover assets sold by his predecessor, it should be

Jenney v. Wilcox, 9 Allen, 245; *Bradford v. Forbes*, 9 Allen, 365; *Wells v. Child*, 12 Allen, 333; *Richards v. Child*, 98 Mass. 284; *Sykes v. Meacham*, 103 Mass. 283; *Bacon v. Pomeroy*, 104 Mass. 583; *Spelman v. Talbot*, 123

Mass. 489; *Brooks v. Rayner*, 127 Mass. 268; *Morey v. American Loan & T. Co.* 149 Mass. 253; *Knight v. Cunningham*, 160 Mass. 580.

This action being simply for the recovery of

shown that there was collusion between the predecessor and the alleged purchaser, in order to deprive the sale of its effect as an administration, and the fraud relied upon should be specifically stated in the pleading. *Deans v. Wilcoxon*, 25 Fla. 981.

Georgia.

Prior to the act of 1845 an administrator *de bonis non* could not maintain a suit for waste or conversion committed by his predecessor. Since that act he can call his predecessor or his representatives to an account. He cannot recover property sold by his predecessor, but since the act of 1845 he may maintain an action to set aside a sale fraudulently made by his predecessor.

Avoiding sales or transfers made by his predecessor.

Under Ga. act 1845, Cobb's Dig. 335, providing that it shall be the duty of the removed executor or administrator to account to the administrator *de bonis non*, it was held that a judgment creditor could not sue to recover property that was sold fraudulently by an executor where there was an administrator *de bonis non* whose duty it was to maintain such action. *Hardwick v. Thomas*, 10 Ga. 266.

An administrator *de bonis non cum testamento annexo* of an insolvent estate could maintain an action against a creditor where the executrix, who had been removed, had paid such creditor an excess beyond his *pro rata* share of the assets, as the statute gives a creditor a cause of action where a distributee has been overpaid, and the same principle applies here. *McFarlin v. Ringer*, 51 Ga. 363.

But where an administratrix individually sold a negro that belonged to the estate, an administratrix *de bonis non* could not recover the same, as she could only recover for goods, chattels, rights, and credits which remain in specie in the hands of the former administratrix unadministered, and are capable of being identified as the property of the first testate. *Paschal v. Davis*, 3 Ga. 256; *Bates v. Woolfolk*, 5 Ga. 329. This was prior to Ga. act 1845.

And in *Thomas v. Hardwick*, 1 Ga. 78, it was said that an administrator *de bonis non* has no right to sue for assets which may have been previously administered, and that where lands and negroes are sold by order of the court of ordinary, or perishable property by the act of the party himself, they are administered so far as the successor is concerned. "He cannot maintain an action for them. Of course the predecessor is liable for their proceeds to creditors, legatees, and distributees. If an executor or administrator be removed or die, having on hand in kind a portion of the original assets, these could be sued for and recovered by the administrator *de bonis non*."

In *Oglesby v. Gilmore*, 5 Ga. 56, it was said that at common law if there was a fraudulent collusion between the administrator and the purchaser in the sale of goods by such administrator, the administrator *de bonis non* might then pursue the property.

In *Hardwick v. Thomas*, 10 Ga. 266, it was said that if a removed executor has colluded with a purchaser at a sale made by the executor the administrator *de bonis non* can pursue the property and collect it, as a fraudulent sale will not be held to be an administration by a removed executor.

Choses in action.

In *Gilbert v. Hardwick*, 11 Ga. 599, it was said that an administrator *de bonis non* at common law could

not sue for the purchase money of negroes sold by the executor, as such sale was an administration, and the administrator *de bonis non* could neither call the executor to an account nor collect any purchase money; and it was held that Ga. act 1845 did not apply where the rights of the removed executor, and his obligations, and the rights of the administrator *de bonis non*, had been fixed before the passage of the act.

In *Oglesby v. Gilmore*, 5 Ga. 56, it was said that at common law the administrator *de bonis non* would have no right or title to a judgment obtained upon a note given for property sold by the former administrator.

Claims for accounting, balance, conversion, or devastavit.

Prior to Ga. act 1845, an administrator *de bonis non* could not maintain a suit for waste or conversion committed by his predecessor. *Thomas v. Hardwick*, 1 Ga. 78; *Paschal v. Davis*, 3 Ga. 256.

But in *Shorter v. Hargroves*, 11 Ga. 658, it was said that under Ga. act 1845, Cobb's Dig. 335, providing that whenever an executor or administrator may be removed or depart this life chargeable to the estate which he or she represented, it shall be the duty of such removed executor or administrator to account fully with the administrator *de bonis non* who may be appointed to finish the administration of such estate. The administrator *de bonis non* can call the representative of his predecessor to an account.

And in *Knight v. Lasseter*, 16 Ga. 151, it was said that under Ga. act 1845, it was designed to give a remedy which should be full and complete as to all and every portion of the estate, whether remaining in specie or converted into cash and notes, remaining in the hands of such removed trustee or his representative, and as to which the rights of other persons had not become vested.

And Ga. act 1845 repeals the common law as to all restrictions which it imposes upon the administrator *de bonis non*, and subjects the first administrator and his estate to liability to account to and with the administrator *de bonis non* touching the entire administration, and the administrator *de bonis non* should be made a party to an action by a distributee against a former administrator charging a devastavit. *Oglesby v. Gilmore*, 5 Ga. 56.

Under Ga. act 1845, the administrator *de bonis non* was not liable to the heirs and creditors for the failure to call the previous administrator to an account, unless they showed that he knew of a devastavit, or was guilty of some positive neglect. *Bowers v. Grimes*, 45 Ga. 616.

And under Ga. Code, § 2514, providing that upon the revocation of letters of one administrator where there are more than one, the trust remains in the hands of the other, and with him as to an administrator *de bonis non* the removed administrator must account, the sureties upon the joint bond of both of the administrators were exonerated from a liability for a devastavit committed after the first was discharged and the other was appointed sole administrator. *Veach v. Rice*, 131 U. S. 293, 33 L. ed. 163.

Illinois.

The authority of the administrator *de bonis non* extends only to such goods as remain in specie unadministered, except in such cases as are modified by the statute authorizing an action on the predecessor's bond where he has been removed. But he statute does not give any right of action for

a specific sum of money or for the recovery of a money judgment, the action is one at law.

Scott v. Neely, 140 U. S. 106, 35 L. ed. 858; *Whitehead v. Shattuck*, 188 U. S. 146, 34 L. ed. 878.

account, balance, or conversion against the representative of the predecessor who has died, but only applies to cases of removal.

Property remaining in specie or unadministered.

In *Newhall v. Turney*, 14 Ill. 338, and *Rowan v. Kirkpatrick*, 14 Ill. 1, it was said that an administrator *de bonis non* could only recover such of the goods and chattels of the intestate as remained unadministered in specie, and such of the debts due the intestate as remained unpaid, but that his authority did not extend to assets already administered, and so far as the estate had been administered by the first administrator he was concluded.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Under *Scates's Comp. Stat. (Ill.) 1196*, Statute of Wills, § 75, providing that where any executor or administrator shall have his letters revoked he shall be liable on his bond to such subsequent administrator for any mismanagement of the estate, and such subsequent administrator may maintain actions of trover, detinue, account, and on the case against such former executor or administrator for all such goods, chattels, debts, and credits which shall have come to the possession of him or her, and which shall be withheld, wasted, embezzled, or misapplied, an administrator *de bonis non* could call a prior administrator to account and maintain an action on his bond. *Duffin v. Abbott*, 48 Ill. 17.

In *Duffin v. Abbott*, 48 Ill. 17, a distinction was made between an administrator *de bonis non* calling his predecessor to account and calling the administrator of his predecessor to account, holding that he could maintain the first-named action, and overruling *Stose v. People*, 25 Ill. 600.

In *Hanifan v. Needles*, 108 Ill. 408, it was said that under Ill. Rev. Stat. 1874, chap. 3, § 39, providing that upon revocation of letters and removal of an executor or administrator from office his successor may maintain an action for waste, mismanagement, or breach of duty in regard to the estate, that an administrator *de bonis non* could maintain an action against his predecessor for an accounting and for mismanagement. But it was said that if he died the administrator *de bonis non* could not maintain such an action.

Where the executor of an estate sold a leasehold and was removed, an administrator *de bonis non* was appointed, and the executor died, the administrator *de bonis non* could maintain an action for the proceeds of the sale against the estate of his predecessor under Ill. Rev. Stat. chap. 3, § 39. *McDonough v. Hanifan*, 7 Ill. App. 50.

And an administrator *de bonis non* could maintain an action on the bond of his predecessor for money due to the estate, under *Starr & C. Stat. (Ill.)* p. 208, § 99, providing that where such executor or administrator shall have his letters revoked he shall be liable on his bond to such subsequent administrator, or to any other persons aggrieved, for any mismanagement of the estate committed to his care. *Nevitt v. Woodburn*, 160 Ill. 203.

In *Stose v. People*, 25 Ill. 600, it was held that an administrator *de bonis non cum testamento annexo* had no right to call for an account of any part of the estate converted or wasted by an executor who had been removed. But this case was overruled in *Duffin v. Abbott*, 48 Ill. 17.

In *Graffenreid v. Kundert*, 34 Ill. App. 483, it was said that the administrator *de bonis non* had no

The bill must allege, and the facts proved must show, that the plaintiff has not pursued his remedy at law for reasons which of themselves afford ground for equitable relief.

Rockland v. Rockland Water Co. 86 Me. 55;

right at common law to an account from his predecessor for the proceeds of the estate or for its mismanagement, or for any breach of duty respecting it, and that where an executor was guilty of a *devastavit* and died, the Illinois statute giving an administrator *de bonis non* an action against a removed executor did not apply.

And in *Re Richart*, 58 Ill. App. 91, it was said that if an administrator converted assets of the estate into money, and used the same, such action operated as a *devastavit*, and the money so converted was to be treated as assets administered, and an administrator *de bonis non* could not maintain an action therefor upon the bond of the prior administrator who converted the same. The court did not make a distinction between a conversion by an administrator who died and one who was removed.

An administrator *de bonis non cum testamento annexo* could not be held to account to the residuary legatee for money and property that the deceased executor administered upon and wrongly converted to his own use. It was further held that such administrator *de bonis non* had no authority to call on the personal representative of the deceased executor for an account of the assets other than those unadministered, as the residuary legatees are the persons who should prosecute the personal representatives of a deceased executor for any waste or misapplication of assets. *Bliss v. Seaman*, 165 Ill. 422, Affirming 59 Ill. App. 238.

And an administrator *de bonis non* could not call in question a settlement of a claim against a debtor made by the prior administrator, as an administrator *de bonis non* could not charge his predecessor with a *devastavit*. *Short v. Johnson*, 25 Ill. 489.

Under Ill. Rev. Stat. chap. 109, § 75, providing that on the revocation of letters of an executor or administrator he shall be liable on his bond to his successor, who may maintain an action of trover, debt, detinue, account, and on the case, against his predecessor for goods, chattels, debts, and credits withheld, wasted, or misapplied, an action of debt for conversion could not be maintained by an administrator *de bonis non* on the bond of the predecessor who had died and had not been removed under the statute. *Marsh v. People*, 15 Ill. 235.

In *Duffin v. Abbott*, 48 Ill. 17, it was said that in *Marsh v. People*, 15 Ill. 236, a distinction was made between the authority of an administrator *de bonis non* on the death of his predecessor, and the authority of one appointed on the revocation of letters.

Choses in action.

Where a note was given "to T. administrator of the estate of S., deceased," and the administratrix of T. brought an action on the same, and it was contended that it should have been brought by the administratrix *de bonis non*, it was said that "for aught that appears in the record, this suit may be prosecuted for the benefit of the administrator *de bonis non*. It makes no difference to the maker of the note which of them is permitted to bring the action." *Newhall v. Turney*, 14 Ill. 338.

Indiana.

In this state prior to the act of 1849 an administrator *de bonis non* could not maintain an action for conversion, *devastavit*, or account, but since that statute such action may be maintained. An action may be maintained to set aside a void sale, and an action may be maintained on choses in action due the estate.

Waltham Bank v. Wright, 8 Allen, 121; *Wells v. Child*, 12 Allen, 333.

In the two cases in Massachusetts, in which relief has been granted, the court acted only upon strong equitable grounds.

Morey v. American Loan & T. Co. 149 Mass. 253; *Knight v. Cunningham*, 160 Mass. 580.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Prior to the statute of 1849 an administrator *de bonis non* could not maintain an action on his predecessor's bond for a devastavit. *State, Piereson v. Gooding*, 8 Blackf. 567; *Anthony v. M'Call*, 8 Blackf. 86.

In *Graham v. State*, Reynolds, 7 Ind. 470, it was said that prior to the passage of Ind. act 1849, p. 53, 2 Rev. Stat. p. 286, an administrator *de bonis non* could not sue his predecessor in administration for a breach of duty.

Ind. Rev. Stat. 1848, p. 567, providing that the executors and administrators of every person who, as executor either of right or in his own wrong, or as administrator, shall have wasted or converted to his own use any goods, chattels, or estate of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been if living, did not give an action to the administrator *de bonis non* for a devastavit committed by his predecessor. *Young v. Kimball*, 8 Blackf. 167.

But under 2 Ind. Rev. Stat. p. 286, §§ 162, 163, Laws 1849, p. 53, providing that any executor or administrator may be sued on his bond by any creditor, heir, legatee, or surviving or succeeding executor or administrator for, (1) failure to inventory the property; (2) failure to pay money of the estate into court; (3) failure to use diligence; (4) want of reasonable care in taking solvent sureties; (5) embezzling, concealing, or converting to his own use; (6) negligently permitting property to be injured; (7) for committing waste,—an administrator *de bonis non* might maintain an action upon the bond of his predecessor for breach of duty to recover assets, although the bond was executed before the passage of this act. *Graham v. State*, Reynolds, 7 Ind. 470, 65 Am. Dec. 745.

And an administrator *de bonis non* could maintain an action against the administrator or the surety of his predecessor for a breach of duty on the part of the latter, in failing to pay into the clerk's office to the proper heirs money belonging to the estate upon which he was administrator, under 2 Ind. Rev. Stat. pp. 286, 286, §§ 162, 163, where the administrator had left the state with money in his hands, and had for that cause been removed. *State, Wright v. Porter*, 9 Ind. 342.

Under 2 Gavin & H. (Ind.) Stat. p. 531, § 162, authorizing a suit by the succeeding administrator on the bond of the previous administrator for any violation of the duties of his trust, an administrator *de bonis non* could maintain an action on the bond of his predecessor for money belonging to the estate which he had failed to pay over. *Lane v. State*, Harmon, 27 Ind. 108; *Myers v. State*, McCray, 47 Ind. 293.

Choses in action.

Under Ind. act 1891, pp. 107, 108, providing that when it is shown that an administrator or executor has been finally discharged, and that there is no administration of said estate pending in any court of this state, and there are assets belonging to the estate within the jurisdiction of said state that have not been and should be administered, the court may appoint an administrator *de bonis non* to have the same powers now given to administrators and executors, an administrator *de bonis non* could maintain an action on an appeal bond given in the decedent's lifetime where such bond had never been

Wiswell, J., delivered the opinion of the court:

Bill in equity by the administrator *de bonis non* of the estate of Abigail T. Hodge against the executrix of William Hodge, the administrator of Abigail T. Hodge.

The complainant, the administrator *de bonis*

administered upon, although the prior administrators had made a final settlement and been discharged. It was further held that such act was remedial, and was not void, and applied, although it was not passed until after final settlement. *Barnett v. Vanmeter*, 7 Ind. App. 45.

And under Ind. act 1891, p. 107, Rev. Stat. 1894, § 2395, after a final settlement and the discharge of an administrator, an administrator *de bonis non* could be appointed where it was shown that there was a claim against the government within the jurisdiction of the state that had not been sold and should be administered. *Wahl v. Schierling*, 11 Ind. App. 696.

In order for an administrator *de bonis non* to recover from a debtor to the estate, he must allege that the defendant did not pay the sum of money sued for, either to the intestate in his lifetime, or to the predecessor of the administrator *de bonis non*. *Griffith v. Fischli*, 4 Blackf. 427.

And in an action by an administrator *de bonis non* against a surviving partner of the decedent to recover the share of the decedent in the partnership assets, the defendant could set off the indebtedness of the decedent to him, and also the amount paid to discharge the debts of the decedent in excess of assets received by him as administrator. *Skillen v. Jones*, 44 Ind. 130.

Avoiding sales or transfers made by his predecessor.

Where an administrator sold land under an order of court, and took the purchase-money notes and canceled them by having a personal debt owing by him to the obligor canceled and made a deed which was never confirmed, the administrator *de bonis non* could maintain an action to recover the purchase money from the purchaser or to have the sale set aside. *Chandler v. Schoonover*, 14 Ind. 324.

And an administrator *de bonis non* who had obtained a judgment against the predecessor and sureties for the conversion by the former of the assets of the estate might, without proceeding to collect the judgment, maintain an action to set aside a conveyance which the defaulting administrator had fraudulently made of land purchased with the trust fund. *Harvey v. State*, Rogers, 123 Ind. 280.

But where the heirs of an intestate obtained a decree for land fraudulently conveyed by an administrator and that the land should be sold to satisfy the decree, the administrator *de bonis non* had no right to enforce that decree, as it belonged to the complainants in that suit. *Ferguson v. Sweeney*, 6 Blackf. 547.

Where there are no assets.

Under Ind. act 1881, p. 247, Rev. Stat. 1881, § 2240 providing that if any executor, administrator with the will annexed, or administrators, shall die, resign, or remove from the state, or his authority be revoked or superseded, the remaining executor or administrator shall complete the administration, but if no such executor or administrator be remaining in the state an administrator *de bonis non* may be appointed with the same rights and subject to the same liabilities as his predecessor, an administrator *de bonis non* could not be appointed where his predecessor had made a final settlement which was unrevoked and in full force, discharging him from the trust because fully settled, as such matter was *res judicata*, under 2 Ind. Rev. §§ 2402, 2403, pro-

non, is the son of Abigail T. and William Hodge. The intestate died April 8, 1879. Her husband, William Hodge, was appointed administrator upon her estate December 7, 1880, and died June 6, 1892. The complainant was

appointed administrator *de bonis non* on the first Tuesday of October, 1892.

The complainant alleges, in substance, that the intestate at the time of her death was the owner of a deposit in the Cambridgeport Sav-

ing that such final settlement is conclusive on all parties interested in the state, unless reopened within three years for mistake or fraud. *Pate v. Moore*, 79 Ind. 20.

In *Barnett v. Vanmeter*, 7 Ind. App. 45, it was said that prior to the act of March 5, 1881, there was no law in force in Indiana under which an administrator *de bonis non* could be appointed for any decedent's estate after the final settlement of such estate, unless such settlement was vacated or set aside.

An administrator *de bonis non* may maintain an action against his predecessor and sureties for assets converted by his predecessor who had been removed, under Iowa Code, § 2348, providing for the appointment of an administrator in case of vacancy, and § 2349, providing that the substitution of other executors shall occasion no delay in the administration of the assets, as this statute changed the common-law rule. It was further held that the substituted administrator was entitled to the possession of all the assets, and could maintain an action for the recovery of any sum in which the estate had an interest, and that was to be applied to the debts. *Stewart v. Phenice*, 65 Iowa, 475.

But an administrator *de bonis non* could not maintain an action to recover from the surety of his predecessor the avails of a policy of insurance on the life of his decedent, collected by his predecessor and not accounted for, under Iowa Code, § 1182, which provided that a policy of insurance on the life of an individual shall inure to the separate use of the husband or wife and children of said individual independently of creditors. *Kelly v. Mann*, 56 Iowa, 625.

In *Stewart v. Phenice*, 65 Iowa, 475, *Kelley v. Mann* was distinguished, as in that case the fund could not be appropriated to the payment of debts but descended directly to the heirs. The holding was that the substituted administrator was not entitled to the funds, but that the sureties on the bond of the first administrator were answerable on the bond to the heirs for their distributive shares. The court said that "if there were no claims against the estate in this case it would be governed by the same principle."

Kansas.

An administrator *de bonis non* could maintain an action on the bond of his predecessor who had sold personal property and taken payment part in cash and part in a note of the purchaser, where the sale was set aside, but the purchaser retained the property and the administrator *de bonis non* subsequently collected the note from the purchaser, and the administrator failed to pay the cash received by him from the sale. This was under Kan. Gen. Stat. (1888) p. 435, § 28, providing that an administrator appointed in the place of an executor or administrator who has resigned, been removed, or whose letters have been revoked, shall be entitled to the possession of all assets unadministered, and may maintain an action against the former executor or administrator and his sureties on his bond, and for all damages arising from maladministration. *Musick v. Beebe*, 17 Kan. 47.

Kentucky.

The administrator *de bonis non* is entitled to control all assets remaining in specie or unadministered. He cannot maintain an action of account or for conversion or for a balance remaining in money in his predecessor's hands. As to a chose in action an administrator *de bonis non* was entitled

to recover in some cases where he had obtained possession of notes, but some cases held that he was not entitled to recover notes taken by his predecessor where there had been a conversion and where it was not shown to be necessary for distribution through him, and he could not intervene to claim choses in action that should go directly to distributees.

Property remaining in specie or unadministered.

Where a will gave to the wife of the testator all his estate, real and personal, "except such as will hereafter be disposed of, which is to fulfil any contracts I may have made for the conveyance" of land, and the wife was made executrix, and after her death certain slaves of the testator came to the hands of another party and the administrator *de bonis non cum testamento annexo* brought detinue for the slaves, it was held that as it was not shown that the executrix had elected to take as devisee, the administrator *de bonis non* could recover. It was not claimed that the executrix sold the slaves or otherwise parted with them in the course of administration. *Floyd v. Breckenridge*, 4 Bibb, 14.

In *Graves v. Downey*, 3 T. B. Mon. 355; *Bradshaw v. Com.* 3 J. J. Marsh. 632; *Oldham v. Collins*, 4 J. J. Marsh. 49; *Slaughter v. Froman*, 5 T. B. Mon. 19, 17 Am. Dec. 33; and *Carroll v. Connet*, 2 J. J. Marsh. 186.—It was said that an administrator *de bonis non* would be entitled to whatever of the estate of the intestate remained in specie.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Administrators *de bonis non* could not call the representatives or sureties of the first administrator to account. *Bradshaw v. Com.* 3 J. J. Marsh. 532; *Slaughter v. Froman*, 5 T. B. Mon. 19, 17 Am. Dec. 33.

So, a decree in favor of an administrator *de bonis non* for an account for money arising from the result of his predecessor's administration was erroneous, as an administrator *de bonis non* was not entitled to the proceeds of chattels sold, nor to the hire of slaves. *Slaughter v. Froman*, 5 T. B. Mon. 19, 17 Am. Dec. 33.

And an administrator *de bonis non* could not maintain an action on his predecessor's bond, where it did not appear that any one article of property which had ever belonged to the intestate remained in the hands of the plaintiff's predecessor at his death, as the right of action was in the distributees and heirs. *Oldham v. Collins*, 4 J. J. Marsh. 49.

And an administrator *de bonis non* could not maintain a suit on the bond of his predecessor for assets converted by him and wasted, as the right of action was in the distributee, and not in the administrator *de bonis non*. *Felts v. Brown*, 7 J. J. Marsh. 147.

And where a trust fund was created by an executor under a will, and several successive administrators *de bonis non cum testamento annexo* were appointed, and the last one brought a suit upon the bond of his predecessor for the fund, it was held that it was a trust fund for the widow for life, and was held by those having control of it as trustees and not as executor or administrator with the will annexed, and that the right and duty to hold it did not devolve on the administrator *de bonis non*, and that the last administrator *de bonis non* could not maintain an action to recover on his predecessor's bond for a devastavit, under Ky. Rev. Stat. chap. 37, art.

ings Bank of Cambridgeport, Massachusetts; that, although such deposit was in the name of one Hannah C. Wilson, it was in fact the money of the intestate, deposited by her in the name of Hannah C. Wilson, in trust for the

sole benefit of the intestate; that after her death William Hodge procured from Hannah C. Wilson a transfer of said deposit, without consideration; and that on August 26, 1879, before his appointment as administrator, he

1. §§ 19-21, providing that if there are no other personal representatives to discharge the trust the court may appoint one who shall have the same power and rights, and be liable to the same responsibility, as respects the estate unadministered, as the person removed. *Warfield v. Brand*, 13 Bush, 77.

In *Anderson v. Miller*, 6 J. J. Marsh. 568, it was said that an administrator *de bonis non* could have no remedy against a previous administrator for money collected for the hire of slaves belonging to the estate.

And in *Thomason v. Thomason*, 1 Met. (Ky.) 53, it was said that the estate in the hands of the administrator at the time of his death, which had been converted into money, formed a part of his estate which was under the control of his personal representatives after his death, and must be accounted for by them, and an administrator *de bonis non* of the first estate would have nothing to do with this part of the estate.

So, in *Graves v. Downey*, 3 T. B. Mon. 356, it was said that where an administratrix had married, and she and her husband had converted some of the assets into money, an administrator *de bonis non* could have no title nor maintain any action on the administration bond for such conversion.

In *Trigg v. Daniel*, 2 Bibb, 301, where the administrator *de bonis non* brought suit against the husband of the administratrix with the will annexed and her sureties for an account of the property administered, and to have the balance delivered over, the court did not discuss the question as to whether or not an administrator *de bonis non* could maintain an action for an accounting, but affirmed the decree with certain corrections as to credits for care, education, and support of the children.

Choses in action.

And an administratrix *de bonis non* could maintain an action in equity to enforce the payment of a note and enforce a lien by which it was secured, where the note was taken by her predecessor in his individual name in satisfaction of a debt due the estate, although the administratrix *de bonis non* could not have maintained an action at law on said note in her own name. *Burrus v. Koulach*, 2 Bush, 40. It was said that this does not conflict with the doctrine recognized in *Saffron v. Kennedy*, 7 J. J. Marsh. 188, and *Williams v. Collins*, 1 B. Mon. 58.

Where notes were given to Sarah C., as administratrix of William C., and she died, it was said that the notes were *prima facie* assets of William C. which his administrator *de bonis non* might have lawfully collected, although the administratrix might have made them their own property by being charged in the settlement with their amount. *Williams v. Collins*, 1 B. Mon. 58.

So, where notes were made payable to C., administrator of M., and he died without collecting the notes or fully administering, and the notes came to the hands of the sheriff of the county as administrator *de bonis non* of M., he was entitled to recover upon them under 1 Ky. Rev. Stat. Stanton's ed. p. 500, providing that in all cases where assets are committed to the hands of a sheriff, he shall by virtue of his office and the order of the court be the administrator *de bonis non* of the decedent, and shall have all the rights and powers, and shall be bound to perform all the duties, of such administrator. *Maraman v. Trunnell*, 3 Met. (Ky.) 147, 77 Am. Dec. 167.

But where an administrator received a note for 40 L. R. A.

goods of the intestate it was assets in his hands, and for a conversion an action would lie by creditors. It was said that in Kentucky an administrator *de bonis non* would not be entitled to the same, although it was settled otherwise in England. *Morrison v. Page*, 9 Dana, 428.

And where more than five years had elapsed from the intestate's death, and it was not shown that the notes in controversy were necessary for the payment of debts and to save circuity and delay, the administrator *de bonis non* was refused possession of uncollected notes belonging to the estate of his intestate, and a decree of distribution was made without permitting it to pass through his hands. *Bellomy v. Bellomy*, 3 Bush, 109.

Bonds made payable to a commissioner in consideration of the sale of slaves made by him as an administrator could not be held to be assets in the hands of an administrator *de bonis non*, where it was supposed that the slaves were sold for the benefit of the distributees and the commissioner was a trustee for the distributees, and the bonds given were not assets in his own hands as the administrator, and consequently could not constitute assets in the hands of an administrator *de bonis non* who would have a right to nothing which had not remained actually in specie and had not been administered. *Saffran v. Kennedy*, 7 J. J. Marsh. 188.

And where heirs quitclaimed to a mortgagee their interest in the estate as a compromise of their claims, and obtained a judgment on the consideration note, and a suit was brought by the grantee to enjoin such judgment, the administrator *de bonis non* was not entitled to intervene and claim the proceeds where twenty years had elapsed from the death of the mortgagor, as it was presumed that there were no debts, and if the administrator had the money he would hold it merely for the benefit of these heirs who were the distributees or devisees. *Breckinridge v. Waters*, 4 Dana, 620.

Maine.

An administrator *de bonis non* was entitled to money remaining in specie, but was not entitled to real estate or trust property. He could not maintain an action on his predecessor's bond for a conversion under the statute where the interest of the administrator *de bonis non* had not been "specifically ascertained." The case of *HODGE v. HODGE*, holding that an administrator *de bonis non* could not maintain an action against the estate of his predecessor for money which could not be identified as remaining in kind, is in accord with this doctrine.

In *HODGE v. HODGE* it was held that an administrator *de bonis non* could not maintain an action against the estate of his predecessor for money belonging to the estate wrongfully received by him prior to his appointment as administrator for which he failed to account, where it was not distinguishable as part of the intestate's property, as an administrator *de bonis non* was entitled only to such goods or chattels of the estate as remained in specie in the hands of his predecessor at the time of his death, or to such money as belonged to the estate and had been kept separate by the predecessor and unmixed with his own.

Property remaining in specie or unadministered.

Where a widow was an executrix, and was given a life estate in most of the property, and collected money from a debtor of her husband, and it was deposited in bank without having been commingled with her money, and the executrix died, the administrator *de bonis non cum testamento annexo* was

withdrew from the savings bank a portion of such deposit,—about \$800; that he did not include this sum in his inventory as administrator, and never in any way accounted for the same; that in withdrawing a portion of such deposit he became an executor, *de son*

tort; and he asks that the defendant, as executrix of such administrator, may be compelled to pay the amount so withdrawn, with interest, to him as administrator *de bonis non*.

The respondent both demurred and answered

entitled to the possession of that money. *Hatch v. Caine*, 86 Me. 282.

Real estate.

An administrator *de bonis non* cannot maintain a real action claiming title under a will which vested the title in two persons, executors and trustees, as the title to a testator's real estate does not vest in an administrator *de bonis non*. *Brown v. Strickland*, 32 Me. 175.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Under Me. Rev. Stat. chap. 72, § 10, providing that any person interested personally or in any official capacity in a probate bond, or in a judgment rendered thereon, whose interest has been specifically ascertained by a decree of the judge of probate or "by judgment" of law, may originate a suit on such bond or scire facias on such judgment, an administrator *de bonis non* could not maintain an action on his predecessor's bond where the interest of the plaintiff had not been "specifically ascertained" or authority from the judge of probate given to him to maintain an action, as, in the absence of statutory provisions, he has no recourse against his official predecessor for devastavit or maladministration. *Waterman v. Dockray*, 78 Me. 141.

Choses in action.

Where an administrator of an administrator turned over to an administrator *de bonis non* two notes described in the predecessor's inventory, they were assets, and the administrator *de bonis non* was liable for the same. *Woodbridge v. Tilton*, 84 Me. 92.

Trust property.

An administrator *de bonis non cum testamento annexo* did not succeed to the rights or duties of his predecessor who was appointed by the will to be a trustee of a fund arising out of the estate of the testator. *Knight v. Loomis*, 30 Me. 204.

Maryland.

An administrator *de bonis non* is entitled to the possession of all the assets remaining in specie and unadministered as at common law. He is entitled under the statute to an order directing that choses in action taken by his predecessor belonging to the estate, and all money in the hands of his predecessor, shall be turned over to him. He could not maintain an action for conversion until the statute of 1820. Where he is diligent he is not liable for any loss of funds by his predecessor.

Property remaining in specie or unadministered.

Where property remained specifically after the death of the executor it was unadministered property, and it was necessary that it should go through the hands of an administrator *de bonis non* in order to pass the title to the distributee. *Alexander v. Stewart*, 8 Gill & J. 226.

Where the residuum of the testator's interest in a leasehold upon the termination of the estate for life given by the testator's will was not converted into money, or distributed, or delivered to the party entitled or retained by the former executors under the court's direction, under Md. act 1798, subchap. 5, § 6, subchap. 14, § 2, providing that the authority conferred by such letters shall be to administer all things herein described as assets not converted into money and not distributed or delivered or retained

by the former executor or administrator under the court's direction, it was the proper subject for an administration *de bonis*, and vested in such administrator upon the grant of his letters. *Smith v. Doe*, Dennis, 38 Md. 442.

And where an executor's inventory showed that a leasehold belonged to an estate, and it did not appear to have been sold or accounted for in any subsequent proceedings in the orphans' court, at his death administration *de bonis non cum testamento annexo* should be granted, although the widow insisted that the executor had sold the property to her, and that she had paid for it, and that the claim was stale, and that after the lapse of twenty-eight years the court ought to presume that all debts and legacies were paid. It was also held that the title of the distributee could not be made in any other way except by administration *de bonis non*. *Neal v. Charlton*, 52 Md. 495.

So, where a husband administered on the estate of his wife and charged himself with the inventory including the leasehold property, and credited himself, thus: "Allowed this accountant for the balance of said estate retained by him as the surviving husband and tenant for life with remainder to his children, viz., a lot of ground and improvements on ———," and after his death two of his wife's sons were appointed administrators *de bonis non* and obtained an order for the sale of the leasehold property on the ground that it was unadministered, it was held that the entry or credit in the account was without legal effect, and the orphans' court properly held that the distribution was incomplete. *Woelfel v. Evans*, 74 Md. 346.

And where an executor or administrator died without having made full administration and distribution of the estate, administration *de bonis non* was necessary, and the title of the distributee could not be made in any other way. *Neal v. Charlton*, 52 Md. 495.

So, where S. K. at his death kept a bank account, and D. K. became his administrator, took possession of his money, and made deposits derived from S. K.'s estate in the account of S. K. at the bank, and died leaving in the bank a balance to the credit of said account of S. K., and there was no final settlement, and it was not shown that the money belonged to D. K., it was assets unadministered, and should go to the administrator *de bonis non*. *Getty v. Long*, 82 Md. 643.

So, where an executrix neglected to counter secure one of her securities, and an order was made directing her to turn over money to her security who gave a bond to deliver the goods to the person having the right to demand the same, and a creditor of the estate brought an action on the bond, it was said "the obligor in the bond is liable to the administrator *de bonis non* if one is appointed; and if none appointed, he is liable to nobody." *State v. Wright*, 4 Harr. & J. 111.

An executor of an executrix was liable in trover to the administrator *de bonis non cum testamento annexo* of the first estate for property that came to the executor's hands, and that had been appropriated and converted by him. *Haslett v. Glenn*, 7 Harr. & J. 13.

In *Kearney v. Sascor*, 37 Md. 204, it was held "an administrator *de bonis non* is chargeable only with the unadministered assets which come into his hands, and the fact that the former administrator may have confessed a judgment, and thereby admitted a sufficiency of assets in his hands to pay

to the bill, and the case is here upon report of the pleadings and testimony. The defendant contends that the bill cannot be sustained, either upon its allegations or upon the testimony.

It is very clear that if this sum of money

the same, does not preclude an administrator *de bonis non* from pleading to a scire facias issued on such judgment that the unadministered assets, for which alone he is responsible, are insufficient to pay the original judgment."

Where the inventory of the administratrix showed six negroes, it was held that a parol order of the orphan's court allowing the administratrix to take the property at the appraisal had no effect, and where the administratrix had died, an administrator *de bonis non* should be appointed under Md. act 1798, subchap. 5, § 6, providing that in case any executor or administrator shall die before the estate shall be fully administered, letters of administration *de bonis non* shall be granted, and subchap. 14, § 2, providing that if an executor die before the administration, letters *de bonis non* may be granted, and the authority conferred shall be to administer all things herein described as assets and not converted into money, and not distributed or delivered or retained by the former executor or administrator under the court's direction. Scott v. Fox, 14 Md. 368.

In Gardner v. Simmes, 1 Gill, 425, it was held: "The acts of 1798 and 1820 confer jurisdiction on the orphan's court to coerce the delivery over of property or chose in action or payment of money by the representative of the executor or administrator to the administrator *de bonis non* only in case the property, chose in action, or money belonged specifically to the deceased while alive, and remained in the hands of the executor or administrator as such, and not as legatee, or in case the chose in action or money was received by the executor or administrator in that capacity, and was so retained in that character till the death of such executor or administrator."

In Hagthorpe v. Hook, 1 Gill & J. 270, it was held by the chancellor that an administrator *de bonis non* could not demand in his representative character anything but those goods, chattels, and credits which remained undisposed of by his predecessor, or which had been and continued to be held unaccounted for by anyone; but this was not discussed on appeal.

Real estate.

Where the executor died in the lifetime of the testator the orphan's court had no power to grant letters of administration *de bonis non cum testamento annexo* simply for the purpose of making the sale of real estate under the will, as in order to authorize the grant of letters of administration *de bonis non* there must be something remaining to be done to complete the administration of the estate of the deceased, or some function to be performed in regard to it. Wilcoxon v. Reese, 63 Md. 542.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Money remaining in the hands of an administrator *de bonis non* was subject to an order of the orphan's court directing it to be paid to his successor, under Md. act 1820, chap. 174, § 3, which is the same as Md. Code, art. 93, § 72. Donaldson v. Raborg, 26 Md. 312.

Under Md. act 1820, chap. 174, § 3, authorizing and requiring the orphan's court on an application of the administrator *de bonis non*, to make an order directing the executor or administrator of a deceased executor or administrator on or before a certain day to deliver over to the administrator *de*

had been received by William Hodge in his capacity as administrator, and had been either administered or converted to his own use, neither an action at law nor a bill in equity could be maintained by the administrator *de bonis non* against him or his estate. As indi-

bonis non all the bonds, notes, accounts, and evidences of debt which the deceased executor or administrator may have taken, received, or had as executor or administrator at the time of his death, and also to pay over to the said administrator *de bonis non* all the money in the hands of such deceased executor or administrator as such at the time of his death unless it has been retained by an order of the orphan's court, an administrator *de bonis non* was entitled to the balance shown to be money in the hands of his predecessor, where the orphan's court made an order directing that it should be paid to him. Lemmon v. Hall, 20 Md. 188.

So, under Md. act 1820, chap. 174, an administrator *de bonis non* was entitled to the proceeds of property which his predecessor had received and converted into money in his lifetime. De Valengin v. Duffy, 14 Pet. 282, 10 L. ed. 457.

But the administrator *de bonis non cum testamento annexo* was not entitled to recover money in the hands of his predecessor at the time of his death belonging to the estate, without obtaining an order from the orphan's court for the payment of money due him, under Md. act 1820, chap. 174, § 3, Rev. Code, art. 50, § 109, providing that the court on the application of the administrator *de bonis non* shall order the administrator of the deceased administrator to deliver over all the bonds, notes, accounts, and evidences of debt which the deceased administrator may have taken, received, or had as administrator at the time of his death, and to pay over the money in his hands as such. State, Green, v. Hart, 57 Md. 234; Johnson v. Farmers' Bank, 11 Md. 414.

So, under Md. Code, § 243, art. 63, providing as in chap. 174, § 3, a similar ruling was made. State, Dittman, v. Robinson, 57 Md. 436.

In Sibley v. Williams, 3 Gill & J. 52, it was said that under Md. act 1798, chap. 101, subchap. 14, § 2, making it the duty of the administrator *de bonis non* to administer all things in that act described as assets not converted into money and not distributed or delivered or retained under the court's direction, it was clear that the legislature did not intend to make anything the subject of administration in the hands of an administrator *de bonis non* which did not exist in specie, and if property had been converted into money, such money was not the subject of administration but the estate of the first executor or administrator was liable therefor as for a devastavit.

In Sibley v. Williams, 3 Gill & J. 52, it was said that Md. act 1820, chap. 174, § 3, giving power to the administrator *de bonis non* to recover assets by an action on the bond extends only to bonds, notes, accounts, and evidences of debt, which the deceased executor or administrator may have taken, received, or had as executor or administrator, and to money in his hands. "Previous to that act, no suit could be maintained on it by an administrator *de bonis non* for goods converted."

Where a will gave to the wife "cash money in hand and the bills receivable of which I shall die possessed for her own absolute benefit, behoof, and disposal," and also a leasehold house and lot on H street, and two leasehold lots on Baltimore street during her life, and the testator sold the lots on Baltimore street before he died, and a part of the purchase money remained due at his death and was collected by the executors, who also sold the H street house and lot and converted the proceeds to their own use, the administrator *de bonis non cum*

cated by his title and commission, there vests in him, as administrator *de bonis non*, only the unadministered property of the intestate; that is, the goods, effects, and credits which were of the intestate at the time of her decease, and which remained in specie, unaltered or uncon-

verted by any act of the administrator, or the proceeds thereof which have not been commingled with the administrator's own money. *American Bd. of Comrs. for Foreign Missions*, 27 Conn. 344.

"But at common law the authority of the

testamento annexo was entitled to recover on his predecessor's bond the amount of the proceeds of the sale of the H street lots sold by the executors and converted to their own use, under Md. Code, § 243, art. 93, providing for the appointment of a new administrator upon the revocation of letters already granted, and for an order to deliver up, and providing the mode of enforcing obedience; but was not entitled to recover for the proceeds of the Baltimore street lot, which was held to be bills receivable and which passed direct to the widow. *State, Dittman, v. Robinson*, 57 Md. 486.

An administrator *de bonis non* who had faithfully and diligently performed his trust should not suffer any loss by reason of the default of his predecessor, and is chargeable only with the funds that come into his hands or which he is entitled to receive from the estate of the deceased executor. *Smithers v. Hooper*, 23 Md. 273.

Where an administratrix settled her account with the orphans' court, and afterwards individually mortgaged some of the personal property, a subsequent administrator *de bonis non* could not maintain replevin against the mortgagee where the presumption was that all the debts had been satisfied and that the remaining assets had been distributed, and that the mortgage was made by the administratrix as a distributee. *Allender v. Riston*, 2 Gill & J. 86.

Choses in action.

Where the administrator of W. W. brought an action upon a note payable to W. W. administrator of R. W., and it was contended that he could not maintain the action because such right of action was in the administrator *de bonis non* of R. W., it was held that Md. act 1820, chap. 174, authorizing the orphans' court to pass an order for the delivery over to the administrator *de bonis non* of all bonds which the deceased executor or administrator may have taken, received, or had as executor or administrator at the time of his death, did not vest the title of such property in the administrator *de bonis non*, nor did it give the right of possession to him where the order of the orphans' court was not made. *West v. Chappell*, 5 Gill, 228.

Where a bond was given to an executor by distributees to refund in case of a deficiency, and the administrator *de bonis non* of the executor brought a suit on the bond to recover because there was a deficiency of assets; and it was claimed that there were other assets than such as were administered upon, it was said that if they had existed they would have been alone subject to the control of an administrator *de bonis non* of the first estate. *Salisbury v. Black*, 6 Harr. & J. 241, 14 Am. Dec. 279.

Massachusetts.

It seems that in this state the common-law doctrine as to the privity between an administrator *de bonis non* and his predecessor in relation to the assets was changed at an early day by the statute, as will be seen from Mass. Rev. Stat. 1836, chap. 70, §§ 1-11, based upon the prior acts of 1788 and 1816, providing for an action upon the predecessor's bond for maladministration, and that all moneys (unless the execution be awarded for the use of a creditor, person, or next of kin) shall be paid over to the coexecutor or coadministrator if there be any, or to whoever shall then be rightful executor or administrator, and shall be assets in his hands to be administered according to law.

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Property remaining in specie or unadministered.

An administrator *de bonis non* was entitled to receive the assets in specie where an administrator was removed and the assets could be identified. *Marvel v. Babbitt*, 143 Mass. 226.

In *Thayer v. Kinsey*, 182 Mass. 232, it was said that it was the duty of the administratrix *de bonis non* to collect and receive the assets remaining unadministered from the predecessor.

In an action by an administrator *de bonis non* against the administrator of his predecessor for the possession of stock belonging to the estate, under Mass. Pub. Stat. chap. 151, § 2, cl. 4, providing for a recovery of property secreted or withheld from the owner, so that it cannot be replevied, it was held that the defendant had the right to retain the same for a settlement and for whatever lien and expenses he should have against the same. *Foster v. Bailey*, 157 Mass. 160.

Claims against predecessor for accounting, balance, conversion, devastavit.

Under Mass. Rev. Stat. chap. 70, § 11, providing that all moneys collected on an executor's or administrator's bond, unless where, in special cases, the money is received for the use of a creditor or next of kin, shall be paid over to the coexecutor or coadministrator if there be any, or to whoever shall then be the rightful executor or administrator, and shall be assets in his hands to be administered according to law, a balance in the hands of a former administrator obtained by a suit on the bond should be paid into the hands of the administrator *de bonis non*, and was assets. *Wiggin v. Swett*, 6 Met. 194, 39 Am. Dec. 716.

So, under Mass. Rev. Stat. chap. 70, § 11, where an action was brought by the probate judge for maladministration, the proceeds should be paid over to the administrator *de bonis non*. *Newcomb v. Williams*, 9 Met. 525.

So, where a trust was created by a will with power in the executrix to sell the property, and the executrix sold the same and her administrator collected the money, such trust passed to the administrator *de bonis non* with the will annexed, and he was entitled to recover the proceeds in an action for money had and received as it should be administered, as there might still be debts due from the testator. The court said that if the trust fund consisted in stocks or specific property, other than money, a bill in equity might be necessary to enable the administrator to recover it. *Buttrick v. King*, 7 Met. 20.

Where a judgment was recovered by the judge of probate in favor of an administrator *de bonis non* on the bond of his predecessors, ordering that said judgment should be a security for the payment by the defendants of such sums as should be found due from them as administrators of J. S. to the plaintiff as administrator *de bonis non* of J. S. for the next of kin of J. S. and their legal representatives, upon the adjustment of plaintiff's administration account and upon a decree for a distribution of the balance that should be remaining in his hands, an action could be maintained by the administrator *de bonis non* upon this judgment. *Storer v. Storer*, 6 Mass. 390.

So, where the personal estate of a deceased person was distributed under a decree of the probate court before the debts of the estate were barred by the statute of limitation and the administrator was removed, a subsequent decree was made reopen-

administrator *de bonis non* does not extend to any property which had been administered, either fully or partly. . . . It follows from these principles that the administrator *de bonis non* can sustain no action at law against his predecessor for anything save unadminis-

tered effects existing in specie." 2 Woeyner, American Law of Administration, pp. 744, 745.

In *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292, it is said: "To the administrator *de bonis non* is committed only the administration

ing the administrator's account, and directing him to pay to an administrator *de bonis non* the amount necessary to settle the estate. *Browne v. Doolittle*, 151 Mass. 595.

And where an action of contract on the bond of an administrator was brought for the use of the administrator *de bonis non*, it was held that the chattels which were returned by the administratrix in her inventory should be accounted for by her, and the fact that the chattels were in existence and had not been sold by the administratrix would make it proper for the administrator *de bonis non* to include them in his inventory, and the administrator *de bonis non* was entitled to receive them or to maintain a suit for their value against the administratrix on her bond. *Fay v. Muzzey*, 13 Gray, 53, 74 Am. Dec. 619.

Where an executrix was entitled only to the income of her husband's estate for widowhood, and at her marriage or death it was to pass in equal shares to his and her heirs, and she used the money of the estate to purchase bank stock in her own name, and at her death her executors sold the stock, the administrator *de bonis non cum testamento annexo* of the first estate could maintain an action against the executors for money had and received with a special count to recover the proceeds of this stock. *Sewall v. Patch*, 132 Mass. 326.

Where the administrator *de bonis non* brought suit on his predecessor's bond, it was held that no recovery could be had for manure which was taken from the barnyard of the homestead of the deceased which was not in a fit condition for use at the time of his death. The court said: "Manure made in the course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it." But a recovery could be had for the manure from the hotel stables, which was agreed to have been personal estate, and was included in the inventory, and it was no sufficient account to say that it had been expended upon the real estate which had since been sold for the payment of debts. *Fay v. Muzzey*, 13 Gray, 53, 74 Am. Dec. 619.

So, where the estate was insolvent and the administratrix had paid debts of the estate without knowledge that such estate was insolvent, the administrator *de bonis non* was entitled to recover on the administratrix's bond for such payment in violation of her official duty, and the administratrix was also liable for money expended on repairs and improvements of her real estate. *Cobb v. Muzzey*, 13 Gray, 57.

But an administrator *de bonis non* with the will annexed could not recover of the administrator of his predecessor money that belonged to his predecessor as heir of his wife although he was her executor, under Mass. Pub. Stat. chap. 147, § 6, providing that a married woman's will shall not, without the husband's written consent, operate to deprive him of more than one half of her personal estate, where he did not consent that her will should deprive him of his half, although he acted as executor. *Tyler v. Wheeler*, 160 Mass. 206.

In *Foster v. Bailey*, 157 Mass. 160, it was said: "It is suggested that specific chattels on the decease of an executor or administrator pass to the administrator *de bonis non* of the original estate, while money, including the proceeds of goods converted into money, does not; and that therefore the plaintiff is entitled at once to the possession of every-

thing except money. In the first place, we do not think that any such distinction exists in this commonwealth. An executor or administrator holds all the property of the estate as a trustee, and he is as much bound to keep the money distinct as he is any chattel.

In *Browne v. Doolittle*, 151 Mass. 595, it was said that when an administrator had made a settlement before the time for presentation of claims had expired and the administrator was removed, he remained liable to account for the whole amount of the inventory as assets, and it was his duty to pay over the assets of the estate to the administrator *de bonis non*, whose duty it was to collect them.

Where an administrator of a partner compromised and settled the interest of his estate in the firm with the surviving partner, and duly accounted for all that he received, and rendered a final account which was duly allowed in the probate court, and the administrator *de bonis non* gave notice to the partner and sought to have the compromise set aside for fraud, and to open the account of his predecessor and restate the partnership account in the probate court, it was held that the administrator *de bonis non* could only proceed in a court of equity to enforce any rights he may have against the surviving partners and secure a settlement of the partnership accounts if a valid one had not been made. It was said that the administrator *de bonis non* cannot be charged with anything until he has received it, or has been guilty of some neglect in not receiving it. *Blake v. Ward*, 137 Mass. 97.

But where the executor resigned and turned over to the administratrix *de bonis non cum testamento annexo* certificates for stock which had been paid for with the money of the estate, worth at that time the value of the assets, and the administrator *de bonis non cum testamento annexo* collected dividends and voted by proxy thereon, he could not maintain an action on his predecessor's bond for the funds after the stock became worthless, as a representative could release or compromise a claim of the estate. *Thayer v. Kinsey*, 162 Mass. 232.

In *Tyler v. Wheeler*, 160 Mass. 206, it was said that in the absence of an account in the probate court an administrator *de bonis non cum testamento annexo* could not recover from the administrator of his predecessor in an action of contract, for assets which his predecessor appropriated and assumed to administer, and which could not be traced or identified as a part of the estate, as a probate account could not be settled in an ordinary action at law.

Choses in action.

Where a testator sold some of his land after he had devised the same to a minor, and the executor gave the purchase-money notes to the legatee's guardian, the administrator *de bonis non* was entitled to recover this money from the guardian with interest in an action for money had and received. *Stevens v. Goodell*, 3 Met. 34.

In this case it was further held that the fact that the defendant had been summoned as the trustee of the executor, in a process of foreign attachment which was then pending, did not prevent a recovery.

Proceeds of real estate.

Where the will gave the executor "or whoever shall execute" the will power to convert the real estate into money, and the executor sold the real estate and died without rendering any account, the

of the goods, chattels, and credits of the deceased which have not been administered. He is entitled to all the goods and personal estate which remain in specie. Money received by the former executor or administrator, in his

character as such, and kept by itself, will be so regarded; but, if mixed with the administrator's own money, it is considered as converted, or, technically speaking, administered."

administrator *de bonis non* of the first estate was entitled to assert against the estate of his predecessor a claim for the amount received from the sale of real estate and not accounted for, as the power to sell the real estate and convert it into money was not a personal trust, but was conferred upon whosoever might execute the will. *Minot v. Norcross*, 143 Mass. 326.

Under Mass. Pub. Stat. chap. 134, § 1, providing that where the estate of an intestate is insufficient to pay his debts, and the real estate is sold for the same, the proceeds are to be considered as assets, where real estate was so sold and the proceeds paid by the administrator to his counsel and the administrator was removed, the administrator *de bonis non* was entitled to this fund as assets of the estate. It was held that the money passed to the administrator *de bonis non* if it could be identified as funds of the estate. *Marvell v. Babbitt*, 143 Mass. 226.

Michigan.

Under Mich. Comp. Laws, § 4408, providing that any person interested in the decedent's estate may bring before the judge of probate for examination anyone whom he suspects of possessing writings which tend to disclose the interest of the deceased in any property, an administrator *de bonis non* was authorized to cite the executor of his predecessor to produce the books of a partnership composed of the deceased and the previous administrator. *Perrin v. Calhoun County Circuit Ct. Judge*, 49 Mich. 343.

Minnesota.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Under Minn. Gen. Stat. 1873, chap. 55, § 6, providing that when an administrator omits to perform any order made in the matter of account or of final settlement, the judge of probate may cause the bond of such administrator to be prosecuted and the moneys collected thereon to be applied in such manner as they ought to have been applied, and § 10 providing that all moneys received on any execution so issued on a judgment in favor of the judge of probate, shall be paid over to such person, other than the defendant, as shall then be the rightful executor, administrator, or guardian, an administrator *de bonis non* was entitled to receive the amount collected upon his predecessor's administration bond, and to institute proceedings which would result in such collection. *Palmer v. Pollock*, 26 Minn. 433.

And under Minn. Gen. Stat. 1878, chap. 55, § 10, an administrator *de bonis non* was entitled to recover on the bond of his predecessor the proceeds of the estate which he had converted into money. *Balch v. Hooper*, 32 Minn. 152.

Mississippi.

In this state the common-law doctrine that the administrator *de bonis non* takes only such property as remains unadministered, and cannot maintain an action for conversion, waste, account, or for the balance, is, in effect, subject, however, to an exception that where transfers of notes or sales are fraudulent or void the administrator *de bonis non* can maintain an action treating the assignment by his predecessor of the purchase-money note as void, or may enforce a statutory lien.

Property remaining in specie or unadministered.

The duties of an administrator *de bonis non* are limited to such assets as were left unadministered by his predecessor. *Gray v. Harris*, 43 Miss. 421.

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In *Hendricks v. Snodgrass*, Walk. (Miss.) 86, it was said that if a person died intestate and administration was granted to A. B., who died without having administered all the intestate's goods, the ordinary should grant administration of the goods unadministered to another, for the first administrator could not continue the trust reposed in him to his executor or administrator, because he had no interest but what he derived from the act of the ordinary.

In *Ruff v. Smith*, 31 Miss. 59, and *Stubblefield v. McRaven*, 5 Smedes & M. 130, 43 Am. Dec. 502, it was said that the administrator *de bonis non* was only entitled to goods remaining in specie.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Where an administrator had made a settlement of his account showing a balance due by him, the administrator *de bonis non* could not maintain an action for the balance, as the right of action was in the creditors or distributees. *Byrd v. Holloway*, 6 Smedes & M. 323.

So, where an administrator had placed a note in the hands of an attorney who had collected the money, and the letters of administration were afterwards revoked and another administrator appointed, the money thus collected was not assets of the estate. It was held that at most the administrator *de bonis non* could only assert an equitable claim to the same, and the extent of that claim would be determined by the amount of the balance which, if any, might appear against his predecessor on a settlement by the court. *Sloan v. Johnson*, 14 Smedes & M. 47.

And a decree directing that the balance found to be due from the administrator to the estate should be paid over to the administrator *de bonis non* was erroneous, because if the fund was for distribution it should have been ordered to be paid to the distributee rather than remit it to the hands of a successor. *Gray v. Harris*, 43 Miss. 421.

And an administrator *de bonis non* was not entitled to money found due the estate upon a final settlement of the account of the first administrator, as a bond of an administrator *de bonis non* only relates to the administered estate, and so far as the administrator had progressed in the administration the estate was already administered, and was therefore not covered by the bond of his successor in the administration. It was said that if the funds in the hands of the executor were paid over to the administrator *de bonis non*, the creditors would be without any security for the faithful distribution of the money. *Dement v. Heth*, 45 Miss. 388.

So, an administrator *de bonis non* could not maintain an action to call the administrator of the previous deceased administrator of his intestate to account for any property of the intestate that such predecessor converted, or wasted, or for money or effects that the representative of such predecessor had in his hands upon the final settlement of his intestate's administration of the first estate. *Rives v. Patty*, 4 Miss. 338.

And under Miss. orphans' court law, § 55, giving the administrator *de bonis non* the right to demand the property of the deceased in the hands of a former administrator, and in case of refusal to deliver it up authorizing a suit on the bond, the administrator *de bonis non* did not have a right of action for the failure of the administrator to make and return a true inventory as that was an act of maladministration, and must have happened

The administrator *de bonis non* is entitled only to such goods or chattels of the testator as remained in specie in the hands of the executor at the time of his death, or to such money as belonged to the testator's estate, and

had been kept by the executor separate and unmixed with his own. *Potts, Wollerton, v. Smith*, 3 Rawle, 861. And see the very full notes to this case in 24 Am. Dec. 379.

This doctrine was fully and unequivocally

before the second administration, and no such remedy was given to the administrator by the statute. *Prosser v. Yerby*, 1 How. (Miss.) 87.

So, in an action by an administrator *de bonis non* on the bond of his predecessor, it was held that where an insolvent administrator took in liquidation from a debtor a debt due by the administrator to such debtor, if the act took place by collusion there would not be an extinguishment of the debt by the pretended receipt, and the debtor would still be liable to the administrator *de bonis non*, but he could not recover on the bond, as the right of action was in favor of creditors or distributees for maladministration. *Judge of Probate v. Green*, 1 How. (Miss.) 146.

In *Davis v. Brandon*, 1 How. (Miss.) 154, where an administrator *de bonis non* brought suit to recover purchase money for a tract of land sold by his predecessor, it was said that where an order of court has been obtained, and the land sold in pursuance thereof, it is an act in the due course of administration, and the administrator is responsible on his bond, and the powers of an administrator *de bonis non* are limited to the administration of goods and chattels left unadministered by the first administrator, and the statute authorizing an administrator to sell land does not provide for a breach of that duty by clothing his successor with power to fulfill it at his own discretion.

The administrator *de bonis non cum testamento annexo* could not maintain an action for a devastavit or maladministration against the executors who had been removed, as the heirs or distributees and legatees would be the only proper parties to maintain such an action. *Stubblefield v. McRaven*, 5 Smedes & M. 130, 43 Am. Dec. 502; *Prosser v. Yerby*, 1 How. (Miss.) 87.

And the administrator *de bonis non* could not recover for money in the hands of his predecessor, where he did not show that it was the specific and identical property of the deceased remaining unadministered. *Prosser v. Yerby*, 1 How. (Miss.) 87.

Where the administrator *de bonis non* procured a citation to be issued against his predecessor requiring him to render an inventory of the estate, suggesting that he was indebted to said intestate, and his predecessor in his answer denied that he was administrator and set up a gift of money made by the intestate in his lifetime, the petition was dismissed, the court saying "that the petitioner has a full and complete remedy, if he can establish his claim as administrator to the property, in a court of law." *Gaskins v. Hammett*, 32 Miss. 103.

In *Ruff v. Smith*, 31 Miss. 60, it was said that an administrator *de bonis non* can maintain no action against the prior administrator for any balance in his hands remaining after a settlement of his accounts.

In *Stubblefield v. McRaven*, 5 Smedes & M. 130, 43 Am. Dec. 502, it was held that a settlement in the probate court by the executors would be a bar to an accounting on behalf of the administrator *de bonis non*.

Chosen in action.

Where an intestate sold property and took mortgage notes, and his administrator collected one of them and made a final settlement and was discharged, and two remaining notes passed into the hands of a guardian, who obtained a judgment on one of the notes, the administrator *de bonis non* of the original owner was entitled to foreclose the mortgage notwithstanding the judgment in favor of the guardian of the heirs of the payee. *The*

court held that mere possession of the evidence of debt was not an administration, and said that as long as a note given to a deceased person remains uncollected or undisposed of by legal means it belongs to the estate. *Morse v. Clayton*, 13 Smedes & M. 373.

And where an administrator transferred, to pay his own debt, a note given to him for the purchase of personal estate of the decedent, and then resigned, an administrator *de bonis non* could maintain a suit in equity in order to obtain the note and to foreclose a mortgage securing it, as the assets constituted a trust fund. *Scott v. Searles*, 7 Smedes & M. 498, 45 Am. Dec. 317.

It was said in the briefs that the bond being payable on its face to the administrator was notice that it belonged to the estate.

So, where a testator sold land in Mississippi secured by a vendor's lien and also by a deed of trust, and died a resident of Kentucky, and his administrator *de bonis non* with the will annexed appointed in Kentucky, obtained possession of the note, an administrator *de bonis non* of Mississippi could there maintain a bill to enforce the vendor's lien, and to enforce the trust deed as further security, without having the note in his possession. It was said that "the fact that the 'evidence' of the debt was in the hands of the Kentucky administrator did not destroy his character as Mississippi assets, nor defeat his right of recovery," and that the protection in favor of a bona fide holder for value would not inure to any assignee of the Kentucky administrator. *McIlvoy v. Alsop*, 45 Miss. 365.

And an administrator *de bonis non* was entitled to notes payable to the intestate held by the administrator of his predecessor and made by the predecessor to the intestate, under Miss. Rev. Code, §§ 88, 99, providing that it shall be the duty of an administrator or executor to give in claims against himself in the list of debts which he is bound to render, and if the executor or administrator shall give in such claim he shall account for the sum due as if it were so much money. *Kelsey v. Smith*, 1 How. (Miss.) 68.

The rents are incident to the legal title, and belong to an administrator *de bonis non* of an estate declared to be insolvent and ordered to be sold. *Forniquet v. Forstall*, 34 Miss. 87.

But where an administrator who was a surviving partner of his intestate assigned away a note received by him as administrator from the sale of his intestate's property, and accounted for the note in his settlement, the administrator *de bonis non* could not enforce it. *Searles v. Scott*, 14 Smedes & M. 95.

In *Searles v. Scott*, 14 Smedes & M. 95, it was said that the difference between this case and *Scott v. Searles*, 7 Smedes & M. 498, 45 Am. Dec. 317, was that in that case a part of the note was transferred and the assignment was made "subject to the payment of the legal representatives of J. S., deceased, of the balance due said estate," and in this case there was an additional fact that the note was included in the settlement of the administrator and accounted for by him in his final settlement.

Where sales or transfers are void.

Where an administrator made a fraudulent disposition of property of the estate, the property remained subject to the control of the administrator *de bonis non* as though it had never been sold by his predecessor. *Forniquet v. Forstall*, 34 Miss. 87; *Hull v. Clark*, 14 Smedes & M. 187; *Rosser v. Leath-*

sustained by this court in the case of *Waterman v. Dockray*, 78 Me. 141.

But the persons legally interested are not without ample remedy in such a case. An omission by an administrator to include in his

inventory any assets of the estate known to him is a breach of his official bond. *Bourne v. Stevenson*, 58 Me. 499. Or an administrator could be charged with any money belonging to the estate that was received by him

erman, 4 How. (Miss.) 240, 34 Am. Dec. 121; *Miller v. Helm*, 2 Smedes & M. 687; *Scott v. Searles*, 7 Smedes & M. 498, 45 Am. Dec. 317; *Searles v. Scott*, 14 Smedes & M. 95; *Murphy v. Clark*, 1 Smedes & M. 221.

So, where there was a declaration of insolvency of the personalty, and the realty became subject to the payment of debts and assets in the hands of an administrator, the administrator *de bonis non* could maintain a suit in equity to have a fraudulent sale of realty made by his predecessor set aside in order to have the same applied to the payment of debts. *Forniquet v. Forstall*, 34 Miss. 87.

So, under How. & H. Miss. Dig. 417, providing that when property, real or personal, of a deceased person shall be sold by order of a probate court it shall be held and remain subject to the amount for which it was sold in the hands of the purchaser or his assignee in the same manner as if a mortgage had been taken on said property, where an administrator sold slaves and took a purchase-money note payable to himself as administrator, and transferred said note for the purchase of other slaves for his personal use, and the vendor had notice from the face of the note that it was property of the estate, the administrator *de bonis non* of the first estate could recover the note, or could enforce the statutory mortgage on the slaves if his right of action on the note was barred. *Miller v. Helm*, 2 Smedes & M. 687.

So, under this statute, where an administrator sold slaves of his intestate at private sale and took the notes payable to himself and died without collecting the amount, the administrator *de bonis non* could maintain a bill to have the sale by the first administrator declared void, or in the alternative to have a statutory lien enforced to recover the purchase money. *Murphy v. Clark*, 1 Smedes & M. 221.

So where an administrator had sold slaves without any valid order of the probate court, the administrator *de bonis non* could maintain an action for the recovery of such slaves or to enforce the mortgage given by the Mississippi statute to secure the purchase money of the property sold by representatives of deceased persons. *Prestidge v. Pendleton*, 24 Miss. 80.

So, where an administrator sold slaves without an order of court, the sale was void and passed no title, and they could be recovered by the administrator *de bonis non* from the purchaser by a bill in chancery, and he could recover also from a subvendee. *Hull v. Clark*, 14 Smedes & M. 187.

Where a widow, who was administratrix and entitled in her own right to one third of the personalty, married again, and her husband, who acquired her interest, managed the business of the estate and sold some of the slaves unlawfully at private sale, it was held, in an action by the heirs to recover a number of the slaves, that as the complainants had an equitable claim to part of the property the cause would be retained in equity. It was said that if there was a remedy at law it could not be enforced by any other person than an administrator *de bonis non*. *Cable v. Martin*, 1 How. (Miss.) 558.

Where an estate was insolvent in fact, and former administrators failed to have it declared insolvent, it was the duty of the administrator *de bonis non* to have it so declared and administered as an insolvent estate, and the land sold to pay debts subject to the widow's right of dower, and a decree allotting dower to the widow on the assumption of the solvency of the estate would not bind

the administrator *de bonis non* where he was not a party to such a proceeding. *Yandell v. Pugh*, 53 Miss. 295.

Missouri.

In this state an early statute provided for an action by the administrator *de bonis non* on his predecessor's bond for conversion, or for an account, or for a balance. As to choses in action the early cases held that such notes were the property of the predecessor and subject to any individual claim against him in the hands of the obligors, but such cases are doubtful now.

Property remaining in specie or unadministered.

Under Mo. Rev. Stat. § 48, providing that if any executor or administrator die his legal representative shall account for, pay, and deliver to his successor all money, real and personal property of every kind, and all rights, credits, deeds, evidences of debt of the deceased, at such times and in such manner as the court shall order on final settlement with such representatives, the property of the estate remaining in the hands of an executor at his death did not go to his representatives, but went to the administrator *de bonis non*. *Booker v. Armstrong*, 92 Mo. 49.

In *Gamble v. Hamilton*, 7 Mo. 489, it was said that the administrator *de bonis non* would be entitled to money remaining unadministered where its identity could be traced.

But where a party died intestate domiciled in Tennessee leaving property in Missouri, and the administrator in Missouri was also appointed administrator in Tennessee, and the settlement made by him in Tennessee showed that he had accounted to the Tennessee administrator for the Missouri property, and the Missouri settlement showed that all debts were paid, a subsequent administrator *de bonis non* in Missouri could not maintain an action of detinue to recover any of the property subsequently returned to Missouri, where the transfer by the former Missouri administrator to the Tennessee administrator would have been ordered by the court, and such transfer completed the administration in Missouri on the property. *Spradling v. Pipkin*, 15 Mo. 118.

In *Spradling v. Pipkin*, 15 Mo. 118, it was said that if an administrator in Tennessee converted slaves to his own use and brought them to Missouri, such conversion gave the distributee a right to proceed against the administrator in the courts of Tennessee and to assert in equity their claim in Missouri; but it did not authorize the Missouri administrator *de bonis non* to maintain an action of detinue for such property.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Under Mo. act 1835, art. 1, § 35, providing that the next succeeding administrator shall proceed against a delinquent predecessor and his securities or either of them, or against any other person possessed of any part of the estate, an administrator *de bonis non* could maintain an action for the failure of the former executor to pay over money, effects, and credits in his hands belonging to the estate of the deceased, in pursuance of an order of the county court. *State, Darland, v. Porter*, 9 Mo. 352.

So, an administrator *de bonis non* was entitled to maintain an action against his predecessor and his securities, where the letters of the former administrator had been revoked and he had failed to ac-

in the settlement of his administrator's account and a failure to present and settle an account, after being cited to do so, would also be a breach of his bond, for which he and his sureties would be liable.

count for money received as assets and which had been converted to his own use, as the principle of the common law which entitled an administrator *de bonis non* to those goods only which remained in specie and not administered on by the first administrator was abolished by the system of administration introduced in Missouri. State, Blanton, v. Hunter, 15 Mo. 490.

Where an administrator brought a suit upon his predecessor's bond for failing to account for assets that he had converted to his own use, it was said that if the plaintiff had established this allegation by evidence, the defendants would then have had to show that the property had been legally disposed of. State, Renfro, v. Price, 17 Mo. 431.

In State, Coste, v. Fulton, 35 Mo. 323, it was held that an administrator *de bonis non* was the only person who could sue for the balance found due in the account of a former administratrix (Mo. Code 1845, §§ 44, 45, showing that the successor of an administrator was made the sole representative of the estate in administration was cited, but the statute was not referred to in the opinion.)

Where an administrator's first annual settlement showed assets to a considerable amount which were liable to the claims of creditors, and he died without making distribution, and an administrator *de bonis non* was appointed, and creditors brought suit on the bond of the administrator in chief to secure their debt, they were not entitled to recover, but such assets should be held by the administrator *de bonis non* under 1 Wagner (Mo.) Stat. 77, §§ 46, 49, providing that if all the executors or administrators of an estate die or resign, letters of administration on the goods unadministered shall be granted, and the administrator appointed shall perform like duties and incur like liabilities as the former executor or administrator, and that if any administrator or executor die, resign, or his letters be revoked, he or his legal representative shall account for, pay, and deliver to his successor, or to the surviving or remaining executor or administrator, all money, real and personal property of every kind, and all rights, credits, deeds, evidences of debt, and such papers of every kind of the deceased at such times as the court shall order. State, Collins, v. Dulle, 45 Mo. 299.

And under 1 Wagner (Mo.) Stat. p. 77, §§ 47, 48, the successor of a public administrator who died without having finished an administration of an estate could maintain an action on his predecessor's bond for a conversion and appropriation to his own use of the assets by his predecessor, and it was not necessary to obtain an order of the court before bringing an action. State, Shields, v. Flynn, 48 Mo. 413.

In State, Crane, v. Heinrichs, 82 Mo. 542, it was said that when an executor is removed, the funds of the estate in his hands at the time of his displacement are debts of the estate and should be paid by him only to his successor in office, under Mo. Rev. Stat. §§ 48, 49.

So, an administrator *de bonis non* was entitled to summary process on fifteen days' notice, ordering and adjudging that the money and effects in the hands of his predecessor might be surrendered to him, and to have such order and judgment enforced against his predecessor and his sureties, where an administrator had been removed and there was cash and personal property in his hands, under 1 Wagner (Mo.) Stat. 81, § 67, providing that if an executor or administrator resign or his letters be revoked, the court shall have power to ascertain the amount of money and property in his hands,

Nor do we think that an administrator *de bonis non* can maintain an action against the estate of his predecessor for money wrongfully received by him, prior to his appointment as administrator, in the absence of allegation and

and to order and adjudge the rendition of the same to his successor, and to enter and order a judgment against him and his sureties, and to enforce the same, first for the amount of money specified in the judgment by execution; second, for all other assets, effects, and papers described in the judgment or order by attachment. Wickham v. Page, 49 Mo. 526.

And in Brown v. Weatherby, 71 Mo. 152, a recovery was allowed by an administrator *de bonis non* on his predecessor's bond, under 1 Wagner (Mo.) Stat. 81, art. 1, § 67, for failure to deliver to his successor assets of the estate.

And under 1 Wagner (Mo.) Stat. p. 82, § 67, an administrator *de bonis non* could maintain an action against a former administrator who had failed to comply with a previous order directing him to make distribution of the fund in his hands among the heirs of the deceased, and the fact that an order of distribution was made and that the debts were all paid did not prevent a recovery. Morehouse v. Ware, 78 Mo. 100.

So, an administrator *de bonis non* could maintain an action for the purpose of ascertaining the amount of money and property in the hands of his predecessor whose letters had been revoked, and for having an order made for the rendition of the same to the plaintiff, under 1 Wagner (Mo.) Stat. p. 81, § 67. Scott v. Crews, 72 Mo. 261.

The case of Scott v. Crews, 72 Mo. 261, distinguished Spraddling v. Pipkin, 15 Mo. 118, saying that case "has no application here; all that it decides is, where the domicile of an intestate, at the time of his death, was in a foreign state, if an administration of his estate here has been finally closed by the payment of all debts against it, and the residue of the assets are transferred and carried into the foreign administration, an administrator *de bonis non* appointed here cannot recover them though brought again into this state."

Where an administrator *de bonis non* brought an action on his predecessors' bond for assets which had not been accounted for by them but had been wrongfully converted to their own use, a recovery could be had although the bond had not been approved by the probate court, and it was not a defense to show that certain demands had been allowed against the estate which were barred by limitation. State, Burrough, v. Farmer, 54 Mo. 439.

And where an administrator *de bonis non* brought a suit upon the bond of his predecessor for failing to account for, pay, and deliver all moneys and property of the estate, it was held that annual settlements made by the predecessor were not final nor conclusive upon the parties interested. State, Daviess County, v. Lankford, 55 Mo. 564.

Where an administrator *de bonis non* recovered a judgment against plaintiff (a surety) and his co-surety upon the former administrator's bond on account of his failure to account for the assets of the estate, and the administrator in chief had illegally surrendered and delivered up to the co-surety notes belonging to the estate, and such co-surety never paid the same in any manner, the plaintiff was entitled to be subrogated to the rights of the administrator *de bonis non*, and to recover the amount due upon the notes from his co-surety. Cowgill v. Linville, 20 Mo. App. 138.

In Bolton v. Whitmore, 12 Mo. App. 581, a judgment in favor of an administrator *de bonis non* against the administrator and the sureties on his bond, to compel the administrators to account and pay over, was not reversed, where it was contended that the form of action was not the appropriate one,

proof that such money is distinguishable as a part of the intestate's property. If this money withdrawn from the savings bank was, in fact, the property of the intestate at the time of her death, her husband, by receiving it, became a

debtor to the estate, and his subsequent appointment and qualification as administrator converted this indebtedness into cash assets in his hands, which, if the allegations of the bill are true, should have been included in his in-

In a controversy between an administrator *de bonis non* and H., the administrator of his predecessor, an order that H. retain all moneys "for the purpose of paying all administrators and guardians such sums as should be found to be due from the estate of said O'Neil in his capacity of executor, administrator, etc.," was erroneous, as the order evidently was made under the belief that the administrator of the first estate, and other administrators in like situations, ought to be preferred creditors. The court said that the administrator of the first estate must fall into the class of creditors to which the statute assigns him. *Gamble v. Hamilton*, 7 Mo. 469.

Choses in action.

Where the first administrators surrendered to bankers certificates of deposit without receiving full payment which they had given to the deceased, the administrator *de bonis non* could not maintain an action against the bankers for the balance, as this was a conversion by the predecessors, and if not accounted for they and their successors were liable on their bond. *Brooks v. Mastin*, 69 Mo. 58.

So, where an administrator of a partnership estate was ordered by the probate court to sell the partnership effects at private sale for cash, and he took a note payable to himself for the proceeds of the sale, the right of action on the note was in him alone during his life, and devolved upon his personal representatives at his death, and the administrator *de bonis non* of the partnership estate was not entitled to the note as part of the partnership assets. *McGilway v. Clement*, 6 Mo. App. 596, Appx.

An administrator *de bonis non* could not maintain an action upon a contract made with his predecessor, promising to pay "D., administrator," a certain sum for the hire of a negro, and to return said slave, under Mo. Code Pr. art. 3, providing that every civil action must be prosecuted in the name of the real party in interest, as, this promise being made to D., the former administrator, he was either entitled to the benefit of it in his own right, or he was trustee for others, and if he was trustee a suit might be brought in his name for those who were entitled to the money, and if the contract was made to him in his own right he was also the proper person to sue. The court said that "when the property in any of the effects of the deceased has been changed by the original executor or administrator, and has vested in him, in his individual capacity, such effects will go to his own administrator or executor, and not to the administrator *de bonis non*." (It was contended that Mo. Code 1845, p. 69, art. 1, § 44, providing that if any administrator, etc., shall resign, etc., he shall account for, pay, and deliver to his successor, etc., all money, real and personal property of every kind, all rights, credits, deeds, and papers of every kind of the deceased, and § 45, providing the administrator *de bonis non* may proceed at law against any person possessed of any part of the estate, gave the administrator *de bonis non* the right of action. But this statute was not passed on by the court.) *Harney v. Dutcher*, 15 Mo. 89, 55 Am. Dec. 131.

So, an administrator *de bonis non* could not recover on a note payable to his predecessor promising to pay B. and C. "as administrators" where he alleged that the note had been lost, mislaid, or destroyed, but he did not state that this occurred while he was in the possession of the note, as the note

might have been paid to his predecessors or their assignees or assigned to an innocent purchaser. *Brooks v. Mastin*, 69 Mo. 58.

In *Brooks v. Mastin*, 69 Mo. 58, it was said: "In *Cook v. Holmes*, 29 Mo. 61, 77 Am. Dec. 548, the court held that upon Cook's death the legal title to the note vested in his executor, and the suit was properly brought in the name of the executor of Cook. *Thomas v. Relfe*, 9 Mo. 373, is to the same effect, and, although overruled by *Lessing v. Vertrees*, 32 Mo. 431, it has not been considered as overruled on that point."

In *Thomas v. Relfe*, 9 Mo. 373, where the payee brought a suit on notes payable "to R., administrator of the estate of H., deceased," a defense that the letters of administrator had been revoked was insufficient, as the term "administrator" was merely a *descriptio persone*, and the notes were the individual property of him to whom they were payable.

And in *Lacompte v. Seargent*, 7 Mo. 351, where an administrator *de bonis non* brought suit on a note payable to his predecessor "D., administrator of the estate of A. S., deceased," it was held that his predecessor was the owner of the moneys of the first intestate which came to his hands, and that the defendant in this case was entitled to a credit for any payment made to the predecessor, and also a set-off for goods sold to him individually.

But in *Lessing v. Vertrees*, 32 Mo. 431, where it was held that a note payable to an administrator could not be garnished for his individual debts *Lacompte v. Seargent*, 7 Mo. 351, and *Thomas v. Relfe*, 9 Mo. 373, to the effect that "no principle of law is more generally acknowledged than that the executor or administrator is for every purpose the owner of the moneys of his intestate which have come to his hands,"—were overruled.

An administrator *de bonis non* was not liable for a failure to collect judgments recovered by a previous administrator and which were assets belonging to the estate, where it was not shown that the debtors were solvent when the successor came into office, or that he had notice of them as existing assets. *State, Reyburn, v. Ruggles*, 23 Mo. 339.

Nebraska.

Under Neb. Comp. Stat. chap. 123, § 318, providing that when an executor or administrator shall be removed or shall die, or his authority shall otherwise be extinguished, and a new administrator shall be appointed, such new administrator shall be entitled to bring an action upon the bond of the former executor or administrator for any damages sustained by reason of his neglect or refusal, or the neglect or refusal of his representatives, to turn over to such new administrator, pursuant to the order or decree of the probate court or according to law, any estate remaining unadministered, his sole surety appointed as administrator *de bonis non* on the removal of his principal is liable in the full penal sum of his bond, where the first administrator had in his hands more than that amount at the time of his removal. As the administrator *de bonis non* could not sue himself, the law treated the amount owing by him on the bond as assets in his hands for the payment of creditors of the estate. *Jacobs v. Morrow*, 21 Neb. 233.

New Hampshire.

New Hampshire Rev. Stat. 1842, chap. 158, § 2, provides that if administration becomes vacant the judge of probate may grant administration on the estate not already administered, to such person as

ventory, and accounted for as administrator. For a failure to do this, he and his sureties were liable upon the official bond.

That a debt due from a person to a testator or intestate becomes, by the debtor's appoint-

ment as executor or administrator, assets in his hands, was decided in Massachusetts in the case of *Stevens v. Gaylord*, 11 Mass. 256; and the doctrine of this case has been universally followed by every subsequent decision upon

he may think proper, and § 12 provides that no person shall act as administrator until he shall have given bonds to the probate judge to pay and deliver the residue of the estate which shall be found remaining upon the account of such executor or administrator unto such person as said judge by his decree shall limit and appoint. It appears that decisions subsequent to this statute take it for granted that the common-law rule is not in force.

Claims against predecessor for accounting, balance, conversion, or devastavit.

An administrator *de bonis non cum testamento annexo* was entitled to prosecute in the name of the judge of probate an action upon the bond of his predecessor, to recover a balance found remaining in his hands on a settlement of his final accounts of administration, as where the balance remained in the hands of a deceased executor unadministered it was peculiarly and legitimately within the province of the new administrator, as part, or the whole of the estate of the deceased testator, of which it was his express and positive duty to take charge. *Judge of Probate v. Claggett*, 36 N. H. 381, 72 Am. Dec. 314.

And where an executor in New Hampshire sold lands in Vermont as administrator with the will annexed, and the settlement in Vermont showed a large sum in his hands with which he was charged, and the court in Vermont ordered him to pay the same to such persons as the probate court in New Hampshire should direct, the administrator *de bonis non* of the estate in New Hampshire was entitled to recover on the executor's bond for the balance in the hands of such executor. *Judge of Probate v. Heydock*, 8 N. H. 491.

An administrator *de bonis non* was the official successor in the trust, and entitled to receive whatever remained of the estate in his predecessor's hands, on the settlement of the account, and in default of payment was the proper person to maintain an action by a suit on the probate bond. *Prescott v. Farmer*, 59 N. H. 90.

So, in *Judge of Probate v. Lane*, 51 N. H. 342, it was said that where there was a breach of an administration bond, the judgment goes for the whole penalty in favor of the probate judge, and if a balance should be found due to an administrator *de bonis non* an execution should go for his use for that amount, as the security is available for the faithful discharge of the trust at every stage of it.

But where the estate of W had no claim to a legacy, the administrator *de bonis non* of W was not entitled to recover the same. *Seavey v. Roberts*, 63 N. H. 621.

New Jersey.

In this state there seems to be no statute affecting the right of an administrator *de bonis non* to maintain an action for conversion, accounting, or waste, where his predecessor is dead. The early decisions in this state were controlled by the common law, but the subsequent decisions overruled them, and an administrator *de bonis non* can now collect the whole estate, whether outstanding or in the hands of those who represent the deceased predecessor.

Claims against predecessor for accounting, balance, conversion, or devastavit.

In *Mulford v. Mulford*, 40 N. J. Eq. 163, it was held that where all the securities in the possession of Jane W. at the time of her death belonged to the estate of her husband, her executors were required 40 L. R. A.

to account for them or their value to the administrator *de bonis non* with the will annexed of the husband, excepting only so much as had been used in the proper discharge of their duties before they had notice of the fact that the moneys represented by said securities were trust funds. It was said that this conclusion was not sustained by the cases of *Brownlee v. Lockwood*, 20 N. J. Eq. 239; *Carrick v. Carrick*, 23 N. J. Eq. 364; and of *United States v. Walker*, 109 U. S. 258, 27 L. ed. 927; but it is in harmony with the conclusions of the chancellor in the case of *Boulton v. Scott*, 3 N. J. Eq. 231.

So, the legatees of A. could not call on the administrators of A.'s executor for money due them under A.'s will, but such administrators should account with the administrators *de bonis non* of A., who should account with the legatees. The court said that it was the duty of the administrator *de bonis non* to collect the whole estate, whether outstanding or in the hands of those who represent the deceased executor, and a settlement by the administrator *de bonis non* should be of the whole estate unadministered, and should be final. *Boulton v. Scott*, 3 N. J. Eq. 231.

But in *Carrick v. Carrick*, 23 N. J. Eq. 364, it was held that where an executor converted property into money and died an administrator *de bonis non cum testamento annexo* could not maintain an action against the executor of his predecessor for that part of the estate which had been administered by conversion into money, as such right of action vested in the legatee. It was said: "There is no statute in New Jersey affecting this question, as there is in many of the states, and as there is in this state when an executor or administrator is removed for cause."

But see *Mulford v. Mulford*, 40 N. J. Eq. 163.

And an administrator *de bonis non* was only responsible for such unadministered assets as he had received, and could not be called upon to account for the maladministration of his predecessor. It was said that he could not call on the representative of the former administratrix for the proceeds of property converted into money in her hands at her death, but only for assets existing in specie. *Brownlee v. Lockwood*, 20 N. J. Eq. 239.

In *Brownlee v. Lockwood*, 20 N. J. Eq. 239, it was held that an administrator *de bonis non* was not responsible for the maladministration of his predecessor. It was said that *Goods of Hall*, 1 Hagg. Eccl. Rep. 139, "would seem to have an aspect to the contrary. But in that case the suit in the court of law was in the name of the ordinary, and was for the benefit of the next of kin and creditors, and although it is stated that it was brought by the administrator *de bonis non*, yet it clearly was not a suit by him, and does not establish the position that he could sustain a suit in his own name, or that the assets when recovered would be paid to him."

Where a bond was given by an administrator on the granting of an order of the orphans' court authorizing him to sell land to pay debts, and a judgment was obtained on the bond in favor of the ordinary, it was held, on an application to ascertain how much should be raised on the judgment, that the inquiry as to whether the money when collected should be paid over to the administrator *de bonis non* to be administered was not involved. *Re Given*, 34 N. J. Eq. 191.

New York.

In regard to choses in action it seems that the administrator *de bonis non* cannot recover possession of the same from third parties, where there has

the question in that state. *Winship v. Bass*, 12 Mass. 198; *Hobart v. Stone*, 10 Pick. 215; *Ipswich Mfg. Co. v. Story*, 5 Met. 310; *Sigourney v. Wetherell*, 6 Met. 553; *Chapin v. Waters*, 110

Mass. 195; *Choate v. Arrington*, 116 Mass. 552; *Tarbell v. Jewett*, 129 Mass. 457.

"It is now well settled, whatever may have formerly been the rule of law, that a testator,

been a conversion by his predecessor. If he obtains possession and they are assets of the estate and unaccounted for he may maintain an action on them. In 1880 the provisions of the Code authorized a recovery by the administrator *de bonis non* from his predecessor for a balance, or accounting, or conversion, or maladministration. Prior to this time there were but few decisions on this question, and although in the leading case of *Walton v. Walton*, 4 Abb. App. Dec. 512, the trial court endeavored to apply the statute, and held that no recovery could be had, the court of appeals allowed a recovery without referring to the statute, but on demurrer to the petition construed the claim to be for unadministered assets, and this was followed by *Luers v. Brunges*, 56 How. Pr. 285, where the court held the goods to be unadministered although they were the proceeds of the goods left in specie. In *Clapp v. Meserole*, 1 Abb. App. Dec. 368, following and referring to *Walton v. Walton*, the court says that an administrator *de bonis non* could recover under the statute, although *Walton v. Walton* does not refer to any statute but endeavors to make out that the goods were partially distributed and therefore were unadministered.

Property remaining in specie or unadministered.

An administrator *de bonis non cum testamento annexo* was entitled to recover from the executor of his predecessor a mortgage and bond belonging to the estate unadministered. *McMahon v. Allen*, 4 E. D. Smith, 519.

In *Yale v. Baker*, 2 Hun, 468, it was said that an administrator *de bonis non* could sue to recover goods unadministered.

In *Buckland v. Gallup*, 105 N. Y. 453, it was said that the administrator *de bonis non* could take any of the goods or effects of the testator remaining in specie; but this rule applied only to such as were distinguishable.

In *Re Place*, 7 N. Y. Legal Obs. 217, it was held that an administrator *de bonis non cum testamento annexo* was not chargeable with any moneys collected by his predecessor for which the parties have their remedy against his representatives, but only for such assets as came specifically into his hands and were lost by his neglect.

Claims against predecessor for accounting, balance, conversion, or devastavit.

An administrator *de bonis non* of J. W. could maintain an action against the executor of his predecessor to compel an accounting and delivery of assets, where the assets were moneys received in payment of choses in action belonging to J. W., and notes executed by his predecessor to J. W., and real estate bid in by his predecessor on a foreclosure of a mortgage belonging to J. W. It was held that all such property should be considered as partially administered, and, in connection with the allegation in the complaint admitted on demurrer, should be treated as unadministered assets. *Walton v. Walton*, 4 Abb. App. Dec. 512, 2 Abb. Pr. N. S. 428.

In this case the trial court held that the New York statute did not change the rule at common law, and that no action would lie, but the judgment was reversed. The statutes referred to by the trial court are as follows: 3 N. Y. Rev. Stat. 5th ed. 6, providing that the executor and administrator of every person who as executor or administrator shall have wasted or converted to his own use any goods, chattels, or estate of any deceased person shall be chargeable as their testator or intestate would have been; 3 Rev. Stat. 5th ed. 747, providing that an executor of an executor shall have no au-

thority to maintain an action relating to the estate of the testator of the first executor; and 3 Rev. Stat. 5th ed. 162, § 45, providing that if all the executors or administrators shall die or become incapable, or their authority be revoked, the surrogate shall issue letters upon goods unadministered in the same manner as in regard to original letters, and the successor shall have like power and authority. These statutes were not referred to by the court of appeals.

In *Luers v. Brunges*, 56 How. Pr. 285, *Walton v. Walton* was followed, and it was held "that, not only the unadministered property of the testator in specie would, by operation of law, pass to the administrator *de bonis non* with the will annexed, but also the moneys and securities realized on a sale thereof for the purpose of further administration and yet not fully administered, and which have not lost their identity, and can be distinguished from the individual property of the executor, will also so pass."

In *Clapp v. Meserole*, 1 Abb. App. Dec. 362, it was said that an administrator *de bonis non* was entitled to maintain an action against the representative of his predecessor who had died without applying the assets which had come into his hands, including moneys which he had collected, as such action could be maintained under the statute of New York.

In *Kelly v. West*, 80 N. Y. 139, under 3 N. Y. Rev. Stat. 6th ed. 85, § 72, providing that whenever it shall appear that the penalty of the bond taken from an executor or administrator or guardian is inadequate a surrogate may revoke the letters granted, where such revocation was made and successors were appointed, and the surrogate directed the prosecution of their predecessor's bond for an accounting and balance, a recovery was allowed. In this case the question of the right of the successor to assets and to pursue the bond was not questioned, but seems to have been taken for granted, but at that time 3 Rev. Stat. 6th ed. 92, § 23, was in effect, providing that whenever directed by the surrogate the bond given by such former executor or administrator shall be prosecuted and a recovery had thereon to the full extent of any injury sustained by the estate of the deceased, by the acts or omissions of such executor or administrator and to the full value of all the property of the deceased received and not duly administered, and the money collected thereon shall be deemed assets in the hands of the person to whom such subsequent letters shall have been issued.

Where an executor was one of a trading firm, and with the knowledge of the firm mixed funds of his testator's estate with those of the firm, and an action was brought by the sole legatee and the administrator *de bonis non cum testamento annexo* against the firm for an account of the funds, the chancellor held that the action was properly brought as an administrator *de bonis non* was the representative of the testator as to all effects not duly administered, and he could seek a discovery of assets in whosever's hands they might be so long as they belonged to the estate. On appeal the decree was affirmed, the court holding that the residuary legatee had the right to pursue the assets. *Coit v. Lasnier*, 9 Cow. 320.

The decision on appeal did not discuss the question as to whether an administrator *de bonis non* could maintain the action, but as to whether a recovery should be allowed on the evidence. And it seems to have been admitted that the firm would be liable to the representative for funds retained by the firm.

by making his debtor executor, does not give him the debt, by way of legacy, nor release or discharge it. In this respect he now stands on the same footing with an administrator. But,

In *Re Fithian*, 44 Hun, 457, it was said that the provisions of Code Civ. Proc. § 2806, authorizing the surrogate to compel the representative of an executor or administrator to account and pay over is not inconsistent with 2 Rev. Stat. 71, §§ 11, 17, 3 Rev. Stat. 7th ed. 2385, 2392, § 60, prohibiting the interference of an executor of an executor with the unadministered assets of the first executor.

In *Peck v. Sherwood*, 5 Redf. 416, it was said that the provisions of Code Civ. Proc. § 2806, providing that where an executor, etc., dies, the surrogate court has the same jurisdiction upon the petition of his successor or of a surviving executor or person interested, to compel the executor of the decedent to account for and deliver over any of the trust property which has come into his possession or is under his control, which it would have against the decedent if his letters had been revoked, are new and important.

In *Spencer v. Popham*, 5 Redf. 425, it was said that under N. Y. Code Civ. Proc. § 2805, the successor, or the remaining executor, administrator, guardian, or trustee, may compel an accounting of one whose letters have been revoked.

Under N. Y. Code Civ. Proc. § 2724, authorizing the surrogate to call an executor or administrator to account where the letters have been revoked, and § 2806, giving the surrogate jurisdiction upon the petition of the successor or of a remaining executor, administrator, guardian, or trustee, to compel the person whose letters have been revoked to account for or deliver over money or other property and to settle his account, a removed executor was required to account and pay over the balance to a remaining executor. *Re Hood*, 104 N. Y. 103.

In *Power v. Speckman*, 128 N. Y. 354, it was said that under N. Y. Code Civ. Proc. § 2805, a successor of an administrator whose letters have been revoked may compel the latter to deliver over money or other property, and is further authorized, with the assent of the surrogate, to prosecute the official bond.

Where the administrator *de bonis non* attempted to compel an accounting of the administrator of his deceased predecessor, under N. Y. Code Civ. Proc. § 2806, it was held that the action was barred within ten years. It seems from the dissenting opinion that this section of the Code was new and took effect in 1890, and the petition was filed in 1890. *Pitkin v. Wilcox*, 20 N. Y. Civ. Proc. Rep. 27.

In *Re Latz*, 33 Hun, 618, 20 N. Y. Week. Dig. 236, where an administrator *de bonis non* filed a petition in the surrogate court against the executrix of his predecessor to settle the account and deliver over money which his predecessor had drawn from the bank and never accounted for, it was held that this proceeding was instituted under N. Y. Code Civ. Proc. § 2806, and could be maintained. It was said: "It is not deemed necessary to inquire whether before the Code of Civil Procedure the statute (2 Rev. Stat. 95, § 69) was applicable to the case of a successor to a deceased administrator, or whether there was any statute authorizing the representative of the latter to be cited to account by such successor before the surrogate. There was no statute which required such representative to deliver the trust property over to such successor (2 Rev. Stat. 95, § 71). . . . But as the representative of the next of kin he had an interest in seeing that his predecessor's account was correctly rendered, and for that purpose, and for discovery, it is supposable he could file a bill in equity. . . . although it has been held that at common law the accounting in his action could not extend beyond, but was confined to,

as an executor or administrator cannot demand or receive payment of himself, and cannot sue himself, and yet is bound to account for his own debt, that debt must be considered as assets.

the unadministered portion of the estate, inasmuch as there was no privity between the deceased and the succeeding administrator, and as the latter had no right except such as related to the unadministered portion of the assets of his intestate; . . . and that beyond this the remedy was with the next of kin. . . . But that he might by action set aside a fraudulent sale and recover the property so disposed of by the chief administrator. . . . The right of recovery was necessarily confined to the assets remaining unadministered, which might be reached by action at law and in equity as the nature and situation required. In the case at bar it does not appear whether or not the money of the appellant's intestate was converted or in any manner appropriated by the deceased administrator. It was by him taken from the bank. If he converted it to any use it would not now be deemed unadministered property, but if he set it apart and kept it separate from his, and it continued so to the time of his death, it would probably go to the appellant."

This was affirmed in 110 N. Y. 681, on the ground that it was not a final order and therefore no appeal would lie.

Where the administratrix of P., whose inventory showed assets, died without an account, and her executor showed assets amounting to \$13,000, but no fund to her credit as administratrix of P. no specific property which could be identified as such, and made a settlement and distributed the surplus, and an administrator *de bonis non* of P. was subsequently appointed, it was held, on a petition by heirs asking for an accounting by the executor of the funds held by the administratrix of P., that the administrator *de bonis non* was the party entitled to receive the estate if there was any. *Re O'Brien*, 45 Hun, 284.

In *Van Camp v. Searle*, 79 Hun, 146, it was said that an action was maintainable by an administrator *de bonis non* against the representative of his predecessor who had died without having fully administered the estate which came to him, and that trover, replevin, assumpsit, or other appropriate action could be maintained if there had been a conversion.

Where the will of J. gave property to R., and the executor of R. settled his accounts and was discharged and his resignation accepted on making certain payments, it was said that an administrator *de bonis non* of R. could pursue the executors of J. if there was any negligence or misfeasance, and he could also hold the executors of R. to account if the estate had been damaged through negligence of the executor. *Re Soutter*, 105 N. Y. 514.

But in *Yale v. Baker*, 2 Hun, 468, it was said that the administrator *de bonis non* could not sue to overhaul the accounts of his predecessors, as they were liable only to the creditors or next of kin.

Under N. Y. Code Civ. Proc. § 2806, the successor of an executor could not maintain an action for an accounting against the executrix of her predecessor for any property, except such as came into the respondent's possession or was under her own control. *Le Count v. Le Count*, 1 Dem. 29.

Where an administrator *de bonis non* filed a petition asking a surrogate to compel the administratrix of plaintiff's predecessors to account for and deliver certain property, it was held that under N. Y. Code Civ. Proc. § 2806, the surrogate had no jurisdiction to direct an accounting where the petition did not allege that property belonging to the decedent's estate came into the possession of the respondent or was under her control. *Scofield v. Adriance*, 2 Dem. 486.

Where the same hand is to pay and receive money the law presumes, as against the debtor himself, that he has done that which he was legally bound to do, and charges him with the

amount as a debt paid. . . . It is sufficient for the present case that the administrator is bound to account for his own debt as a debt paid, and as assets, without other acts

In *Breslin v. Smyth*, 3 Dem. 251, it was said that N. Y. Code Civ. Proc. § 2606, providing that when letters have been revoked the surrogate has jurisdiction upon the petition of the successor to compel the person whose letters have been revoked to account for or deliver over money or other property and to settle his account, specified the persons who may enforce such an accounting.

In *Hood v. Hayward*, 124 N. Y. 1, it was said that N. Y. Code Civ. Proc. § 2608, provides that when letters of an executor or administrator have been revoked the successor may maintain an action upon his predecessor's bond in which he may recover any money or the value of any other property received by the principal and not duly administered by him, and that under 2 Rev. Stat. 85, § 21, the prosecution was by the direction of the surrogate, and that actions under prior statutes other than 1837 were prosecuted in the name of the people.

Choses in action.

Where an executrix and sole legatee converted the estate and loaned the money, taking a note, bond, and mortgage payable to her individually, the administrator *de bonis non* with the will annexed of the first estate could not recover possession of the same from a third party, as the executrix had converted the assets, and had become (if any liability at all was created) personally liable for them. *Buckland v. Gallup*, 105 N. Y. 453.

So, where an executrix was entitled to the use of the property of the deceased during her natural life, and also to use any part of the principal which might be necessary, and she loaned the money taking a bond and mortgage in her own name and not as executrix, the administrator *de bonis non cum testamento annexo* was not entitled to the same. *Caulkins v. Bolton*, 31 Hun, 458, 98 N. Y. 511.

And it was said that if the consideration of the bond and mortgage was assets of the estate so as to make the estate of the executrix accountable, it would not follow that the bond and mortgage could be enforced by the administrator *de bonis non*. *Caulkins v. Bolton*, 98 N. Y. 511.

In *Caulkins v. Bolton*, 98 N. Y. 511, it was said: "The grounds on which the cases cited by the appellants (*Walton v. Walton*, 4 Abb. App. Dec. 512; *Luers v. Brunges*, 56 How. Pr. 282) stand, are not in conflict with the doctrine to which I have adverted. Both arose on demurrer, and in both it was admitted that the property in question was assets of the testator, remaining unadministered by the first executor. *Walton's Case* was an action for an account and payment of assets, consisting of moneys received by the executor in payment of debts due the testator at the time of his death, or debts due from the executor to him, on real estate bid in by the executor for the benefit of the estate on the foreclosure of a mortgage running to the testator, and the court held there was no ground for an account. *Luer's Case* was for the foreclosure of a mortgage executed by the defendants to the original executors of *Luer's estate* as such, and 'payable to them and their successors.'"

So, an administrator *de bonis non* could not recover a deposit from a bank that had been paid by the bank to the plaintiff's predecessors as widow before she had been appointed administratrix, as the plaintiff had no other rights than those of mere successor, and was concluded by what had previously taken place. *Whitlock v. Bowery Sav. Bank*, 38 Hun, 460.

But where an administrator holding a mortgage given by him to his intestate was removed, he was

required to turn over to his successor as administrator *de bonis non* the mortgage and also a bank account of the intestate. But the ownership of these assets was not disposed of in this case. The intestate had been an administratrix of a former estate in which she had a life estate, and had transferred all the deposits into her individual name, and it was said that the representatives of her estate would have to account to the representatives under the will of the prior testator. *Re Seitz*, 13 Misc. 522.

In *Gatfield v. Hanson*, 57 How. Pr. 331, it was held that the widow and next of kin could not foreclose a mortgage given to an intestate, although one of the plaintiffs was appointed administrator *de bonis non* during the pendency of the action, as the right of action was in the administrator *de bonis non*, and his appointment after the commencement of the action would not uphold the same.

Where the executors took a bond and mortgage payable to them "as executors as aforesaid, their survivors, successors, or assigns," the administrator *de bonis non* could foreclose such mortgage. A demurrer admitted that the plaintiff could recover where the bill alleged that the mortgage was taken and held by the executors as assets, and as the property of the estate of the decedent. The court held that the word "successors" was important. *Luers v. Brunges*, 56 How. Pr. 282.

North Carolina.

An administrator *de bonis non* is entitled to the assets not administered. He may maintain an action for breaches of the bond of his predecessor, and for an account and settlement and for a conversion. Some of the cases holding this are supported by a statute. The administrator *de bonis non* may recover choses in action belonging to the estate although payable to his predecessor. He may maintain an action to set aside void sales or transfers made by his predecessor.

Property remaining in specie or unadministered.

An administrator *de bonis non* was entitled to money that his predecessor had deposited for safe-keeping with a surety upon his bond just prior to his death, with instructions to pay the same over to his intestate's estate. *Hackney v. Steadman*, 46 N. C. (1 Jones L.) 207.

In *Taylor v. Brooks*, 20 N. C. (4 Dev. & B. L.) 139, it was said that upon the death of an administrator the goods of the intestate did not go to the executor or administrator, but to the administrator *de bonis non* of the intestate.

In *Ferebee v. Baxter*, 34 N. C. (12 Ired. L.) 64, it was said that upon the death of an administrator the duty of settling up the estate devolved on an administrator *de bonis non*, and the administrator of the administrator would have nothing to do with it except to account for and deliver over to the administrator *de bonis non* such of the assets as had not been disposed of by the first administrator in the due course of administration.

Claims against predecessor for accounting, balance, conversion, or devastavit.

A distributee cannot maintain an action for an accounting and distribution of the balance, where the administrator has died or has been removed, as the sole right of action is in the administrator *de bonis non*. *State, Goodman, v. Goodman*, 72 N. C. 508; *Merrill v. Merrill*, 92 N. C. 657; *Ham v. Kornegay*, 85 N. C. 119; *Gilliam v. Watkins*, 104 N. C. 180; *State, Baldwin, v. Johnston*, 90 N. C. (8 Ired. L.) 381.

or ceremony. . . . The administrator's own debt being assets, it becomes an item in his administration account, and the question whether such debt is due, and the amount of it, becomes a question of probate jurisdiction in the

first instance, to be decided by the judge of probate, on all questions as well of fact as of law, subject to an appeal to this court." *Sigourney v. Wetherell*, 6 Met. 558.

In *Stevens v. Gaylord*, 11 Mass. 256, it was

So, where an administrator resigned, an administrator *de bonis non* was appointed, and the next of kin of the intestate brought an action on the bond of the original administrator for breaches of the bond and for an account and settlement, it was held that the action could not be maintained by the next of kin but should have been brought by the administrator *de bonis non*, under N. C. Code, § 1517, providing that whenever the letters of an executor, administrator, or collector are revoked his bond may be prosecuted by the person or persons succeeding to the administration of the estate. It was said: "However it may be elsewhere, under the section of the Code and decisions referred to, it is different in this state, and it is well settled that such an action cannot be maintained by the next of kin, distributees, or creditors." *Tulburt v. Hoilar*, 102 N. C. 407.

So, where the next of kin brought an action on the administrator's bond after the death of the administrator because he had failed to take into his possession and distribute certain negroes to which his intestate was entitled, it was held that the sole right of action vested in the administrator *de bonis non*, as that officer was to take charge of all the estate which had not been administered, and to finish whatever had been left undone by the first administrator. It was said that "assets are administered by taking them into possession and paying them over to creditors, or to the next of kin in the course of distribution. Both acts must concur before the goods can be said to have been administered." *State, Williams, v. Britton*, 33 N. C. (11 Ired. L.) 110.

And where the legatee brought an action against the administrator of an administrator with the will annexed charging that the first administrator had made a fraudulent sale of slaves, and asking for an account by the last administrator, it was held that such administrators could not be held to account with any person but an administrator *de bonis non*. *Cannon v. Jenkins*, 16 N. C. (1 Dev. Eq.) 422.

And in an action by a distributee against the administrator of an executor charging a fraudulent disposition of the real estate of the testator by the executor, and to vacate a decree and to surcharge and falsify an account, it was held that there should be an administrator *de bonis non cum testamento annexo* appointed and made a party defendant to the action, as the right of action vested in him on the death of the executor. *Hardy v. Miles*, 91 N. C. 131.

Where the university brought an action upon the bond of an administrator for an undistributed surplus, under N. C. Code, § 1504, providing for the distribution of the estate of an alien unclaimed by creditors, next of kin or otherwise, and pending the action the administrator died, it was held that the action could not be continued against his executor by the plaintiff, as the administrator *de bonis non* was the only party entitled to recover the assets. *University of North Carolina v. Hughes*, 90 N. C. 537.

Where an administrator *de bonis non* wasted the estate, his successor as administrator *de bonis non* of the same estate was entitled to maintain an action upon his predecessor's bond. It was said that such actions could not be maintained in the name of the next of kin, as wasting an estate was not administering it. *Lansdell v. Winstead*, 76 N. C. 366.

In *Duke v. Ferebee*, 52 N. C. (7 Jones L.) 10, it was said that if anything was due an estate from the first administrator, it might have been recovered 40 L. R. A.

upon his death from his administrator, provided administration *de bonis non* had been taken out and suit brought to recover in proper time.

In *Badger v. Jones*, 66 N. C. 305, it was said that where an administrator *de bonis non* brought an action for a devastavit on the part of the former administrator for the value of goods wasted, a recovery could be had, as the right of an administrator *de bonis non* related back to the death of the intestate, and he was bound only by such lawful acts of the previous administrator as were done in the due course of administration of the assets of the estate, and for any devastavit on the part of the administrator the administrator *de bonis non* ought to recover, by an action on the bond of his predecessor, the value of the goods and effects wasted.

Under N. C. Code, chap. 43, §§ 50, 51, authorizing the sale of real estate on the petition of an executor or administrator for the payment of debts, and making the proceeds of the sale assets for the payment of debts, and directing that the excess shall be paid by the executor or administrator to such persons as would have been entitled to the land had it not been sold, where an administratrix *de bonis non cum testamento annexo* died before she had completed the settlement of the assets derived from real estate by paying over the excess to the heirs, the administrator *de bonis non cum testamento annexo* could maintain an action on his predecessor's bond for the balance, and was not concluded as to the amount of debts by the showing made by his predecessor in the proceeding to sell the land. *Latta v. Russ*, 53 N. C. (8 Jones, L.) 111.

In *Wilson v. Pearson*, 102 N. C. 290, it was said that an action for devastavit committed by an administrator *de bonis non cum testamento annexo* who had died, should be brought in the name of the administrator *de bonis non*, and that this was well settled in North Carolina, although a different rule prevailed elsewhere.

But the administrator *de bonis non* of a deceased ward was not entitled to recover in an action against the administrator of a deceased guardian on his bond, moneys which came into the guardian's hands as proceeds of real estate belonging to the ward, sold under a decree of the court for partition, under N. C. New Const., which abolished the distinction between courts of law and courts of equity, as the proceeds of land sold for partition to which an infant was entitled was real estate and the heirs of the infant were necessary parties to this action. *State, Allison, v. Robinson*, 78 N. C. 222.

In this case *State, Reddick, v. Satterfield*, 31 N. C. (9 Ired. L.) 358, and *Latta v. Russ*, 53 N. C. (8 Jones, L.) 111, were distinguished. It was pointed out that the case of *Latta v. Russ* was under the statute above quoted. It was said that a different rule prevailed in equity.

Where an administrator in an action for division divided the slaves between the widow and distributees, and in a subsequent action for partition by the distributees sold slaves as commissioner of the court and took notes payable to himself as administrator, the administrator *de bonis non* was not liable for the neglect of his predecessor to account for the proceeds of the sale, nor for his own failure to collect such notes as came to his hands from the former administration, but was liable for such accounts as he had collected by virtue of his office. *State, Roper, v. Burton*, 107 N. C. 523.

It was said in this case, when slaves when surrendered as not needed to pay debts, and were di-

said: "The case might have been very different, if the defendant had denied that he owed this debt, and had refused to insert it in the inventory, and to account for it as the property of the deceased." And in some other of the

vided between the widow and next of kin, and afterwards sold for partition at the instance of the next of kin, they became in a legal sense goods administered, and the liability of the first administrator as such, and that of the sureties on his bond, ceased, and no responsibility attached to the administrator other than as commissioner.

Chosen in action.

Where an executor of a legatee obtained a judgment for a legacy, and died before execution or satisfaction of the same, the right to the legacy of the deceased legatee vested in the administrator *de bonis non*; but he was not entitled to an execution until he had been made a proper party to the cause. *Ellison v. Andrews*, 34 N. C. (12 Ired. L.) 188.

So, where a note was payable to William B., executor of Richard B., and the executor died, it was held that an action upon the note should have been made by the administrator *de bonis non* of Richard B., under *Battle* (N. C.) Rev. chap. 45, § 130, Code, § 1511, providing that every action brought by an executor or administrator upon a cause of action or right to which the estate is party in interest shall be brought in his representative capacity. *Ballinger v. Cureton*, 104 N. C. 474.

Under N. C. act 1795, chap. 14, § 1, providing for a sale by executors or administrators upon credit, and for bonds with sureties to be taken, and that "such executor, etc., or administrator, etc., shall, after the time of such payment is past, take and pursue all lawful ways and means to recover and receive the money so due as aforesaid, or otherwise shall be chargeable or answerable for the same; and that such moneys, when received, shall be liable to the satisfaction of judgments previously obtained, and entered up as judgments when assets should come to the hands of the executor or administrator,"—a bond payable to an administrator passed at his death to the administrator *de bonis non* of the first intestate as a part of his estate, and not to the administrator of the first administrator. *Cutlar v. Quince*, 3 N. C. (2 Hayw.) 60.

In *Anonymous*, 3 N. C. (2 Hayw.) 18, the question whether an administrator *de bonis non* could sue upon a bond taken by the former administrator for goods sold which were the deceased's, in the name of himself as administrator, was not decided.

Avoiding sales or transfers made by his predecessor.

Where a sale of land was made by an administrator which was void, under N. C. Rev. Code, chap. 48, § 61, Acts 1868-69, chap. 113, § 105, providing that a sale of land by the heirs at law within two years after the death of the intestate shall be void as against creditors and administrators, and the administrator had committed a devastavit, the administrator *de bonis non* could maintain an action to set aside a conveyance of real estate made by his predecessor and an heir in order to have the same administered as assets, when the securities on the bond of his predecessor were insolvent. *Badger v. Jones*, 66 N. C. 305.

Where the administrator *de bonis non* brought an action alleging that the intestate had made a fraudulent deed of trust, and that there was collusive fraud on the part of his predecessor in a foreclosure of such trust deed, and that the property embraced therein was necessary for the payment of debts, it was held that the deed of trust and the subsequent sale of the property were void for fraud, and that in the absence of personal assets such land of the intestate was liable to be sold to

Massachusetts cases above cited the rule as laid down contains the qualification, "when the debt is acknowledged," although we are aware of no case in which this has been decided to be the law; and we think, upon principle and

make assets to pay his debts until they were all discharged. *Glover v. Flowers*, 101 N. C. 134.

So, in *Hackney v. Steadman*, 46 N. C. (1 Jones, L.) 207, it was said that where an administrator of an estate turned over money of the estate fraudulently to another party, the administrator *de bonis non* appointed after his death could recover the same.

But where a will gave the property, real and personal, to a wife for life, and at her death to the testator's three daughters, and to a child *in ventre sa mère*, and at his death there were two other children, and his wife was made executrix and took possession of slaves and sold them, the administrator *de bonis non* could not recover as the sale was held to be a sale in the capacity of executrix, and the purchaser acquired an absolute title. *Windley v. Gaylord*, 52 N. C. (7 Jones, L.) 55.

So, where a widow administered on her husband's estate and sold a slave to a trustee in trust for herself and daughter who were the only next of kin, it was held that this act was a full administration, and after her death an administrator *de bonis non* could not maintain an action of trover for possession of the slave. It was held the deed was effectual to divest her title as administratrix, and amounted to "an assent" or delivery to herself and daughter as distributees, and had the same legal effect as the assent of an executor. *Quince v. Nixon*, 31 N. C. (6 Jones, L.) 289.

And where the will of a husband gave his real and personal property to his wife under certain powers and trusts for the use of their children, and the wife as executrix disposed of the property and assented to the legacy given to herself and children, the administrator *de bonis non* could not recover property which the wife had of her husband's estate as there was nothing which had not been administered. In this case it was said that if the wife had not assented to the legacy to herself and the children, then the legal title would have been in the plaintiff as administrator *de bonis non*, and if anybody interfered with his rights he had a remedy at law to recover possession. *Carson v. Duffy*, 55 N. C. (2 Jones, Eq.) 507.

Ohio.

An administrator *de bonis non* could not maintain an action on his predecessor's bond for an accounting, or for the balance in his hands, or for conversion, until a statute giving such a right of action was passed. Such a statute is now in effect in this state. It seems that for choses in action due the estate by the predecessor the administrator *de bonis non* may recover.

Property remaining in specie or unadministered.

In *Tracy v. Card*, 2 Ohio St. 431, it was said that at common law an administrator or executor who had resigned or been removed was liable to no action at the suit of the administrator *de bonis non* except for the recovery of such assets as remained in specie.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Under Ohio act April 7, 1854 (Swan & C. 619), conferring power to maintain an action on the bond of such executor or administrator whose powers have ceased by death or otherwise, an administrator *de bonis non* could maintain an action on the bond of his predecessor for failing to render an account, and for failing to administer according to law the money and chattels, and for appropriating to his own use a large amount of assets. It was held that

authority, that there is no difference in the rule whether the debt is acknowledged or denied.

In *Winship v. Bass*, 12 Mass. 198, the indebtedness was not acknowledged. The executor

refused to treat his indebtedness to the estate as assets, claiming that it was extinguished by his appointment. The court held that the debt was not extinguished, but must be treated as assets; and that, as his sureties

it was not necessary that the amount due the estate from the deceased administrator should be ascertained by the judgment of the probate court before bringing the action. *Douglas v. Day*, 28 Ohio St. 175.

So, under Ohio Stat. 1831, vol. 29, p. 235 (Swan, 344), providing for a suit by the administrator who may be appointed in the place of any administrator who may have resigned, or been removed, against such administrator for any moneys, assets, rents, or profits that may have been received by such administrator as well as all damage done by such administrator to the estate, an administrator *de bonis non* could maintain an action on the bond of his predecessor who had been removed for neglecting to settle, and for the receipt of a large amount of money for which he never accounted. *O'Conner v. State*, Potter, 18 Ohio, 225.

And where an executor resigned, and administrators *de bonis non* were appointed, and the executor died, and the administrators *de bonis non* resigned and an administratrix *de bonis non* was appointed, she could maintain an action against the administrator of the executor for notes, bills, accounts, rents, and profits received by the executor and converted and disposed of by him to his own use, under Ohio act March 12, 1831, § 25 (29 Ohio Laws, 233, 3 Chase, 1780), providing that when an executor shall resign or be removed, and the administrator with the will annexed appointed, such newly appointed administrator shall be authorized immediately to commence an action on the case against such prior executor and hold him to bail, and in such action to recover moneys, assets, rents, issues, and profits received by such removed executor and not applied according to law, as well as all damages done or committed by such executor in respect to the estate, as this cause of action accrued before the executor died. *Tracy v. Card*, 2 Ohio St. 431.

It was said that this case in no wise conflicts with *Blizzard v. Filler*, 20 Ohio, 479, as there the administrator died in office and there were no provisions in the statute for a suit by the administrator *de bonis non* against the representative.

And under Ohio Rev. Stat. 1880, § 6020, providing that an executor or administrator appointed in the place of an executor or administrator who has resigned, been removed, or whose letters have been revoked or authority extinguished, shall be entitled to the possession of all the personal effects and assets of the estate unadministered, and may maintain a suit against the former executor or administrator and his sureties on administration bond for the same and for damages arising from maladministration, an administrator *de bonis non* with the will annexed could maintain a suit upon the bond of his predecessor who had been removed, for the amount found due from him on the settlement of his accounts. The failure of the predecessor to pay such amount was a breach of the bond "to administer according to law" the assets of the estate. *Slagle v. Entekin*, 44 Ohio St. 637.

And under 52 Ohio Laws, 31, 1854, providing that in all cases where the powers of an executor or administrator heretofore or hereafter appointed have ceased by death, removal, resignation, or in any other manner, any administrator or coexecutor or coadministrator may maintain an action on the bond of such executor or administrator whose powers have ceased, against any of the obligors thereof or their representatives for any breach of the conditions of said bond, an administrator *de bonis non* could maintain an action on his predecessor's

bond for the balance in the hands of his predecessor unadministered. *Chatfield v. Faran*, 1 Disney (Ohio) 488.

So, under Ohio Rev. Stat. § 6020, authorizing an administrator appointed in the place of one who has been removed, not only to maintain a suit against the predecessor and the sureties on his bond, for all the personal effects and assets of the intestate unadministered, but also for all damages arising from the maladministration of such predecessor, an administrator *de bonis non cum testamento annexo* could maintain an action upon these several bonds given by his predecessor who had been removed for assets received by him and converted to his own use. *Foster v. Wise*, 46 Ohio St. 20.

In *Douglas v. Day*, 28 Ohio St. 175, it was said that without the aid of the statute no action could be maintained by the administrator *de bonis non* on the bond of his predecessor for waste.

But an administrator *de bonis non* could not maintain an action for an accounting on the bond of his deceased predecessor under Swan's Stat. (Ohio) pp. 43, 44, § 25, providing that an administrator appointed in the place of an executor or administrator who has resigned, been removed, or whose letters have been revoked, shall be entitled to the possession of all the personal effects and assets of the estate unadministered, and may maintain a suit against the former executor or administrator on the administration bond for all damages arising from the maladministration or omission of the former executor or administrator, as this statute did not apply except where the predecessor resigned, was removed, or where his letters were revoked. *Blizzard v. Filler*, 20 Ohio, 479.

The same was held in *Curtis v. Lynch*, 19 Ohio St. 392, deciding that this statute did not give an action against the representative of a deceased administrator who died in office, but left the matter as it stood at common law. It was further held that Ohio act April, 1854, Swan & C. Stat. 619, concerning suits on the bonds of executors and administrators, only conferred power to maintain an action on the bond of such executor or administrator whose powers have ceased. The court said that the plaintiff should look to his remedy on the bond.

Where executors directed by will to hold property in trust for the benefit of Hannah H. for life, the principal to be paid to her children after her death, were given a large discretion, and, believing they had the right, paid the principal to Hannah H., and filed a final account which was confirmed by the court, and two sons of Hannah H. applied for the appointment of an administrator *de bonis non*, it was held that the account filed could not be disturbed. It was further held that the probate court had no jurisdiction in these kinds of cases to determine whether the executor rightfully or wrongfully paid out this money as contended, and therefore could not say affirmatively that there was an unadministered estate, and could not grant the application for appointment of an administrator. *Re Hess*, 3 Ohio N. P. 62.

Choses in action.

Where a mortgagor of the testator was appointed executor and was removed, the administrator *de bonis non* was entitled to proceed upon the mortgage against the removed executor and the land, notwithstanding other and subsequent mortgagees, as the appointment of the mortgagor as executor

were liable upon his bond, he need not be removed.

In *Sigourney v. Wetherell*, 6 Met. 553, the indebtedness of the administrator was not ac-

did not extinguish the mortgage lien. *Miller v. Donaldson*, 17 Ohio, 264.

And where a will directed that after the expiration of six years the executors should appropriate \$10,000 for the erection of a Masonic hall, the application of the money to be under the exclusive control of the executors, and G., the acting executor, paid the principal sum to a contractor and took a bond for the performance of the contract and then resigned, his successor and administrator *de bonis non* with the will annexed could maintain an action upon the bond for a breach thereof, as this money was paid to the contractor by G. as "executor" of J., and the administrator *de bonis non cum testamento annexo* succeeded to the control of this trust and the right to sue for the breach of this bond. *Mathews v. Meek*, 23 Ohio St. 272.

So, where a recovery by an administrator *de bonis non* was allowed by statute against the administrator of his predecessor for assets in his hands, it was held that he could recover the value of the promissory notes owing by the executor to the testator, and that the appointment of the executor did not release such claim, and the notes, as they fell due, became assets in the executor's hands as executor, and he was accountable for them as such. *Tracy v. Card*, 2 Ohio St. 431.

But where an administrator sold land under an order of court, and received mortgage notes as part of the purchase money, and sold the notes and mortgage to an innocent purchaser and converted the proceeds to his own use, the administrator *de bonis non* could not recover of the purchaser the notes and mortgage, as (until 88 Ohio Laws, 41, February, 1891, amending § 6182, and 89 Ohio Laws, 148, regulating and restricting the sale of notes taken by an executor or administrator for real estate sold by him), there was no statute in this state in any manner abridging the power of an executor or administrator to sell notes taken by him in the course of administration of the estate payable to himself in his representative capacity. *Jelke v. Goldsmith*, 52 Ohio St. 499.

Oregon.

Where an administrator sold land and was removed, his successor was not liable for the proceeds of the sale converted by his predecessor to his own use, nor was he liable because he did not collect from his predecessor money misappropriated, but was liable for moneys received by himself. *Dray v. Bloch*, 27 Or. 549.

Pennsylvania.

Before the act of 1834 an administrator *de bonis non* could not maintain a *scire facias* upon a judgment obtained by his predecessor, and could not maintain an action for a balance in his predecessor's hands; but since the act of 1834 an administrator *de bonis non* can maintain an action on his predecessor's bond for conversion, for an account and for the balance on hand. Since 1834 an administrator *de bonis non* can maintain an action to avoid a transfer made by his predecessor and is entitled to maintain an action upon all choses in action belonging to the estate.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Under Pa. act Feb. 24, 1834, § 31, providing that the administrators *de bonis non* shall have power to recover from their predecessors or their representatives all moneys and assets in their hands belonging to the estate of the decedent, providing that such suit may be stayed until the ac-

knowledge, but, on the contrary, was strenuously denied.

In *Tarbell v. Jewett*, 129 Mass. 457, it was said: "The note, therefore, became assets of

count is finally settled, an administrator *de bonis non* was given a direct remedy against the estate of the deceased executor for the balance remaining in the hands of his predecessor after settlement. *Bowman's Appeal*, 62 Pa. 166.

So, under Pa. act Feb. 24, 1834, § 31, an administrator *de bonis non* could sue the representative of his predecessor for assets actually converted. *Parish v. Brooks*, 4 Brewst. (Pa.) 154.

And in *Croyell v. Blackfan*, 1 Pittab. 327, it was held in the court of common pleas that under Pa. act Feb. 24, 1834, an administrator *de bonis non* who was not appointed until after the confirmation of an auditor's report directing the distribution of the balance in the hands of the superseded administrator to and amongst creditors could recover the fund from his predecessor. On appeal the decision was affirmed by a division of the court.

And in *Drenkle v. Sharman*, 9 Watts, 485, it was said that the distinction between the right of an administrator *de bonis non* whose predecessor had died, and the right of one whose predecessor had been dismissed, to the assets belonging to the estate of the decedent, was abolished by Pa. act 1834, and under that act the administrator *de bonis non* was entitled to the whole assets in either case, and was bound to look after and obtain them, whether in the hands of his predecessor, their representatives, or those of others.

In an action against the administrator of a husband's administrator, for the widow's share, a payment to the administrator *de bonis non* was a defense although the payment was made previous to Pa. act 1834, § 31, providing that administrators *de bonis non* shall be the proper persons to receive such funds from their predecessor or their legal representatives, as this applied to cases then existing as well as to others which might thereafter arise. *Little v. Walton*, 23 Pa. 164.

So, under Pa. act 1834, § 33, providing that in all cases where property, real or personal, of the decedent is sold upon execution, and more money raised than is sufficient to pay off liens of record, the balance shall be paid over to the executor or administrator for distribution, and such money shall be distributed as the real estate would have been, and § 31, providing that an administrator may call for any fund which his predecessor may legally receive, the successor was entitled to the avails of realty left undisposed of by the first administrator. *Carter v. Trueman*, 7 Pa. 315.

So, in *Connelly's Appeal*, 1 Grant, Cas. 366, it was held that where an executor was discharged without accounting for a claim in the hands of an agent, and the agent was appointed administrator *de bonis non*, an heir could not maintain an action against the executor to compel him to account and distribute, as a discharged executor was not to make distribution but simply to pay over the fund to his successor.

But prior to Pa. act 1834, an administrator *de bonis non* could not maintain a *scire facias* upon a judgment on his predecessor's bond to recover a balance due from his predecessor to the estate, as an administrator *de bonis non* could claim nothing but the goods of the intestate remaining in specie, unconverted and unchanged at the time of the death of the original administrator. *Potts, Wollerton, v. Smith*, 3 Rawle, 361, 24 Am. Dec. 359.

In *Allen v. Irwin*, 1 Serg. & R. 549, the question whether or not an administrator *de bonis non cum testamento annexo* could maintain against the administratrix of their predecessor, an action of assumpsit for money had and received by the pre-

the estate, from which the liability of the estate to the guardian could properly be met, and it is immaterial that it was not named in the inventory or accounts. . . . The fact

that an executor charges himself with his debt in the inventory or account is an important fact; it settles the question that he owes the estate, and the amount of his debt, and, in

decease was not decided. It was said that a creditor, legatee, or next of kin could maintain an action for the undisposed surplus of the personal estate.

In *Carter v. Trueman*, 7 Pa. 815, it was said that before the Pennsylvania act of 1834 an action to recover the balance appearing to be due upon the face of an administration account could not be maintained by the administrator *de bonis non*.

In *Re Montgomery*, 3 Brewst. (Pa.) 308, it was held that a creditor could have an account from the executor of an executor, but that distribution and payment could only be effected through the agency of an administrator *de bonis non*.

Chosen in action.

Under Pa. act Feb. 24, 1834, providing that administrators *de bonis non* are authorized to recover from their predecessors in the administration or their legal representatives, the moneys, goods, and assets remaining in their hands due and belonging to the estate of the decedent, and to sue out writs of execution upon judgments obtained by or in the name of the executors or administrators into whose places they have come, an administrator *de bonis non* had a right to sue forth a writ of execution on a judgment obtained by his predecessor in the administration. *Meiser v. Eckhart*, 19 Pa. 201.

And it was not a defense that the defendant had paid the same to the administrator of the administratrix, having notice not to pay the same. *Meiser v. Eckhart*, 19 Pa. 201.

In *Com. v. Strohecker*, 9 Watts, 479, where an administrator *de bonis non* recovered a judgment on the bond of his predecessor and died, and a subsequent administrator *de bonis non* was appointed, the heirs could not maintain an action on the judgment under Pa. act 1834. *Stroud's Purd.* 364, § 21, providing that an administrator *de bonis non* shall have power to commence and prosecute actions upon promises made to their predecessors in their representative character, and also to proceed with and perfect all unexecuted executions which may have been issued thereon at the instance of such predecessors.

So, under Pa. act 1834, an administrator *de bonis non* was properly substituted as plaintiff where his predecessor had recovered a judgment for debt against an agent for loss of money belonging to an estate, as "the object of the statute was to bring into the hands of the administrator *de bonis non* everything that, when recovered, would go in a course of administration." *Lea v. Hopkins*, 7 Pa. 385.

And under Pa. act 1834 it was no defense to an action by an administrator *de bonis non* on a claim due the estate that his predecessor had agreed to offset the same by a note given by him for his own private debt. *Miller v. Com.* 111 Pa. 221.

Where a will authorized an executor to sell land and invest the proceeds in bonds, the dividends to be paid to his wife for life and at her death the principal to be paid to the children of his daughter, and the executor sold the land and gave the widow the proceeds, and she placed the same in the hands of a party who bought bonds and paid her the income for life, and she died, the administrator *de bonis non cum testamento annexo* was entitled to recover the bonds from the holder under Pa. act 1834, providing that administrators *de bonis non* with or without the will annexed shall have power to demand or recover from their predecessors, or their legal representatives, all moneys, goods, and assets remaining in their hands due and belonging to the

estate of the decedent. *Tucker v. Horner*, 10 Phila. 122.

So, where the funds of an estate were deposited by an executor in a bank, the administrator *de bonis non* was entitled to the same where it was shown to be the property of the estate. *Stair v. York Nat. Bank*, 55 Pa. 384.

But in *Slaymaker v. Farmers' Nat. Bank*, 103 Pa. 616, it was held that under Pa. act Feb. 24, 1834, Pub. Laws, 77, vesting every administrator *de bonis non* with power to collect from his predecessor or his legal representatives all assets in his hands, or for which he is liable, that belong to the estate, an administrator *de bonis non* had no right to deposit in bank kept by his predecessor in his representative capacity, and the payment of such deposit to the administrator *de bonis non* was no defense in an action against the bank by the executor of the original administrator.

And under Pa. act 1834, Pub. Laws, 77, an administrator *de bonis non* could not recover from a bank the amount of a deposit which originally stood in the name of the intestate, but which was drawn out of the bank by his predecessor. *Sibbs v. Philadelphia Sav. Fund Soc.* 153 Pa. 345.

In *Sibbs v. Philadelphia Sav. Fund Soc.* 153 Pa. 345, *Meiser v. Eckhart*, 19 Pa. 201, was distinguished, as that case holds that an administrator *de bonis non* may collect an uncollected judgment taken by a deceased administrator for purchase money due the estate which was held to be an uncollected asset.

In *Sibbs v. Philadelphia Sav. Fund Soc.* 153 Pa. 345, the case of *Little v. Walton*, 23 Pa. 164, was distinguished, as that case holds that the representatives of a deceased administrator may properly pay the unascertained balance due after a settlement of the account to the administrator *de bonis non*.

In *Sibbs v. Philadelphia Sav. Fund Soc.* 153 Pa. 345, the case of *Stair v. York Nat. Bank*, 55 Pa. 384, 93 Am. Dec. 759, was distinguished, as in that case the contest was over the ownership or a deposit of which the bank was still the holder, and notice was given to the bank before it parted with the fund, and in that case the claimant successfully attacked and overcame the presumption of ownership arising from the form of the deposit, and established his title.

Prior to Pa. act 1834, where real estate was sold by an administrator, who obtained a judgment upon the purchase-money bond and then died, it was no defense to a scire facias issued on a judgment by the administrator of the administrator that the administrator *de bonis non* had received payment and given a discharge, as an administrator *de bonis non* had no control over such a bond given to his predecessor. *Kendall v. Lee*, 2 Penr. & W. 482.

An administrator *de bonis non* could not maintain a scire facias on a judgment rendered on the bond of his predecessor, under Pa. act April 4, 1797, 3 Smith, Laws, 396, § 2, providing that when an executor or administrator is dismissed by a decree or order of the court, the court may order him to deliver over and to pay to the successor the goods, chattels, rights, credits, title deeds, and securities of the deceased which came to his or their hands and remain unadministered, and to account with the said successor for all the goods, chattels, rights, and credits which shall have been previously administered, and to pay over the balance which shall remain due from him or them to the said successor in such manner and time as the court shall order. It was held that the cases intended to be provided for in these acts were where letters of administration had been granted without bond, and sureties

those cases where the debt has thus been accounted for, great stress has been laid upon the fact. . . . But an executor cannot escape his liability, or change the character of

it, by failing to charge himself with his own debt; if he could, then by neglecting his duty there would be no remedy for the estate. Nor is charging himself with it the only way in

had been taken but were insufficient, or where executors or administrators were wasting or mismanaging the estate. It was held that an administrator *de bonis non* was not within the letter or spirit of this act, or else the legislature in the same law would have authorized the orphans' court to dismiss an executor or administrator, and to appoint an administrator *de bonis non* with all the rights, powers, and privileges of such. Potts, Wollerton, v. Smith, 8 Rawle, 361, 24 Am. Dec. 356.

Avoiding sales or transfers made by his predecessor

Where an administrator *de bonis non cum testamento annexo* filed a bill in equity in the court of common pleas to set aside a power of attorney given by the testator to the executor, on the ground that it was procured by fraud, and further asking for an account of investments made and moneys collected and retained by the defendant thereunder, it was held that a settlement in the orphans' court did not oust the court of common pleas of jurisdiction. Fidelity Ins. Trust & S. D. Co. v. Gazjam, 161 Pa. 536.

Rhode Island.

In this state an administrator *de bonis non* cannot maintain an action for conversion on the bond of his predecessor who has died. He may recover upon contracts made with his predecessor for the estate, as a statute changed the rule that an executor of a deceased executor represents the estate.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Under R. I. Pub. Stat. chap. 184, § 27, giving an action to "an administrator appointed to succeed an executor resigning or removed" to recover the goods and effects of the deceased, an administrator *de bonis non* could not maintain an action on the bond of his predecessor for converting the goods of the estate, as this statute did not give an action on the bond but only for goods and effects remaining to be administered, and the statute only applied where an executor or administrator resigned or was removed, and not where the predecessor died. Scituate Ct. of Probate v. Smith, 16 R. I. 444.

So, in Scituate Ct. of Probate v. Smith, 16 R. I. 444, it was said that the administrator *de bonis non* could not sue the former administrator or his representative for a devastavit or for delinquencies, nor maintain an action on the former administrator's bond for such cause.

Choses in action.

Where an administrator under an order of court sold real estate and the purchaser failed to complete the purchase, and the realty was again sold at a loss, the administrator *de bonis non* could maintain an action against the purchaser for damages for not completing his contract. It was said that R. I. Pub. Stat. chap. 184, § 23, providing that "in no case shall the executor of a deceased executor in consequence thereof become an executor of the first intestate" annulled the old rule that an executor of a deceased executor represents the original testator. McGuinness v. Whalen, 17 R. I. 619.

South Carolina.

It seems that in this state the administrator *de bonis non* is entitled to the funds in the hands of his predecessor, and may maintain an action for an account and for the balance, unless it is shown that there are no debts and that the fund is ready to distribute, although some *dicta* intimate that he cannot require his predecessor to account. The cases generally hold that the administrator *de bonis* 40 L. R. A.

non cannot maintain an action for a chose in action due his predecessor.

Choses in action.

Where an executor leased, by parol, premises for one year, and the will was set aside, the administrator *de bonis non* could not maintain an action of assumpsit for the use and occupation of the property, as the right of action was in the representative of the executor to whom the administrator *de bonis non* would have recourse. Boyd v. Sloan, 2 Bail. L. 311.

So, an administrator *de bonis non* could not maintain an action of assumpsit to recover the price of certain goods purchased at a sale of the intestate's effects, which sale was made by his predecessor who was afterwards removed. It was said that the first administrator was answerable to the administrator *de bonis non* for all goods which he received of the estate. Ross v. Sutton, 1 Bail. L. 126, 19 Am. Dec. 660.

And where a bond was payable to F., executor of R., and the executor brought an action on the bond, and it was contended that he was the wrongful holder and that payment to him would be no bar to an action brought by an administrator *de bonis non* of R., it was held that the action was properly brought, and that the bond never was the property of R., but was only the representative of what might have been the property of R. that had been disposed of by his executor and had been administered so that nothing would survive to an administrator *de bonis non*. Seabrook v. Williams, 3 McCord, L. 371.

It was said in Miller v. Alexander, 1 Hill, Eq. 25, that it was not intended to be said in Seabrook v. Williams, 3 McCord, L. 371, that because an administrator *de bonis non* could not sue on a note given to the first administrator, therefore he would not be entitled to recover in equity any unadministered balance which might be in the hands of the first administrator.

And a recovery was denied where an administrator *de bonis non cum testamento annexo* alleged that his predecessor had on deposit funds in a bank to his credit as said executor, and that the bank paid the same to said executor on his check, knowing that the executor intended to misappropriate and convert the funds deposited by him in his name as executor as aforesaid to his own use, and not to the use of the estate of the testator, and that he did misappropriate such funds. Knobloch v. Germania Sav. Bank, 43 S. C. 233.

So, where an administrator sold property and took a note of two heirs for the purchase, and made a settlement and died, and one of said heirs obtained possession of the note and was appointed administrator *de bonis non*, it was held that in equity she was entitled to retain possession of that note, and to set off against it whatever would be the amount coming to her on distribution. Miller v. Alexander, 1 Hill, Eq. 25.

And where N., as executor, recovered a judgment, and the executor was removed, and an administrator *de bonis non* was appointed and attempted to enforce the judgment, he was bound by an agreement made by his predecessor setting off a claim of the defendant against the estate. Nettles v. Elkins, 2 McCord, Eq. 182.

But in Johnston v. Lewis, Rice, Eq. 40, 33 Am. Dec. 74, it was held that an administrator *de bonis non* could compel an accounting where the defendant was a surviving partner and had bought property from his predecessor and had not paid for the same, and the defendant would be liable also for

which the fact of his indebtedness may appear or be proved; and if it appears, or is proved otherwise, then his liability is established as conclusively as if he had charged himself with

the debt in his inventory, and his sureties become responsible if he fails to account for it."

In this state it was early decided in the case of *Potter v. Titcomb*, 10 Me. 53, that an ad-

loss of assets or negligence in collecting debts as surviving partner. It was further held that the administrator *de bonis non* would be bound by the sale made by his predecessor.

Avoiding sales or transfers made by his predecessor.

Where a negro either belonged to C. in his own right or as administrator, and he sold her by bill of sale, an administrator *de bonis non* could not maintain an action of trover for the negro or her increase. *Collins v. Bankhead*, 1 Strobb. L. 25.

In *Spoon v. Smith*, 36 S. C. 583, where a creditor brought suit to set aside a judgment which an intestate had confessed in favor of a party who became his administrator, and which judgment was claimed to be fraudulent, it was said that an administrator *de bonis non* could not maintain such action as he was not a creditor.

Claims against predecessor for accounting, balance, conversion, or devastavit.

In *Trimmer v. Trail*, 2 Bail. L. 480, it was held that if an administrator was appointed administrator *de bonis non* the law would transfer the funds in his hands to himself as his successor, and the sureties on his first bond would be discharged, but if another person was appointed as administrator *de bonis non* the first administrator should pay over the funds in his hands before his sureties were discharged, under S. C. act 1789, Pub. Laws, 494, providing for discharging sureties as follows: "If the securities for administrators conceive themselves in danger of being injured by such suretyship, they may petition the court to whom they stand bound for relief, which court shall summon the administrator to appear, and thereupon make such order or decree as shall be sufficient to give relief to the petitioner."

And where two administrators converted part of their testator's goods into money, and died, and the legatees of the testator brought an action against the representatives of the executors, it was a sufficient defense that they had turned the money over into the hands of an administrator *de bonis non cum testamento annexo*. *Villard v. Robert*, 1 Strobb. Eq. 393.

In *Villard v. Robert*, 1 Strobb. Eq. 393, it is said that "the argument for the doctrine that an administrator *de bonis non* cannot recover from the representative of the first executor, funds in his hands arising from assets of the testator, goes very far back, and is made to rest on the doctrine which is now little better than a legal fiction."

In *Villard v. Robert*, 1 Strobb. Eq. 393, the case of *Smith v. Carrere*, 1 Rich. Eq. 123, was distinguished, and the *dictum* in that case questioned.

In *Esterling v. Thompson*, 1 Rice, L. 343, it was said that upon the death of an administrator his administrator was not accountable to the creditors of the first intestate, and that against him they had no right of action, but their remedy was against the administrator *de bonis non* of the first intestate whose duty it was to have an account from the administrator of the first administrator.

Where the surety on an administratrix's bond became the administrator *de bonis non* on the death of the administratrix, and on proceedings against the administrator *de bonis non*, who was absent from the state, the decree of the probate court charged him with the balance on account of his administration and with a devastavit on account of his predecessor, and he did not appeal, it was held, in an action by a distributee for his share, that the decree was binding on the administrator *de bonis non* and his sureties. *Lowe v. Carlisle*, 38 S. C. 597. 40 L. R. A.

But where an administration was revoked and the administrator accounted showing that he had paid off all the debts, and was entitled to the whole estate through his wife and by purchase from another distributee, an administrator *de bonis non* could not compel his predecessor to account although there were some old judgments against the estate that were barred by limitation, and the judgment creditors were not parties to the bill. *Thompson v. Buckner*, 2 Hill, Eq. 499, *Riley*, Eq. 30.

And where a distributee brought suit for an accounting against the representative of a deceased administrator, it was held that an administrator *de bonis non* was not a necessary party, as he had no right to call the administrator of a deceased administrator to account for any part of the estate wasted or converted by the deceased administrator. *Smith v. Carrere*, 1 Rich. Eq. 123.

In *Smith v. Carrere*, 1 Rich. Eq. 123, it was said that "before the statute of distributions, the executor was entitled to the whole personal estate, subject to the payment of debts and legacies. When, therefore, he sold or converted any part of it, this was understood to be a seizing or taking possession in his individual right, as an executor or administrator may now assent to his own legacy. The goods were said to be administered, and no longer in his possession as executor or administrator. If he failed to retain enough of the estate to meet the claims of creditors and legatees, he was liable for a devastavit, as of his own personal debt; and it is certain that the rule of law has not changed since the statute."

In *Villard v. Robert*, 1 Strobb. Eq. 393, *Smith v. Carrere*, 1 Rich. Eq. 123, was distinguished, as the point in issue in that case was that where distributees brought suit against the administrator of an administrator they should not be delayed for want of an administrator *de bonis non*.

Tennessee.

An administrator *de bonis non* may maintain an action on choses in action obtained by his predecessor. It was held that he could not maintain an action to set aside a void sale of property made by his predecessor (overruling a prior case *contra*). There was some conflict as to his power to call his predecessor to account and recover on his bond for the balance, a distinction being made between a suit at law and a suit in equity, but under the Code an order can be had requiring an account and for the delivery of the balance to the successor.

Claims against predecessor for accounting, balance, conversion, or devastavit.

In *Thompson v. Childress*, 1 Tenn. Ch. 369, it was said that "the nearest analogy in the law to the case before us is that of an administrator *de bonis non*, and his right to sue his predecessor. Upon this subject, the decisions of our supreme court are not quite as clear and consistent as an inferior tribunal would like to find them. In *Shackelford v. Runyan*, 7 Humph. 141, it was held that an administrator *de bonis non* might call his predecessor in the administration to account in a court of chancery, while in *Stott v. Alexander*, 2 Sneed, 650, 654, there is a *dictum* to the contrary. On the other hand, in *Thomas v. Stanley*, 4 Sneed, 411, it was held that an administrator *de bonis non* could not maintain covenant on the administration bond of his predecessor, which decision is referred to and recognized in *Reeves v. Steele*, 2 Head, 647. The latest decisions, and the weight of authority are against the power to sue, at any rate upon the bond of the pre-

ministrator must inventory and account for any debt due from himself to the intestate, even though he should deny that there was such indebtedness. And in *Potter v. Titcomb*,

7 Me. 302, it was held that, in order to compel an administrator on his official bond to pay the amount of a debt due from him to the intestate, it is necessary that he should first be

decessor; and it is a suit upon the bond that is now before us."

So, the administrator *de bonis non* could not maintain an action of trover against the representative of the former administrator for money of the plaintiff's intestate collected by the former administrator, where the same could not be specifically distinguished and identified. *Stott v. Alexander*, 2 Sneed, 650.

And an administrator *de bonis non* could not maintain an action on the bond of his predecessor for money received by him which he had failed to pay over to the heirs and distributees, as the duty of administrators *de bonis non* only applies to such property and effects not administered as remained in specie. *Thomas v. Stanley*, 4 Sneed, 411.

But in *Shackelford v. Runyan*, 7 Humph. 141, it was held that an administrator *de bonis non* could call to account the personal representative of the first administrator. The court said: "However it may be in England, or elsewhere, an administrator *de bonis non* in our state is clothed with full powers, and subject to all the duties, of the first personal representative, and is embraced and described in our statutes by the general description of administrators, whether by such statutes powers are given, or duties imposed."

And where an administrator *de bonis non* and the heirs and distributees brought a bill against the executors and sureties of the administrator seeking to collect the balance found due on the last settlement, and to correct all errors therein, it was held that such an action could be maintained. *Whitaker v. Whitaker*, 12 Lea, 393.

In *Whitaker v. Whitaker*, 12 Lea, 393, the cases of *Thomas v. Stanley*, 4 Sneed, 411; *Stott v. Alexander*, 2 Sneed, 648, and *Cheek v. Wheatley*, 3 Sneed, 484, were distinguished, as these cases were all actions at law, and "they necessarily, in their investigations, would have ordered a review of the accounts of the former administrator for which the machinery of the lower court is insufficient."

In *Coleman v. Raynor*, 3 Coldw. 25, it was said that under Tenn. Code, § 2238, providing that where an executor or administrator resigns the court shall order him to pay over and deliver to the new administrator the balance of money, property, and effects in his hands, "all the assets of the estate which came to the hands of the original administrator and remaining in his hands at the time of his resignation are without delay placed in the hands of the new administrator."

Choses in action.

An administrator *de bonis non cum testamento annexo* could maintain an action of debt upon a judgment obtained by his predecessor. It was held that Tenn. act 1851, chap. 20, giving an administrator *de bonis non* the right to a writ of *scire facias* was only cumulative, and did not take away the right of action on the judgment. *Smith v. Pearce*, 2 Swan, 127.

So, where a judgment was obtained by an administrator who died, the administrator *de bonis non* should collect it as assets to be appropriated to pay debts. *Brasfield v. Cardwell*, 7 Lea, 252.

And where an administrator of an executor brought suit on a note taken by the executor for and sold by him belonging to his testator, it was said that the modern and prevalent opinion is that notes of this kind are assets of the original decedent, and pass to and are sueable by the administrator *de bonis non*. *Abington v. Tyler*, 6 Coldw. 502.

40 L. R. A.

Avoiding sales or transfers made by his predecessor.

Where the administrator sold the interest of the estate in a slave, which sale was void under Tenn. act 1827, chap. 61, § 1, 2, prohibiting the sale of a slave by an administrator unless he has obtained an order of the court, and declaring such sale null and void, the administrator *de bonis non* could not maintain an action of trover,—the court saying that an administrator *de bonis non* is only to administer such assets as remain in specie at the death of the former administrator, and he is not responsible for maladministration or devastavit of his predecessor, and cannot impeach the validity of his acts, and would be bound by an estoppel which would affect his predecessor. It was said that in equity if the former administrator had by collusion disposed of goods of the estate for his own use, his successor might apply to have a fraudulent sale set aside. *Cheek v. Wheatley*, 3 Sneed, 484.

This in effect overruled *Bell v. Speight*, 11 Humph. 451, but that case was not referred to in the opinion.

But in *Bell v. Speight*, 11 Humph. 451, it was held that under Tenn. act 1827, chap. 61, prohibiting an administrator or executor from selling the slaves of the estate he represents without a proper order of court for that purpose, a sale under execution against the intestate after his death where the administrator consented, passed no title, and the administrator *de bonis non* could maintain an action of trover for the slaves so sold.

Texas.

In this state an action can be maintained under Hart's (Tex.) Dig. art. 1224, by an administrator *de bonis non* against his predecessor on his bond for an accounting or conversion or waste. Some cases seem to imply the contrary, but they have been distinguished and modified. There is some conflict as to the right of an administrator *de bonis non* to maintain an action to set aside a fraudulent sale made by his predecessor and realize the assets, but the weight of authority and the latest cases affirm the doctrine.

Claims against predecessor for accounting, balance, conversion, or devastavit.

An administrator *de bonis non* may maintain an action against his predecessor on his bond, for the value of the unadministered assets shown in the inventory. *Johnson v. Morris*, 45 Tex. 463; *Martel v. Martel*, 17 Tex. 396; *Baldwin v. Dearborn*, 21 Tex. 446; *Boulware v. Hendricks*, 23 Tex. 667; *Grant v. McKinney*, 36 Tex. 62.

Under Hart's (Tex.) Dig. art. 1224, providing that an administrator *de bonis non* shall have power to settle with the former executor or administrator, to receive and receipt for all such portion of the estate as remains in his hands, and shall have power to bring suit on the bond of his predecessor in his own name as administrator, for all the estate that has not been accounted for by such former executor or administrator an administrator *de bonis non* could maintain an action against his predecessor and the sureties on his bond for assets wasted, converted, and disposed of to his own use. *Martel v. Martel*, 17 Tex. 391.

In *Martel v. Martel*, 17 Tex. 391, the case of *Murphey v. Menard*, 11 Tex. 673, was distinguished, saying: "The only point settled in that case is that an administrator *de bonis non* cannot sustain an action under the 121st section of the act of March 20, 1848, to regulate proceedings in the county court pertaining to estates of deceased persons (Hart's (Tex.) Dig.

charged with the amount in an administration account, by a decree of the judge of probate.

An indebtedness from an administrator to the estate, having been converted into assets by

his appointment, is not revived by the death or removal of the administrator, so that it can be sued by an administrator *de bonis non*. In *Tarbell v. Jewett*, 129 Mass. 457, it is said:

art. 1230), nor under any other section of that act, nor on general principles, in the district court, to revise the settlement of a former administrator; such proceeding lies at the suit of a creditor, legatee, or distributee only."

So, under Hart's Dig. art. 1224, an administrator *de bonis non* could maintain an action upon his predecessor's bond for failing to deliver over the property in his hands on demand and asking for a settlement of the funds of the estate in his possession. *Baldwin v. Dearborn*, 21 Tex. 446.

So, under Hart's Dig. art. 1224, an administrator *de bonis non* could maintain an action against his predecessor and his sureties for the recovery of the hire of negroes unaccounted for, although the freedom of such negroes had been established since his predecessor ceased to be administrator. It was said that the negroes were not entitled to the profits of their services. *Boulware v. Hendricks*, 23 Tex. 667.

So, where a surviving partner was administrator, and was removed, an administrator *de bonis non* could maintain an action against his predecessor and his securities on his official bond for assets of the estate consisting of the intestate's interest of the goods of the firm, where the assets were inventoried but unaccounted for, although it was contended that the conversion, if any, was made by the surviving partner, and not as administrator. *Grant v. McKinney*, 36 Tex. 62.

Where an administrator brought suit on a bond given for community property by the widow who had been removed, it was said this bond takes the place of the wasted property, and a cause of action upon it exists in favor of the party entitled to the administration of such property. The court said that it is upon this theory that the statute regulating proceedings in the matter of decedent's estate authorizes an administrator *de bonis non* to sue a former executor or administrator on his bond for a devastavit (Tex. Rev. Stat. art. 1960), and it was not necessary that a devastavit be first established in the county court. *Brown v. Seaman*, 65 Tex. 628.

An administrator *de bonis non cum testamento annexo* could maintain an action against the executor of his predecessor for property of the estate, for which his predecessor had not accounted, although such predecessor did not give any bond. It was held that Tex. Rev. Stat. chap. 13, title 37, shows "that it was the purpose of the legislature to make a subsequent administration but the continuation of the former, and to enable the administrator *de bonis non* to recover of his predecessor, not only such property and funds as remained in his hands, but to recover any loss that may have accrued through his maladministration of the trust. That the remedy can be more conveniently and certainly exercised through the succeeding administrator than when left to the heirs or creditors, is quite apparent." *Dwyer v. Kalteyer*, 68 Tex. 554.

In *Mott v. Ruenbuhl*, 1 Tex. App. Civ. Cas. (Willson) § 600, it was said that if the estate of an administrator (who had died) was liable at all for money in the hands of such administrator at the time he made his final settlement as administrator it was first to the administrator *de bonis non*, as it was the duty of an administrator *de bonis non* to collect and receive from his predecessor all the property of every description in his hands at the date of his removal.

But under Hart's (Tex.) Dig. art. 1028, giving a term of twelve months for closing the succession,

and Louisiana Civ. Code, arts. 1179, 1198, providing for an extension of time from year to year not exceeding five years, and the Louisiana law of succession in force until the act of Congress of the republic went into effect, March 16, 1840, and under Tex. act. 1840, Hart's Dig. 1028, providing that should said executor or administrator fail to render his account to the probate court at or before the end of the first term of the probate court after the expiration of twelve months from the grant of letters, or should he fail to pay the creditors according to the order of the probate court, then execution may issue from the probate court in the name of the creditors where the last settlement was made in 1843 and the administrator was removed in 1848, an administrator *de bonis non* appointed in 1851 could not maintain an action on his predecessor's bond, as the estate was closed and there was no one to whom the administrator could account but the heirs or legatees. *Murphy v. Menard*, 14 Tex. 62.

In *Murphey v. Menard*, 11 Tex. 673, it was held that under Hart's (Tex.) Dig. art. 1230, act March 20, 1848, § 121, providing that anyone interested in the estate of a deceased person may at any time within two years after the settlement by the chief justice of any account of the executor or administrator of such estate have the same revised and corrected, an administrator *de bonis non* could not maintain an action for that cause and for wasting the estate, where his predecessor was removed, as it was not intended to provide a remedy for the administrator *de bonis non*, and he could not maintain an action against the former administrator for maladministration. It was said that art. 1224 made provision for suits by administrator *de bonis non* against his predecessor, and the cases there provided for were the only ones in which such action could be maintained.

In *Murphey v. Menard*, 14 Tex. 62, it was said by Wheeler, J., that the case of *Murphey v. Menard*, 11 Tex. 673, does not warrant the proposition that the only action which an administrator *de bonis non* can have against the former administrator is on his bond, but it holds upon that point that administrator *de bonis non* can sue the former administrator only in the cases provided for in art. 1224 of the Digest. It was not proposed to give a construction to that article, nor did the case call for it.

In *Johnson v. Hogan*, 37 Tex. 77, following *Murphey v. Menard*, 11 Tex. 673, an administrator *de bonis non* brought an action to recover the price of a horse and pony and the hire of certain slaves which it was alleged had come to the hands of the first administrator, and it was held that this necessarily involved a revision of his account, and that this revisory power could not be invoked by an administrator *de bonis non*.

In *Johnson v. Morris*, 45 Tex. 463, it was said: "If a contrary doctrine has ever been announced, it has been through inadvertently giving a construction to what is said in the cases of *Murphey v. Menard*, 11 Tex. 673, and *Johnson v. Hogan*, 37 Tex. 77, without a due observance of the facts in these cases and the questions they involved. In neither of these cases was the court called upon to decide whether a suit might be maintained by the administrator *de bonis non* against his predecessor and his surety on his bond for property of the estate which came into his possession and upon which he had not administered. But they in effect involved the right of the administrator *de bonis non*, by suit on his predecessor's bond in the district court to correct and revise the action of the probate court on his accounts."

"We are not aware of any case where it has been held that a debt due from an executor, having once become assets, can be revived, and an action maintained upon it by an adminis-

trator with the will annexed; nor of any case where a debt due to the executor has been held not to be extinguished if sufficient assets come to his hands."

Avoiding sales or transfers made by his predecessor.

An administrator *de bonis non* could maintain an action to recover the proceeds of a note belonging to the estate, which had been fraudulently disposed of by the first administrator. *Williams v. Verne*, 68 Tex. 414; *DeWitt v. Miller*, 9 Tex. 239; *Todd v. Willis*, 66 Tex. 704; *Cochran v. Thompson*, 18 Tex. 652; *Giddings v. Steele*, 28 Tex. 643; *Burdett v. Silsbee*, 15 Tex. 605, same case, *Pearson v. Burditt*, 26 Tex. 157, 80 Am. Dec. 649; *Evans v. Oakley*, 2 Tex. 184.

So he could maintain an action to set aside an execution sale fraudulently suffered by his predecessor in collusion with the creditor, as *Tex. Rev. Stat. 1959-1901*; same as act March 20, 1848, providing that an administrator *de bonis non* succeeds to all the rights, powers, and duties of the former executor or administrator, except such rights and powers conferred on the former executor by will, as are different from those conferred by this statute, and providing that such administrator may make himself a party to all suits prosecuted by the former executor or administrator of the estate, and may be made a party to all suits prosecuted against the former executor or administrator of the estate. *Todd v. Willis*, 66 Tex. 704.

And an administrator *de bonis non* of a vendee could maintain an action against the administratrix of a vendor to set aside a decree obtained by the administratrix which vested the title in such administratrix, if it had been obtained by fraud and collusion, and by the co-operation of plaintiff's predecessor. *DeWitt v. Miller*, 9 Tex. 239.

So, an administrator *de bonis non* could maintain an action to set aside a sale made by his predecessor, where such sale was fraudulent and procured by the administrator in collusion with the purchaser, as the assets were unadministered, because the acts of the predecessor were not done in due course of administration. *Cochran v. Thompson*, 18 Tex. 652.

In *Giddings v. Steele*, 28 Tex. 748, 91 Am. Dec. 336, where an action was brought by an heir to recover land and to set aside an administrator's deed made in pursuance of an order of the probate court, on the ground of a fraudulent confederation between the administrator of the estate and the vendee, the court said: "If the sale of the certificate were fraudulently made, and for that the sale would be canceled, the law regards it as unadministered assets of the estate, and it would properly pass back into the hand of the administrator of the estate, to be disposed of in due course of administration. . . . If necessary, the administrator who makes the fraudulent sale can be removed for that cause, and an administrator *de bonis non* appointed in his stead."

Burdett v. Silsbee, 15 Tex. 605, same case, *Pearson v. Burditt*, 26 Tex. 157, 80 Am. Dec. 649, was an action brought by an administrator *de bonis non* to recover land sold under an order of the probate court, by a former administrator, and the invalidity of the administration, as well as a fraudulent collusion between the administrator and the vendee, were set up as a ground for holding the sale invalid. It was held that in that collateral action the validity of the administration could not be questioned, but that the plaintiff would be entitled to recover the land if the fraud alleged was proved, unless defeated by limitation based on adverse possession of the land.

In *Evans v. Oakley*, 2 Tex. 184, where an administrator had pledged to the defendant, to secure a loan of money to himself, some of the property of the estate, on suit brought by the heirs to recover

the property, it was held that they could not maintain it; and, the administrator having died, that the administrator *de bonis non* would have the right to maintain the action.

But in *McDonald v. Alford*, 32 Tex. 35, it was held that under *Paschal's (Tex.) Dig. art. 1376*, providing that when an administrator of an estate not administered is appointed he shall succeed to the rights of his predecessor, except to such rights conferred by the will of the testator as are different from those conferred by this act on executors generally, and such administrators shall have power to make themselves parties to all suits; they shall have power to settle with their predecessor and to receive all such portion of the estate as remains in their hands; they shall have power to bring suit on the bond of the former executor in their own name as administrator for all the estate that has not been accounted for; and they shall proceed to administer such estate as if their administration was a continuation of that of the former executor or administrator,—the administrator *de bonis non* had no power or authority to impeach or set aside a sale procured by his predecessor under an order of court, although he alleged that it was fraudulent. The only way he could maintain a suit against his predecessor was a suit on his bond to recover property that had not been accounted for.

In *McDonald v. Alford*, 32 Tex. 35, it was said that in *Murphey v. Menard*, 11 Tex. 673, an administrator *de bonis non* brought a suit against a former administrator to set aside a final settlement of his accounts as such administrator, and the court said: "The administrator *de bonis non* could have no interest in the settlement of the account of a former administrator. This duty only extends to effects left unadministered, and his interest is in them alone. He is a mere trustee, is chargeable only in so far as he receives assets, and has no such interest in the estate as will enable him to maintain an action against a former administrator for maladministration, or as will authorize him to prosecute an appeal or other proceeding to have the acts of the former administrator revised and corrected."

So, in *Brown v. Franklin*, 44 Tex. 559, it was held that an administrator *de bonis non* could not maintain an action against his predecessor to annul a sale of real estate made by him under an order of court charged to have been fraudulent, citing *Murphey v. Menard*, 11 Tex. 673; *Johnson v. Hogan*, 37 Tex. 80.

The case of *Todd v. Willis*, 66 Tex. 704, reviews all the Texas cases upon this question, approving the cases of *DeWitt v. Miller*, 9 Tex. 248; *Cochran v. Thompson*, 18 Tex. 652; *Burdett v. Silsbee*, 15 Tex. 605, same case, *Pearson v. Burditt*, 26 Tex. 157, 80 Am. Dec. 649; and the dictum in *Giddings v. Steele*, 28 Tex. 748, 91 Am. Dec. 336; and a similar doctrine held in *Evans v. Oakley*, 2 Tex. 184. It distinguishes *Murphey v. Menard*, as that action was under a statute to set aside the settlement of the predecessor, which statute applied only to persons interested. The court criticised *McDonald v. Alford*, 32 Tex. 36, saying: "The court seems not to have considered the averments of fraud" or else "regarded them as showing mere irregularities." The court in *Todd v. Willis* says the case of *Johnson v. Hogan*, 37 Tex. 78, "is difficult to understand from the statement of it given in the opinion," and says, in regard to *Brown v. Franklin*, 44 Tex. 564, "This relief was asked on the ground of combination, collusion, and fraud between the former administrator and purchaser in the approval and allowance of the claim and in making the sale, as well as in its confirmation. From

In *Monroe v. Holmes*, 9 Allen, 244, it was held that, where an executor had died, leaving the estate unsettled, his administrator could not maintain an action at law against the ad-

ministrator *de bonis non* to recover a balance due to the executor, but must present an account to the probate court for settlement. And in *Prentice v. Dehon*, 10 Allen, 358, it was held

the report of the case, this is all we can ascertain in relation to the matters above stated. . . . It seems to us that the two cases cited to sustain the opinion do not support it. . . . That the rule announced in the other cases to which we have referred is the better and sounder rule by which to test the power of an administrator *de bonis non*."

Vermont.

Choses in action.

Under Vt. Comp. Stat. 338, § 18, providing that an administrator appointed in the place of any former executor or administrator for the purpose of administering the estate not already administered may sue out a scire facias, and have execution on any judgment recovered in the name of such former executor or administrator, a judgment recovered by a former executor who had been removed was assets, and his successor could prosecute the same in his own name by scire facias. *Hunt v. Payne*, 29 Vt. 176.

But where a wife was made executrix and also trustee, an administrator *de bonis non* was not entitled to notes left by the testator, that came into the hands of the administrators of the executrix, until after they settled the trust account, and a lien claimed by such administrators was settled. *Merriam v. Hemmenway*, 26 Vt. 565.

In *Davis v. Flint*, 67 Vt. 485, where an administrator *de bonis non* presented a claim against the estate of his predecessor for a note shown in the inventory but not accounted for in the settlement, it was held that the action was improperly brought, as the probate court should determine the accountability of the executrix before any action. The court said: "Nor do we pass upon the question whether the proceeding could be sustained by an administrator *de bonis non* if otherwise properly brought."

Virginia.

The common-law doctrine applies in this state, and an administrator *de bonis non* cannot call the representatives of his predecessor to an account for assets converted or wasted. He may, however, maintain an action on choses in action like a judgment obtained by his predecessor on the doctrine that in equity such asset is considered as unadministered. The leading case on the question of converted assets is *Coleman v. M'Murdo*, which has been frequently followed in the United States, where a statute has not changed the rule.

Claims against predecessor for accounting, balance, conversion, or devastavit.

An administrator *de bonis non* could not call the representative of his predecessor to account for assets wasted or converted by such predecessor, as Va. acts 1661-1662, chap. 45, providing that if an administrator die before he hath given an account of the estate, the court should have power to grant administration of the estate not so accounted for to some other person who may call the heirs, executors, or administrators of the former administrator to an account, was repealed by act 1711, chap. 2, § 3, providing for administration *de bonis non* as at common law. *Coleman v. M'Murdo*, 5 Rand. (Va.) 51.

So, the administrator *de bonis non* could not maintain an action against the representatives of his predecessor to recover assets converted by the first administrator. *Cheatham v. Burfoot*, 9 Leigh, 580.

And in *Burnley v. Duke*, 2 Rob. (Va.) 102, it was said that an administrator *de bonis non* could not

compel the representative of a former administrator to account for converted assets.

In *Cooke v. Harrison*, 3 Rand. (Va.) 494, the court declined to intimate an opinion on the question whether an administrator *de bonis non* could call the representative of the previous executor or administrator to an account and recover from him any balance due from his testator or intestate to the estate.

But under Va. Code 1873, chap. 118, § 24, providing in a contest of a will that a curator shall be appointed, and that upon the qualification of an executor or administrator, the curator shall account with him for and pay and deliver to him such estate as he has in his hands or may be liable for, an administrator *de bonis non cum testamento annexo* may maintain an action against the curator and his sureties for a debt collected by the curator and unaccounted for. *Helsley v. Craig*, 33 Gratt. 716.

In *Helsley v. Craig*, 33 Gratt. 716, the case of *Coleman v. M'Murdo* was distinguished, as the principles of law in that case did not apply to a curator.

Choses in action.

Where a testator sold land retaining a lien for the purchase money, and died, and after a decree was made directing that the money be paid to the executor he also died, a further decree directing that it should be paid to the administrator of the executor was erroneous because the administrator *de bonis non cum testamento annexo* was not made a party to the same. *Hinton v. Bland*, 81 Va. 588.

In *Hinton v. Bland*, 81 Va. 588, the case of *Coleman v. M'Murdo*, 5 Rand. (Va.) 51, was distinguished, as there the question was as to the right of an administrator *de bonis non* to sue the representatives of his predecessor for assets wasted or converted.

In *Clarke v. Wells*, 6 Gratt. 475, it was said that a sale by an executor or administrator of his decedent's goods and effects must be treated at law as a conversion, yet this rule is subject to exceptions in a court of equity; and it was held that sale bonds not needed to reimburse the first administrator passed to the administrator *de bonis non* of the first decedent.

In *Tyler v. Nelson*, 14 Gratt. 214, the same was said to be the rule.

In *Coleman v. M'Murdo*, 5 Rand. (Va.) 51, it was said that "it was determined in *Dykes v. Woodhouse*, 3 Rand. (Va.) 287, that an administrator *de bonis non* was entitled to a scire facias to revive a judgment in favor of a deceased executor or administrator, for a debt due to the testator or intestate, because such judgment did not, as was admitted in the English courts, convert the property of the debt, or amount to an administration."

In *Waddy v. Hawkins*, 4 Leigh, 456, it was held that an administrator *de bonis non cum testamento annexo* could recover profits made by a surety of an executrix where such sureties on a motion for a counter security against an executrix obtained an order for the delivery to their possession of slaves that belonged to an estate. The court said: "Supposing he was to be regarded as the agent of Mrs. Hawkins, the executrix; then, as the moneys he had received had never been accounted for and paid to her, she neither had in fact, nor could have, administered them, or converted them to her own use; so that the balance due from Waddy was assets of Hawkins's estate remaining unadministered and unconverted, which, according to the principles of *Coleman v. M'Murdo*

that upon the same principle such an action could not be maintained after the resignation of the executor.

Whether the debt is due to or from the exec-

utor or administrator, and the principle is the same in the case of either executor or administrator, the debt as such becomes extinguished by the appointment of the debtor or creditor,

belonged to the administrator *de bonis non* of Hawkins."

Where an agent of an administrator took forty slaves to New Orleans, and received \$5,242 as part payment, and there made a new contract for one hundred slaves, and retained the cash as commission, which was ratified by the administrator, and the administrator was removed and the balance of the slaves seized by the court of chancery in Virginia, an administrator *de bonis non* could not maintain in Virginia an action against the nonresidents for the money due on sale of the forty slaves, as that court had not jurisdiction of the parties. It was further held that jurisdiction could not be obtained through garnishment on the agent by claiming that he was indebted to the nonresidents on account of the sale being incomplete. *Hefferman v. Grymes*, 2 Leigh, 512.

In *Hefferman v. Grymes*, 2 Leigh, 512, it was said that if the nonresidents were before the court, the administrator *de bonis non* might well recover against them in the present action by the very principles established in *Coleman v. M'Murdo*, 5 Rand. (Va.) 51, as this case falls within that class distinctly treated of there, where the executor had changed the property, as by investing the money in the funds, transferring it from one particular stock to another, or the like, but this being done for the benefit of the estate, and without intention of making the money his own. "In such cases, though the act may amount to a conversion at law, equity, looking at the *quo animo*, will follow the property, and consider it still unadministered."

Washington.

Where a husband acted as executor of his deceased wife's will, and his executors administered upon all the property including the separate community estate of the wife, and an administrator *de bonis non* of the wife claimed the right to administer the community estate, it was held that his laches in failing for a year and a half to assert any right barred his claim. *Re Hill*, 6 Wash. 285.

West Virginia.

Where an executor sold land and took bonds from the purchaser, and the executor was removed, an administrator *de bonis non cum testamento annexo* was not entitled to the proceeds of the sale, as the bonds or money became administered assets. *Wooddell v. Bruffy*, 25 W. Va. 465.

Wisconsin.

In this state it seems that under the statute an administrator *de bonis non* may maintain an action on his predecessor's bond in order to obtain an accounting or balance. It appears in a *dictum* that he cannot maintain an action to set aside a fraudulent transfer made by his predecessor.

Claims against administrator for accounting, balance, conversion, or devastavit.

An administrator *de bonis non cum testamento annexo* could maintain an action in the name of his county judge on his predecessor's bond for failing to make a true and perfect inventory, and failure to administer the sale according to law and the will, and for failing to account, under Wis. Rev. Stat. chap. 104, §§ 6, 7, providing for actions upon such bonds, and § 12 authorizing claims for damages on account of the breach of the conditions of any bond to be prosecuted by an executor, administrator, or guardian in behalf of those he may represent. *Golder v. Littlejohn*, 23 Wis. 251, 40 L. R. A.

Avoiding sales or transfers made by his predecessor.

In *Stronach v. Stronach*, 20 Wis. 129, where the heirs brought suit to set aside a pledge fraudulently made by the administrator, it was said "the administrator cannot avoid his own sale or pledge, though he was guilty of a breach of trust in making it. If he dies or is removed, and an administrator *de bonis non* is appointed, the latter cannot avoid the wrongful sale or pledge by the first administrator. . . . This is the rule except where there are statutory provisions in force authorizing the administrator *de bonis non* to do what otherwise the creditors, legatees, or distributees alone could do. We have examined our statutes on this subject, and find no provision authorizing an administrator *de bonis non* to do anything except to administer on the estate or assets remaining undisposed of by the first administrator."

In *Golder v. Littlejohn*, 23 Wis. 251, the case of *Stronach v. Stronach*, 20 Wis. 129, was distinguished, as the question there was whether an administrator *de bonis non* could avoid a wrongful sale or pledge of the property by the first administrator, and the court held as there was no statute authorizing the administrator *de bonis non* to do so, that the action for such devastavit was properly brought in the name of the heirs of the intestate.

Federal courts.

It seems that in these courts the common-law doctrine applies, and the administrator *de bonis non* cannot maintain an action for accounting or conversion. The leading case is *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292, which has been frequently followed and cited. He may maintain an action on choses in action where they can be treated as not administered. Some of the Federal cases construing statutes will be found under the several states.

Claims against predecessor for accounting, balance, conversion, or devastavit.

Under act of Congress Feb. 20, 1846, Rev. Stat. § 976, providing that on the removal of an administrator and the appointment of a successor the court shall further have power to order and require any assets which remain unadministered to be delivered to the newly appointed administrator *de bonis non*, the successor could not maintain an action upon his predecessor's bond for failure to pay the proceeds of a claim due the intestate and collected by the former administrator. *United States v. Walker*, 109 U. S. 258, 27 L. ed. 927.

In a subsequent action brought by the administrator *de bonis non* against the agent of his predecessor who had collected the claim, it was held that such collection was an administered estate and could not be recovered of the agent by the administrator *de bonis non*. *Wilson v. Arrick*, 112 U. S. 83, 28 L. ed. 617.

An administrator *de bonis non* could not maintain an action on his predecessor's bond for delinquency in failing to prosecute a claim, as for such delinquency the former administrator was responsible to the creditors, legatees, and distributees directly, and not to the administrator *de bonis non*. *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292, Rev'g 1 N. M. 507.

Choses in action.

In *Lidderdale v. Robinson*, 2 Brock. 169, it was said where a surviving administrator ought to have brought agents of the administrator to a settlement of their accounts, that this duty on the death of the surviving administrator devolved on the ad-

and is not revived by his death or removal from that position.

No action at law, under the circumstances of this case, could be maintained by the administrator *de bonis non* against the personal repre-

sentative of his predecessor, for the reasons already considered, and we think that the complainant can have no better nor greater rights, in this respect, in a proceeding in equity.

The defendant was appointed executrix Sep-

tember 1896. The administrator *de bonis non* who was also executor of the surviving administrator, and the whole balance due from these agents should be chargeable to him unless he could free himself from the charge of gross negligence for having failed to call them to a settlement.

Where administration was granted in Philadelphia, and a lot in Georgetown, District of Columbia, on which the intestate held a mortgage, was sold, and the purchase money was paid to a third party, and the administrator died, and another administrator was subsequently appointed in New York, it was held that he could recover the funds as an administrator *de bonis non*. *Blydenburgh v. Lowry*, 4 Cranch, C. C. 368.

But an administrator *de bonis non* could not maintain an action of *indebitatus assumpsit* in his own name for matters chargeable in account and for goods of his intestate sold by his predecessor to the defendant. *Calder v. Pyfer*, 2 Cranch, C. C. 430. See also *Wilson v. Arrick*, 112 U. S. 83, 28 L. ed. 617.

English cases.

Under the English cases an action may be maintained for goods remaining in specie, or money where it can be identified, or choses in action that can be construed to be not administered; but cannot be maintained for choses in action that are administered, or choses in action that have been converted.

Property remaining in specie or unadministered.

Where an administrator died leaving a considerable sum of the intestate's effects in his banker's hands, and the representatives of the administrator refused to deliver the same to the administrator *de bonis non*, an action was allowed for the same in the archbishop's name. *Goods of Hall*, 1 Hagg. Eccl. Rep. 139.

In *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292, the case of *Goods of Hall*, 1 Hagg. Eccl. Rep. 139, was distinguished, the court saying that the judgment rendered was undoubtedly founded on the theory that the money in bank was a part of the original intestate's estate in specie, and as such that the administrator *de bonis non* was entitled to it.

In *Duke Rutland v. Duchess Rutland*, 2 P. Wms. 200, it was said that "when an executor dies intestate, whatever is his will go to his administrator; whereas all the personal estate of his testator will belong to his administrator *de bonis non*, etc., and not to the administrator of the executor."

In *Atty. Gen. v. Hooker*, 3 P. Wms. 340, it was said that if an executor dies intestate all his personal estate, the property whereof is not altered, shall go to the administrator *de bonis non*, and not to the next of kin of the executor, because from the time the executor dies intestate the first testator dies intestate also, and it was the testator's own fault that he did not, as he might alter the property.

In *Lloyd v. Stoddart*, 1 Amb. 152, it was said that the executor does not always take the whole personal estate, even at law, for if an executor dies before he has administered, the effects unadministered shall not go to the representative of the executor, but to the administrator *de bonis non* of the testator in trust for his next of kin.

The administrator *de bonis non* is entitled to all the goods and personal estate which remain in specie and were not administered by the first executor or administrator, as well as to all debts due and owing to the testator or intestate. *Tingrey v. Brown*, 1 Bos. & P. 310.

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In 4 Bacon, Abr. title *Executors*, it is said that an administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, etc., "which remain in specie, and are not administered by the first executor or administrator, as also to all debts due and owing to the testator or intestate."

Where three executors were appointed in India, and one renounced, and one accounted with the other and returned to England, and the one in India remitted the assets to the one in England and then died, a residuary legatee could not maintain an action against the one in England; but the case was ordered to stand over in order that the necessary probate or administration could be taken out in England. *Bond v. Graham*, 1 Hare, 482, 6 Jur. 620.

In an action against an administrator *de bonis non* for the balance due on a mortgage and bond, the administrator *de bonis non* pleaded that he had no assets to be administered, and it was held that he was chargeable where it was shown that there was personal property owned by the deceased at the time of his death and real estate which the administrator *de bonis non* might have made available as assets under N. S. Rev. Stat. chap. 100, § 20, providing that in case the personal estate shall be insufficient, the judge may at his discretion grant a license for the sale of the whole or such part of the real estate of the deceased as he shall deem necessary. *Northrup v. Cunningham*, 42 N. S. 188.

Choses in action.

Where an administratrix of an executor brought suit for debt for double the yearly value of land held over, contrary to 4 Geo. II., chap. 28, after notice to quit under a demise from the testator, it was held: "Is not everything unadministered which has not been reduced into the actual possession of the executor, and converted by him? Most certainly in any case in which the plaintiff means to make title, she must take out administration *de bonis non*. It is not incumbent on those who resist to show that there are debts of the testator unsatisfied, but the plaintiff must show that there are no debts, and that the executor possessed himself absolutely in his own right." *Tingrey v. Brown*, 1 Bos. & P. 310.

Where the testatrix directed that a leasehold should be sold and the money divided among five persons, and the administrator, claiming that he had become entitled to the leasehold through an arrangement with the legatees, assigned it over for a valuable consideration, on his death it was held to be assets unadministered, and that the administrator *de bonis non* was entitled to it. It was said that if it had been sold to a party who was ignorant of the real nature of the transaction the sale could not be set aside, but it was clear that the assignment was not done in the character of administrator or in the course of administration of the assets, but was still assets unadministered. *Cubbridge v. Boatwright*, 1 Russ. Ch. 549.

In *Wankford v. Wankford*, 1 Saik. 306, it was said that "if the executrix of the obligee takes the obligor to husband, that is no extinguishment of the debt . . . [for] he may pay money to her as executrix, because if she lays the money so paid to her by itself, the administrator *de bonis non* of her testator (if she dies intestate) shall have that money as well as any other goods that were her testator's; for if the goods of the testator remain in specie, they shall go to his administrator *de bonis non*, be

tember 6, 1892. This bill in equity was commenced October 5, 1895. By Rev. Stat. chap. 87, § 19, when a claim has not been presented within the time limited by statute against the estate of a deceased person, this court, if of

opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim, may give judgment for the amount of the claim against the estate. The only object of this

cause in that case it is notorious which were the goods of the testator, and they are distinguishable; and there is the same reason where money is kept by itself, and the husband permits it so to be; but if the husband seizes it, it will be his, and will be a devastavit."

And where a bill was given to S. C. as the administratrix of J. C. for money due to her intestate, the administrator *de bonis non* could maintain an action upon such bill, on the ground that the money not having been received the bill remained a part of J. C.'s estate, and the right to it devolved upon the persons who afterwards became his representatives. It was said that the decisions in the old cases proceeding upon the principle that contracts made with an administrator were personal to him and that he should sue upon them in his own right and not in his representative capacity, had since been altered. *Catherwood v. Chabaud*, 1 Barn. & C. 150, 2 Dowl. & R. 271.

In *Catherwood v. Chabaud*, 1 Barn. & C. 150, 2 Dowl. & R. 271, the case of *Barker v. Talcot*, 1 Vern. 473, was distinguished, as there the debtor gave a bill to the administrator of his creditor and paid the executor of the administrator, which was held to be a discharge of the debt.

Where an action was brought by an administrator *de bonis non* upon promises, and one set of counts were on notes given by the defendant to the intestate in which the promises were stated to have been made to the intestate, and another set in which the promises were alleged to have been made to the first administrator, the first counts were barred by limitation, but a verdict was given the plaintiff on the remaining counts, the court saying: "The defendant's objection rests on this broad foundation, that there is no privity between the former administrator and the plaintiff, the administrator *de bonis non*; but that proposition certainly is not true in its extent. Suppose the former administrator had entered into an agreement for the sale of the lease of a chattel interest belonging to the intestate, and had died before the agreement was completed, the administrator *de bonis non* stands in such privity of estate that he would be compelled to carry that agreement into execution." *Hirst v. Smith*, 7 T. R. 183.

Where the administratrix carried on the business of the testator for two or three months repairing carriages, and died, an administrator *de bonis non* could maintain an action for price of work done by the administratrix, as the presumption was that the work was carried on for the benefit of the estate. The court said: "It has been long ago laid down, that though the executor of an executor represents the original testator, yet that rule does not apply to the administrator of an administrator, and that consequently when the estate of a deceased person has been left unadministered at the death of an administrator, it is necessary, in order to complete the administration, to take out administration *de bonis non*. Now if the promise was made to the original administratrix as administratrix, the proceeds of the action would be assets, and the present plaintiffs were the proper persons to sue. *Moseley v. Rendell*, L. R. 6 Q. B. 337, 40 L. J. Q. B. N. S. 111, 23 L. T. N. S. 774, 19 Week. Rep. 619.

Where an executor G., made an infant H., his executor, and died, and during minority administration was granted to the plaintiff, who, as administrator of G., brought an action of debt on a bond made to the first testator, it was held that the action should have been brought as administrator

of the first testator, under 10 Edw. IV. 1, 28 Hen. VIII. 7. *Limver and Evorie's Case*, 4 Leon. 58.

But where an administrator took a note to himself for rent due the testator on the death of the administrator, the rent note belonged to his administrator and not to the administrator *de bonis non* of the first. *Barker v. Talcot*, 1 Vern. 473.

In *Anonymous, Skinner*, 143, it was held that where "one acknowledges a recognizance, the con-usee makes his executor and dies; the executor, before an extent, assigns the recognizance to J. S. who pays the money to the executor; the executor dies, and administration *de bonis non* is committed to the next of kin to the first testator, who sues for this recognizance; but Lord Keeper said: It is like the cases where the testator is indebted to A, and B was indebted by bond to the testator; and then the executor assigns B's bond in satisfaction of the debt owing to A, that here the administrator *de bonis non* shall never recover upon this bond, no more shall he in the principal case upon recognizance."

And where an action was brought by an executor upon a bond to perform an award that the plaintiff should deliver certain goods of which the testator died possessed, and that the defendant should pay unto the plaintiff a certain sum, and the defense was that such sum was attached under the custom of foreign attachment in London, providing that if a suit were commenced against the executor of any person, any debt which was due to the testator *tempore mortis sue* might be attached, and pleaded that this was attached. It was held "that this was not attachable as the testator's debt, for then the administrator *de bonis non* might sue for it. And they held it to be like the cases where the executor takes bond for a debt due to his testator, or where he sells the goods, the money for which they are sold cannot be attached; and here the award is made of this sum, in consideration of conveying to the defendant the goods of the testator, and releasing of his debts, which seems to be all one with the other cases. *Horsam v. Turget*, Vent. 111.

And where an executor possessed of a term let part of it, reserving a rent, and died, and the question was whether the executor should have the rent or the administrator *de bonis non*, it was held that the executor should have the rent; but when recovered, Hale said it should be assets in his hands. *Norton v. Harvey*, Vent. 259.

And where an administrator possessed of a term made a lease for years of part of it reserving a rent, and made his executor, and died, his executor could maintain an action of debt for this rent, although it was contended that reversionary part of the term did not come to the executor of the administrator, but did belong to the administrator *de bonis non* of the first testator. *Drue v. Bayly*, Freem. C. L. 393, and 402; 2 Lev. 100; Vent. 275; 3 Keble, 298.

In *Butler v. Bernard*, Freem. Ch. 139, it was held: "An administrator mortgageth the intestate's term, and makes A his executor, and dies. B takes out letters of administration *de bonis non* to the first intestate, and claims the residuary interest and trust of the term, and prays that he may have the benefit of redemption; but the court decreed the benefit of redemption to A, the executor of the first administrator, who had aliened the whole estate in law of the term, and was not possessed *in autre droit*, of any part of the interest thereof, but in his own right; and so it shall go to his executor, and not to B, the administrator *de bonis non*."

statute is to relieve a creditor, under certain circumstances, from the limitation of the statute in regard to the prosecution of claims against the estates of deceased persons. It does not create a cause of action in equity, after the

bar of the statute, when there was none at law before.

Nor can the bill be sustained upon the ground, as contended, that this money was received by the defendant's testator charged with

III. Summary.

a. Goods remaining in specie.

An administrator *de bonis non*, as the name implies, is entitled to all goods remaining in specie and unadministered, and he can recover them wherever he can find them. The following cases hold that he is entitled to all goods remaining in specie or unadministered: Kelly v. Kelly, 9 Ala. 908, 44 Am. Dec. 469; Finn v. Hempstead, 24 Ark. 111; Turner v. Tapeccott, 30 Ark. 312; Connecticut Trust & S. D. Co. v. Security Co. 67 Conn. 438; Rowan v. Kirkpatrick, 14 Ill. 1; Hatch v. Caine, 88 Me. 232; Alexander v. Stewart, 8 Gill & J. 226; Smith v. Doe, Dennis, 33 Md. 442; Neal v. Charlton, 52 Md. 495; Haslett v. Glenn, 7 Harr. & J. 17; Scott v. Fox, 14 Md. 388; Marvel v. Babbitt, 143 Mass. 226; Thayer v. Kinsey, 162 Mass. 232; Booker v. Armstrong, 93 Mo. 49; McMahon v. Allen, 4 E. D. Smith, 519; Goods of Hall, 1 Hagg. Eccl. Rep. 139; Duke Rutland v. Duchess Rutland, 2 P. Wms. 209; Atty. Gen. v. Hooker, 2 P. Wms. 340; Tingrey v. Brown, 1 Bos. & P. 310.

And where it was money. Getty v. Long, 82 Md. 648; Hackney v. Steadman, 46 N. C. (1 Jones, L.) 207.

And the same was said to be the rule in the following cases: State, Burton, v. Tunnell, 5 Harr. (Del.) 182; Newhall v. Turney, 14 Ill. 338; Floyd v. Breckenridge, 4 Bibb, 14; Graves v. Downey, 3 T. B. Mon. 355; Bradshaw v. Com. 3 J. J. Marsh. 622; Oldham v. Collins, 4 J. J. Marsh. 49; Slaughter v. Froman, 5 T. B. Mon. 19, 17 Am. Dec. 33; Carrol v. Connet, 2 J. J. Marsh. 185; Hendricks v. Snodgrass, Walk. (Miss.) 86; Gamble v. Hamilton, 7 Mo. 469; Yale v. Baker, 2 Hun, 463; Taylor v. Brooks, 20 N. C. (4 Dev. & B. L.) 139; Ferebee v. Baxter, 34 N. C. (12 Ired. L.) 64; Lloyd v. Stoddard, 1 Amb. 152.

Some cases put the rule in this form, that he is only entitled to what remains in specie. Nolly v. Wilkins, 11 Ala. 872; Benton County Ct. Judge v. Price, 6 Ala. 36; Chamberlain v. Bates, 2 Port. (Ala.) 550, 27 Am. Dec. 667; Willis v. Willis, 9 Ala. 721; Whitworth v. Oliver, 39 Ala. 286; Price v. Simmons, 13 Ala. 749; King v. Smith, 15 Ala. 264; Eubank v. Clark, 78 Ala. 73; Abney v. Pickett, 21 Ala. 739; Deans v. Wilcoxson, 25 Fla. 980; Gregory v. Harrison, 4 Fla. 56; Paschal v. Davis, 3 Ga. 256; Bates v. Woolfolk, 5 Ga. 329; Kearney v. Sasser, 37 Md. 264; Gardner v. Simmes, 1 Gill, 425; Hagthorp v. Hook, 1 Gill & J. 270; Gray v. Harris, 43 Miss. 421; *Re Place*, 7 N. Y. Legal Obs. 217.

And the same was said to be the rule in the following cases: Graves v. Flowers, 51 Ala. 402; Hatchett v. Billingslea, 65 Ala. 16; Martin v. Ellerbe, 70 Ala. 326; Waring v. Lewis, 53 Ala. 615; Ruff v. Smith, 31 Miss. 59; Stubblefield v. McRaven, 5 Smedes & M. 130; Buckland v. Gallup, 105 N. Y. 453; Tracy v. Card, 2 Ohio St. 431.

b. Choses in action.

It is generally held that an administrator *de bonis non* can maintain an action on choses in action due the estate, though some cases hold that he cannot maintain an action on notes given to his predecessor, or maintain an action in assumpsit for goods sold by his predecessor, nor recover a deposit made by his predecessor, and that he is not entitled to sale bonds taken by his predecessor. This holding is on the ground that the predecessor has administered the goods.

But the weight of authority is that if the administrator *de bonis non* comes into possession of the choses in action due the estate for property sold by 40 L. R. A.

his predecessor which has not been accounted for an action may be maintained. Caller v. Boykin, Minor (Ala.) 206; King v. Green, 2 Stew. (Ala.) 133, 19 Am. Dec. 146; Harbin v. Levi, 6 Ala. 399; Barron v. Vandvert, 13 Ala. 232; Barwick v. White, 2 Del. Ch. 284; McFarlin v. Ringer, 51 Ga. 363; Barnett v. Vanmeter, 7 Ind. App. 45; Wahl v. Schlerling, 11 Ind. App. 696; Griffith v. Fischell, 4 Blackf. 427; Skillen v. Jones, 44 Ind. 136; Burrus v. Roulhac, 2 Bush, 38; Williams v. Collins, 1 B. Mon. 58; Maraman v. Trunnell, 3 Met. (Ky.) 146, 77 Am. Dec. 167; Woodbridge v. Tilton, 84 Me. 92; Salisbury v. Black, 6 Harr. & J. 294, 14 Am. Dec. 278; Stevens v. Goodell, 3 Met. 34; Minot v. Norcross, 143 Mass. 326; Marvel v. Babbitt, 143 Mass. 226; Morse v. Clayton, 13 Smedes & M. 373; Scott v. Searles, 7 Smedes & M. 498, 45 Am. Dec. 317; McIlvoy v. Alsop, 45 Miss. 365; Kelsey v. Smith, 1 How. (Miss.) 68; Forniquet v. Forstall, 34 Miss. 87; *Re Seitz*, 16 Misc. 522; Gatfield v. Hanson, 57 How. Pr. 331; Luers v. Brunges, 56 How. Pr. 232; Ellison v. Andrews, 34 N. C. (12 Ired. L.) 188; Ballinger v. Cureton, 104 N. C. 474; Cutler v. Quinoo, 3 N. C. (2 Hayw.) 60; Miller v. Donaldson, 17 Ohio, 264; Mathews v. Meek, 23 Ohio St. 272; Tracy v. Card, 2 Ohio St. 431; Meiser v. Eckhart, 19 Pa. 201; Lea v. Hopkins, 7 Pa. 385; Miller v. Com. 111 Pa. 321; Tucker v. Horner, 10 Phila. 122; Stair v. York Nat. Bank, 55 Pa. 364, 93 Am. Dec. 759; McGuinness v. Whalen, 17 R. I. 619; Johnston v. Lewis, Rice, Eq. 40, 38 Am. Dec. 74; Smith v. Pearce, 2 Swan, 127; Brasfield v. Cardwell, 7 Lea, 252; Hunt v. Payne, 29 Vt. 176; Hinton v. Bland, 81 Va. 588; Clarke v. Wells, 6 Gratt. 475; Blydenburgh v. Lowry, 4 Cranch, C. C. 368; Tingrey v. Brown, 1 Bos. & P. 310; Cubbidge v. Boatwright, 1 Russ. Ch. 549; Catherwood v. Chabaud, 1 Barn. & C. 150, 2 Dowl. & R. 271; Hirst v. Smith, 7 T. R. 90; Moseley v. Rendell, L. R. 6 Q. B. 337, 40 L. J. Q. B. N. S. 111, 23 L. T. N. S. 774, 19 Week. Rep. 619; Limver and Evorles Case, 4 Leon. 58.

And the same was said to be the rule in King v. Griffin, 6 Ala. 387; Adams v. Internal Improvement Fund, 37 Fla. 286; Com. v. Strohecker, 9 Watts, 479; Abingdon v. Tyler, 6 Coldw. 502; Merriam v. Hemmenway, 26 Vt. 565; Tyler v. Nelson, 14 Gratt. 214; Coleman v. M'Murdo, 5 Rand. (Va.) 51; Heffernan v. Grymes, 2 Leigh, 512; Lidderdale v. Robinson, 2 Brock. 159; Wankford v. Wankford, 1 Sal. 299.

But some cases hold that an administrator *de bonis non* is not entitled to maintain an action on choses in action obtained by his predecessor.

As where heirs obtained a decree for land conveyed by his predecessor. Morrison v. Page, 9 Dana, 428.

And where a judgment was rendered on the bond of his predecessor prior to the Pennsylvania act of 1834. Potts, Wollerton, v. Smith, 3 Rawle, 361, 24 Am. Dec. 359.

And where the action was in assumpsit for goods sold by predecessor. Ross v. Sutton, 1 Bail. L. 129, 19 Am. Dec. 660; Calder v. Pyfer, 2 Cranch, C. C. 430.

And where the action was for use and occupation of property leased by the predecessor. Boyd v. Sloan, 2 Bail. L. 311.

And where a note was taken by the predecessor for goods sold. Morrison v. Page, 9 Dana, 428.

And where the contract was payable to the predecessor. Harney v. Dutcher, 15 Mo. 89, 55 Am. Dec. 131.

And where the bond was payable to the predecessor. Seabrook v. Williams, 3 McCord, L. 371.

And where the sale bond was taken by predecessor when the common law was in force. Kendall v. Lee, 2 Penr. & W. 482.

a trust in favor of the intestate, because, if this was so, the identity of the trust fund has been lost. There is no attempt here to hold a particular fund or property as charged with the trust. There is no allegation or testimony

to the effect that this money can be traced or distinguished from other property or money of the defendant's testator, the original administrator.

The identity of this trust fund, if such it

And where a sale bond was taken by predecessor. Woodell v. Bruffy, 25 W. Va. 465.

And where a rent note was given to predecessor. Barker v. Talcot, 1 Vern. 473. Distinguished in Catherwood v. Chaubaud, 1 Barn. & C. 150, 2 Dowl. & R. 271.

And where a note was given to predecessor individually. McGilway v. Clement, 6 Mo. App. 598. Appx.; Buckland v. Gallup, 105 N. Y. 453; Caulkins v. Bolton, 81 Hun, 458, 98 N. Y. 511.

And where a note was assigned by predecessor. Searles v. Scott, 14 Smedes & M. 94; Jelke v. Goldsmith, 52 Ohio St. 499.

And where a recognizance was assigned. Anonymous, Skinner, 143.

And where an executor assigned part of a term. Norton v. Harvey, Vent. 259; Drue v. Baylye, Freem. C. L. 393 and 402, 2 Lev. 100, Vent. 275, 3 Keble, 298; Butler v. Bernard, Freem. Ch. 139.

And where predecessor surrendered certificates of deposit. Brooks v. Mastin, 69 Mo. 58.

And where a deposit was paid to predecessor. Whitlock v. Bowery Sav. Bank, 36 Hun, 460; Sibbs v. Philadelphia Sav. Fund Soc. 153 Pa. 345; Knobloch v. Germania Sav. Bank, 43 S. C. 233.

And where deposit was kept by predecessor. Slaymaker v. Farmer's Nat. Bank, 103 Pa. 616.

And where no unpaid debts against the estate were shown to exist. Bellomy v. Bellomy, 3 Bush, 109.

And where purchase-money notes were given to commissioners for distribution. Saffran v. Kennedy, 7 J. J. Marsh. 188.

And where a mortgage was given to heirs for their claim. Breckinridge v. Waters, 4 Dana, 620.

And where an order of court was not made under the statute. West v. Chappell, 5 Gill, 223.

And where a claim was collected by an agent of the predecessor. Wilson v. Arrick, 112 U. S. 83, 28 L. ed. 617.

And the same was said to be the rule at common law where a judgment was obtained by the predecessor. Oglesby v. Gilmore, 5 Ga. 56.

And where the action was for the purchase price of slaves sold by his predecessor. Gilbert v. Hardwick, 11 Ga. 599.

And the same was said to be the rule where an action was brought by an executor on an award obtained by him. Horsam v. Turget, Vent. 111.

c. *Avoiding sales or transfers made by predecessor.*

Generally an administrator *de bonis non* may avoid sales and transfers made by his predecessor which are fraudulent or void or invalid. Ikelheimer v. Chapman, 32 Ala. 678; Swink v. Snodgrass, 17 Ala. 553, 52 Am. Dec. 190; Hopper v. Steele, 18 Ala. 828; Wyatt v. Rambo, 29 Ala. 510, 68 Am. Dec. 89; Deans v. Wilcoxon, 25 Fla. 980; Hardwick v. Thomas, 10 Ga. 266; Chandler v. Schoonover, 14 Ind. 324; Harvey v. State, Rogers, 123 Ind. 260; Forniquet v. Forstall, 34 Miss. 87; Hull v. Clark, 14 Smedes & M. 187; Prosser v. Leatherman, 4 How. (Miss.) 237, 34 Am. Dec. 121; Miller v. Helm, 2 Smedes & M. 687; Scott v. Searles, 7 Smedes & M. 498, 45 Am. Dec. 317; Searles v. Scott, 14 Smedes & M. 94; Murphy v. Clark, 1 Smedes & M. 221; Prestidge v. Pendleton, 24 Miss. 80; Badger v. Jones, 66 N. C. 305; Glover v. Flowers, 101 N. C. 134; Fidelity Ins. Trust & S. D. Co. v. Gazzam, 161 Pa. 596; Williams v. Verne, 68 Tex. 414; Todd v. Willis, 66 Tex. 704; De Witt v. Miller, 9 Tex. 239; Cochran v. Thompson, 18 Tex. 652; Giddings v. Steele, 28 Tex. 732, 91 Am. Dec. 336; Burdett v. Silsbee, 15 Tex. 605; Pearson v. Burditt, 26 Tex. 157, 80 Am. Dec. 649.

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And the same was said to be the rule in the following cases: Woolfolk v. Sullivan, 23 Ala. 548; Elliott v. Branch Bank, 20 Ala. 345; Oglesby v. Gilmore, 5 Ga. 56; Hackney v. Steadman, 46 N. C. (1 Jones, L.) 207; Evans v. Oakley, 2 Tex. 182.

The cases denying his right to avoid the sale generally do so on the ground that the sales were not fraudulent, or refuse it on the ground of estoppel, although some of the cases refuse it on the ground that he is in the place of his predecessor and therefore cannot avoid his acts. The cases denying the right of action are as follows: Bell v. Craig, 52 Ala. 215; Sampey v. Sowell, 93 Ala. 447; Paschal v. Davis, 3 Ga. 259; Bates v. Woolfolk, 5 Ga. 329; Windley v. Gaylord, 52 N. C. (7 Jones, L.) 55; Quince v. Nixon, 51 N. C. (6 Jones, L.) 289; Carson v. Duffy, 55 N. C. (2 Jones, Eq.) 507; Collins v. Bankhead, 1 Strobb. L. 25; Cheek v. Wheatley, 3 Sneed, 484, Overruling Bell v. Speight, 11 Humph. 451; Brown v. Franklin, 44 Tex. 559, Criticised in Todd v. Willis, 66 Tex. 704; McDonald v. Alford, 32 Tex. 85, Criticised in Todd v. Willis, 66 Tex. 704; Stronach v. Stronach, 20 Wis. 129.

And the same was said to be the rule in the following cases: Thomas v. Hardwick, 1 Ga. 78; Spoon v. Smith, 36 S. C. 588.

d. Rule at common law.

1. Where assets have been converted by predecessor.

At common law the administrator *de bonis non* is not entitled to assets converted by his predecessor, and cannot maintain an action against his predecessor for conversion in order to obtain further assets. In many of the states this is now remedied by statute. The following cases hold that he cannot maintain an action for conversion in the absence of a statute, and some cases hold this without discussing the question of statute. Finn v. Hempstead, 24 Ark. 111; Bliss v. Seaman, 165 Ill. 422, Affirming 59 Ill. App. 236; Marsh v. People, 15 Ill. 284; Felts v. Brown, 7 J. J. Marsh. 147; Carrick v. Carrick, 23 N. J. Eq. 364; Scituate Ct. of Probate v. Smith, 16 R. I. 444; Brownlee v. Lockwood, 20 N. J. Eq. 239, but see Mulford v. Mulford, 40 N. J. Eq. 163.

And the same was said to be the rule in Graves v. Downey, 3 T. B. Mon. 356.

2. Where there is a devastavit.

At common law an administrator *de bonis non* cannot maintain an action for a devastavit committed by his predecessor, as only assets unadministered pass to the administrator *de bonis non*. In the absence of a statute the following cases hold that a recovery cannot be allowed. Brice v. Taylor, 51 Ark. 75; Ludlow v. Flournoy, 34 Ark. 451; State, Oliver v. Rottaken, 34 Ark. 144; Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703; Thomas v. Hardwick, 1 Ga. 78; Paschal v. Davis, 3 Ga. 259; Re Richard, 58 Ill. App. 91; Short v. Johnson, 25 Ill. 489; State, Pierson v. Gooding, 8 Blackf. 567; Anthony v. McCall, 8 Blackf. 86; Young v. Kimball, 8 Blackf. 167; Warfield v. Brand, 13 Bush, 77; Waterman v. Dockray, 78 Me. 139; Prosser v. Yerby, 1 How. (Miss.) 87; Judge of Probate v. Green, 1 How. (Miss.) 146; Davis v. Brandon, 1 How. (Miss.) 154; Stubblefield v. McRaven, 5 Smedes & M. 130, 43 Am. Dec. 502; Gaskins v. Hammett, 32 Miss. 103; United States, Wilson v. Walker, 109 U. S. 258, 27 L. ed. 927; Wilson v. Arrick, 112 U. S. 83, 28 L. ed. 617; Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292.

And the same was said to be the rule in the following cases: Chamberlain v. Bates, 2 Port. (Ala.) 550, 27 Am. Dec. 667; Benton County Ct. Judge v.

was, having been lost, the *cestui que trust* can stand in no better position than other creditors. *Goodell v. Buck*, 67 Me. 514; *Portland & H.*

S. B. Co. v. Locke, 73 Me. 370; *Fowler v. True*, 76 Me. 43.

Bill dismissed, with costs for the respondent.

Price, 6 Ala. 36; *Willis v. Willis*, 9 Ala. 721; *Martin v. Ellerbe*, 70 Ala. 326; *King v. Smith*, 15 Ala. 264; *Waring v. Lewis*, 53 Ala. 615; *American Bd. of Comrs. for Foreign Missions*, 27 Conn. 344; *Graffenreid v. Kundert*, 34 Ill. App. 483; *Graham v. State*, *Reynolds*, 7 Ind. 470, 65 Am. Dec. 745.

3. Requiring the predecessor to account.

Generally, in the absence of a statute, an action will not lie by an administrator *de bonis non* to obtain an accounting of the assets that were in the hands of his predecessor. *Nolly v. Wilkins*, 11 Ala. 872; *Green v. Byrne*, 46 Ark. 453; *Williams v. Cubage*, 36 Ark. 307; *Finn v. Hempstead*, 24 Ark. 111; *State, Oliver, v. Kottaken*, 34 Ark. 144; *Bradshaw v. Com. 3 J. J. Marsh.* 632; *Slaughter v. Froman*, 5 T. B. Mon. 19, 17 Am. Dec. 33; *Oldham v. Collins*, 4 J. J. Marsh. 49; *Stubblefield v. McRaven*, 5 Smedes & M. 130, 43 Am. Dec. 502; *Blizzard v. Filler*, 20 Ohio, 479; *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *Smith v. Carrere*, 1 Rich. Eq. 123, *Distinguished in Villard v. Robert*, 1 Strobb. Eq. 363.

And the same was said to be the rule in *Eubank v. Clark*, 78 Ala. 73; *Gregory v. Harrison*, 4 Fla. 56; *Burnley v. Duke*, 2 Rob. (Va.) 102.

And the same was held to be the rule where there were no debts. *Thompson v. Buckner*, 2 Hill, Eq. 499, *Riley*, Eq. 33.

And where no statute was discussed. *Shackelford v. Runyan*, 7 Humph. 141.

And the same was said to be the rule in *Easterling v. Thompson*, *Rice*, L. 346.

4. Money and balance due from predecessor.

Generally an action will not lie by an administrator *de bonis non* for the balance in money due by his predecessor, in the absence of a statute. The following cases hold that an action will not lie: *Willis v. Willis*, 9 Ala. 721; *Byrd v. Holloway*, 6 Smedes & M. 323; *Gray v. Harris*, 43 Miss. 421; *Ruff v. Smith*, 31 Miss. 59; *Potts, Wollerton, v. Smith*, 3 Rawle, 361, 24 Am. Dec. 359; *Curtis v. Lynch*, 19 Ohio St. 362.

And the same was said to be the rule in *Carter v. Trueman*, 7 Pa. 315.

But a recovery was allowed without discussing the question of statute, in *Whitaker v. Whitaker*, 12 Lea, 363, distinguishing *Thomas v. Stanley*, 4 Sneed, 411; *Stott v. Alexander*, 2 Sneed, 650; *Cheek v. Wheatley*, 3 Sneed, 484.

Some cases hold that an action cannot be had by an administrator *de bonis non* for money in the hands of his predecessor. *Chamberlain v. Bates*, 2 Port. (Ala.) 550, 27 Am. Dec. 667; *Sibley v. Williams*, 3 Gill & J. 52; *Dement v. Heth*, 45 Miss. 388; *Rives v. Patty*, 43 Miss. 338; *Prosser v. Yerby*, 1 How. (Miss.) 87; *Sloan v. Johnson*, 14 Smedes & M. 47; *Stott v. Alexander*, 2 Sneed, 650; *Thomas v. Stanley*, 4 Sneed, 411.

And the same was said to be the rule in *Anderson v. Miller*, 6 J. J. Marsh. 508; *Thomason v. Thomason*, 1 Met. (Ky.) 53.

But a recovery was allowed in the following cases where the question of statute was not discussed: *Getty v. Long*, 82 Md. 643; *State v. Wright*, 4 Harr. & J. 148.

e. Where the common-law rule has been changed by statute.

1. Where assets have been converted by predecessor.

Where the common law has been changed by statute an administrator *de bonis non* is entitled to recover for conversion by his predecessor in order to obtain assets. In some few cases the question of 40 L. R. A.

this being a remedy by statute was not discussed. *Nevitt v. Woodburn*, 160 Ill. 203; *State, Wright, v. Porter*, 9 Ind. 342; *Stewart v. Phenice*, 65 Iowa, 475; *De Valengin v. Duffy*, 14 Pet. 282, 10 L. ed. 457; *State, Dittman, v. Robinson*, 57 Md. 486; *Balch v. Hooper*, 32 Minn. 158; *State, Renfro, v. Price*, 17 Mo. 431; *State, Shields, v. Flynn*, 48 Mo. 413; *Brown v. Weatherby*, 71 Mo. 152; *State, Burrough, v. Farmer*, 54 Mo. 439; *Van Camp v. Searle*, 79 Hun, 134; *Douglas v. Day*, 28 Ohio St. 173; *Tracy v. Card*, 2 Ohio St. 431; *Foster v. Wise*, 46 Ohio St. 20; *Parrish v. Brooks*, 4 Brewst. (Pa.) 154.

And it was said that a recovery could not be had where it could not be traced. *Tyler v. Wheeler*, 180 Mass. 206.

2. Where there is a devastavit.

Where a statute authorized a recovery by an administrator *de bonis non* for a devastavit, a recovery was allowed. *Eubank v. Clark*, 78 Ala. 73; *Martin v. Ellerbe*, 70 Ala. 327; *Glenn v. Billingslea*, 64 Ala. 345; *Waring v. Lewis*, 53 Ala. 615; *Banks v. Speers*, 103 Ala. 436; *Whitworth v. Oliver*, 39 Ala. 286; *Wilkinson v. Hunter*, 37 Ala. 268; *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472; *Oglesby v. Gilmore*, 5 Ga. 56; *Veach v. Rice*, 131 U. S. 243, 33 L. ed. 163; *Graham v. State, Reynolds*, 7 Ind. 470, 65 Am. Dec. 745; *Newcomb v. Williams*, 9 Met. 525; *Fay v. Muzzey*, 13 Gray, 53, 74 Am. Dec. 619; *Cobb v. Muzzey*, 13 Gray, 57; *State, Koper, v. Burton*, 107 N. C. 526; *Brown v. Seaman*, 65 Tex. 628; *Dwyer v. Kaltetey*, 68 Tex. 554; *Golder v. Littlejohn*, 23 Wis. 251.

And the same was said to be the rule in the following cases, although in some of them the question of statute was not discussed. *Bowers v. Grimes*, 45 Ga. 616; *Soutter v. Porter*, 105 N. Y. 514; *State, Williams, v. Britton*, 33 N. C. (11 Ired. L.) 110; *Cannon v. Jenkins*, 16 N. C. (1 Dev. Eq.) 422; *Hardy v. Miles*, 91 N. C. 131; *Lansdell v. Winstead*, 76 N. C. 366; *Badger v. Jones*, 66 N. C. 305; *Wilson v. Pearson*, 102 N. C. 290; *Low v. Carlisle*, 33 S. C. 567.

A negative holding was had in the following cases: *Murphey v. Menard*, 11 Tex. 673, *Distinguished in Murphy v. Menard*, 14 Tex. 62; *Johnson v. Hogan*, 37 Tex. 77, *Disapproved in Johnson v. Morris*, 45 Tex. 483.

3. Requiring the predecessor to account.

In most of the states by statute an administrator *de bonis non* can compel an accounting on the part of his predecessor in order to realize assets. *Wilson v. Hinton*, 63 Ark. 145; *Duffin v. Abbott*, 48 Ill. 17, *Overruling Stose v. People*, 25 Ill. 600; *Hanifan v. Needles*, 108 Ill. 403; *McDonough v. Hanifan*, 7 Ill. App. 50; *Browne v. Doolittle*, 151 Mass. 595; *Fay v. Muzzey*, 13 Gray, 53, 74 Am. Dec. 619; *Perrine v. Calhoun County Circuit Ct. Judge*, 49 Mich. 342; *State, Davless County, v. Lankford*, 55 Mo. 364; *Boulton v. Whitmore*, 12 Mo. App. 581, *Appx.: Boulton v. Scott*, 3 N. J. Eq. 231; *Walton v. Walton*, 4 Abb. App. Dec. 512; *Kelly v. West*, 80 N. Y. 139; *Colt v. Lasnier*, 9 Cow. 320; *Re Hood*, 104 N. Y. 103; *Re Latz*, 33 Hun, 618, 20 N. Y. Week. Dig. 235; *Le Count v. LeCount*, 1 Dem. 29; *O'Connor v. State, Potter*, 18 Ohio, 225.

And the same was said to be the rule although in some of the cases the question of statute was not discussed. *Martin v. Ellerbe*, 70 Ala. 326; *Shorter v. Hargroves*, 11 Ga. 658; *Knight v. Lasseter*, 16 Ga. 151; *Re Fithian*, 44 Hun, 457; *Peck v. Sherwood*, 5 Redf. 416; *Spencer v. Popham*, 5 Redf. 425; *Re O'Brien*, 45 Hun, 284; *Breslin v. Smyth*, 3 Dem. 251; *State, Goodman, v. Goodman*, 72 N. C. 508; *Merrill v. Merrill*, 92 N. C. 657; *Ham v. Kornegay*, 85 N. C.

119; Gilliam v. Watkins, 104 N. C. 180; State, Baldwin, v. Johnston, 30 N. C. (8 Fred. L.) 381; Tulburt v. Hollar, 102 N. C. 406.

But a recovery was denied on the question of limitation. Pitkin v. Wilcox, 20 N. Y. Civ. Proc. Rep. 27; Murphy v. Menard, 14 Tex. 62.

And on the question of pleading. State v. Ferguson, 8 Ark. 172; Scofield v. Adriance, 2 Dem. 486.

And it was said that a recovery could not be had in Yale v. Baker (The question of statute was not discussed), 2 Hun. 468.

4. Money and balance due from predecessor.

Where the common law has been changed by statute the administrator *de bonis non* is entitled to recover the balance due the estate from his predecessor, in order to administer the same. Brice v. Taylor, 51 Ark. 75; Storer v. Storer, 6 Mass. 390; Palmer v. Pollock, 26 Minn. 433; State, Coste, v. Fulton, 35 Mo. 323; State, Collins, v. Duile, 45 Mo. 269; Morehouse v. Ware, 78 Mo. 100; Scott v. Crews, 72 Mo. 261; Jacobs v. Morrow, 21 Neb. 233; Judge of Probate v. Lane, 51 N. H. 342; Latta v. Russ, 53 N. C. (8 Jones, L.) 111; Slagle v. Entrekin, 44 Ohio St. 637; Chatfield v. Faran, 1 Disney (Ohio) 488; Bowman's Appeal, 62 Pa. 166; Croyell v. Blackfan, 1 Pittsb. 327; Carter v. Trueman, 7 Pa. 315; Connelly's Appeal, 1 Grant, Cas. 366; Trimmier v. Trail, 2 Bail. L. 480; Johnson v. Morris, 45 Tex. 463; Martel v. Martel, 17 Tex. 391; Baldwin v. Dearborn, 21 Tex. 446; Boulware v. Hendricks, 23 Tex. 667; Grant v. McKinney, 36 Tex. 62; Mott v. Ruenbuhl, 1 Tex. App. Civ. Cas. (Willson) § 600.

And the same was held where the statute was not discussed. Judge of Probate v. Claggett, 36 N. H. 381, 72 Am. Dec. 314; Judge of Probate v. Heydock, 8 N. H. 491; Prescott v. Farmer, 50 N. H. 90; Villard v. Robert, 1 Strobh. Eq. 393, Questioning

Smith v. Carrere, 1 Rich. Eq. 123; State, Crane, v. Heinrichs, 82 Mo. 542.

And the same was said to be the rule in the following cases: Hood v. Hayward, 124 N. Y. 1; University of North Carolina v. Hughes, 90 N. C. 537; Duke v. Ferebee, 52 N. C. (7 Jones, L.) 10.

This rule was denied in Stose v. People, 25 Ill. 600, but this case was overruled in Duffin v. Abbott, 48 Ill. 17.

And so it has been held that the administrator *de bonis non* is entitled to the money in the hands of his predecessor. State, Burton, v. Tunnell, 5 Harr. (Del.) 182; Peckard v. Price, 5 Del. Ch. 239; Nevitt v. Woodburn, 160 Ill. 203; Lane v. State, Harmon, 27 Ind. 108; Myers v. State, McCray, 47 Ind. 293; Musick v. Beebe, 17 Kan. 47; State v. Wright, 4 Harr. & J. 111; Donaldson v. Raborg, 26 Md. 312; Sibley v. Williams, 3 Gill & J. 52; Wiggin v. Swett, 6 Met. 194, 39 Am. Dec. 718; Buttrick v. King, 7 Met. 20; Sewall v. Patch, 132 Mass. 326; Foster v. Bailey, 157 Mass. 160; State, Darland, v. Porter, 9 Mo. 352; State, Blanton, v. Hunter, 15 Mo. 490; Wickham v. Page, 49 Mo. 526; Luers v. Brunges, 56 How. Pr. 232.

And the same is said to be the rule in Clapp v. Meserole, 1 Abb. App. Dec. 362; Power v. Speckman, 126 N. Y. 354.

And the same was held where the money was treated as specie unadministered. Hatch v. Caine, 86 Me. 282; Hackney v. Steadman, 46 N. C. (1 Jones, L.) 207.

And the same was said to be the rule in Gamble v. Hamilton, 7 Mo. 469.

But a recovery was denied for money where the order of court required by statute was not obtained. Johnson v. Farmers' Bank, 11 Md. 412; State, Dittman, v. Robinson, 57 Md. 486; State, Green, v. Hart, 57 Md. 234.

An a recovery was denied on the ground of estoppel. Thayer v. Kinsey, 182 Mass. 232. I. T.

ARKANSAS SUPREME COURT.

S. J. JOHNSON, Admr., etc., of N. G. Hewitt, Deceased, *Appt.*,

P. C. DOOLEY, Admr., etc., of Laura S. Hewitt, Deceased.

(.....Ark.....)

1. The word "payable," when used in promissory notes and other commercial transactions, means "to be paid" rather than "which may be paid."

2. A note "payable" in specified bonds at par does not become payable in money on the failure of the maker to pay or tender the bonds on the day the note is due, since it does not give him the mere privilege or option to pay in bonds, but makes a positive and absolute promise to pay in the specific funds named.

(February 19, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiff in an action brought to enforce payment of an instrument in the form of a promissory note. *Reversed.*

NOTE.—As to the right to make payment in bonds or stocks instead of money, see also Farmers' Loan & Trust Co. v. Canada & St. L. R. Co. (Ind.) 11 L. R. A. 740; Oriental Hotel Co. v. Griffiths (Tex.) 30 L. R. A. 765.

40 L. R. A.

The facts are stated in the opinion.

Messrs. Dodge, Johnson, Carroll, and Pemberton, for appellant:

The writing sued on is not a promissory note, but is an agreement to deliver certain property and choses in action by a day certain, to wit: Arkansas levee bonds at the city of Little Rock, Arkansas.

Fry v. Rousseau, 3 McLean, 106; *Irvine v. Lowry*, 39 U. S. 14 Pet. 299, 10 L. ed. 464; *Quimby v. Merritt*, 11 Humph. 489; *Cor v. Peck*, 3 Yerg. 485; *Wynn v. Harman*, 5 Gratt. 163; *Thompson v. Sloan*, 23 Wend. 78, 35 Am. Dec. 546; *Cook v. Satterlee*, 6 Cow. 108, 16 Am. Dec. 432.

The contract calls for Arkansas levee bonds to the amount of \$1,000, face value; nothing more, nothing less, and all this court can award claimant would be \$1,000 in levee bonds, or their value, and nothing more.

Dillard v. Evans, 4 Ark. 176; *McChord v. Ford*, 3 T. B. Mon. 166; *Stucker v. Miller*, 5 Litt. (Ky.) 235; *Chambers v. George*, 5 Litt. (Ky.) 335; *Graham v. Adams*, 5 Ark. 262; *Hawkins v. Watkins*, 5 Ark. 482; *Chitty, Bills*, 152; *Rex v. Wilcox*, cited in Bayley on Bills of Exchange, p. 10; *Jones v. Fales*, 4 Mass. 245; *Leiber v. Goodrich*, 5 Cow. 186; *McCormick v. Trotter*, 10 Serg. & R. 94; *Lange v. Kohne*, 1 McCord. L. 115; *Gwinn v. Roberts*, 3 Ark. 73; *Wallace v. Henry*, 5 Ark. 107;

Sims v. Whitlock, 5 Ark. 103; *Wilburn v. Greer*, 6 Ark. 253; 1 Randolph, Com. Paper, § 96.

Where the means of payment provided for is not money, it follows that the damages recoverable are not the amount named, but the value of the medium in money.

1 Randolph, Com. Paper, § 96, and cases cited in note; *Wallace v. Henry*, 5 Ark. 105.

A note payable in merchandise or work is not commercial paper.

1 Randolph, Com. Paper, § 101.

A promise to pay levee bonds to the claimant is a contract to deliver certain species of personal property. It is not a negotiable note or commercial paper.

1 Parsons, Notes & Bills, pp. 37, 45; Story, Promissory Notes, §§ 17, 18.

A bond or covenant for \$1,000 in levee bonds is payable in levee bonds at their nominal value, regardless of depreciation. If the bonds are not forthcoming the market value must control.

Bizzell v. Brewer, 9 Ark. 58; *McKiel v. Porter*, 4 Ark. 584; *Mitchell v. Walker*, 4 Ark. 147; *Brodie v. Watkins*, 31 Ark. 319; *Smithee v. Garth*, 33 Ark. 17.

Mr. P. C. Dooley, *in propria persona*:

The note is for the payment of a fixed number of dollars with interest at a fixed time and place, leaving no uncertainty, nothing for computation or calculation.

Gregory v. Bewly, 5 Ark. 318; *Day v. Lafferty*, 4 Ark. 450; *Gist v. Gans*, 30 Ark. 285; *Hoy v. Tuttle*, 8 Ark. 124, 46 Am. Dec. 309.

The contract is simply in the alternative, and when the privilege it gives is refused, it certainly becomes absolute and the privilege is lost.

Bizzell v. Brewer, 9 Ark. 58; 2 Parsons, Notes & Bills, 163; *Plowman v. Riddle*, 7 Ala. 775; *Stewart v. Donnelly*, 4 Yerg. 177; *Orr v. Williams*, 5 Humph. 423; *Gilman v. Moore*, 14 Vt. 457; *Townsend v. Wells*, 8 Day, 327; *Edwards v. Morris*, 1 Ohio, 524; *Crockett v. Moore*, 3 Sneed, 145.

When the contract, upon its face, or in its terms, furnishes the means of ascertaining the exact amount due for specific articles or services, debt will lie.

Langtry v. Walker, 6 Humph. 336; 1 Meigs, Dig. p. 418; *Marrigan v. Page*, 4 Humph. 247; *Lawrence v. Dougherty*, 5 Yerg. 435.

Wood, J., delivered the opinion of the court:

This appeal is from a judgment of the Pulaski circuit court in favor of appellee, based on the following instrument:

\$1,000. Keesville, N. Y., Aug. 3, 1882.

On the first day of January, 1883, for value received, I promise to pay Laura S. Hewitt, one thousand dollars with interest, payable in levee bonds of the state of Arkansas, at par, and at Little Rock, in said state.

N. G. Hewitt.

The case was tried by the court sitting as a jury, and the facts as found by the court are as follows: "The court finds the note executed August 3, 1882, and due January 1, 1883. That N. G. Hewitt died February 6, 40 L. R. A.

1887, and letters of administration were issued on his estate February 19, 1887. The claim was presented in due form of law to the administrator on December 15, 1888, within two years of granting of letters. That the levee bonds and furniture claimed to have been accepted under the agreement of December, 1886, were never, in fact, delivered and accepted in satisfaction of said note, and that the accord was never consummated, though it was agreed upon by the parties; and plaintiff is entitled to judgment for \$1,000, and interest at 6 per cent from August 3, 1882." The court declared the law as follows: "The note is for \$1,000, with interest at 6 per cent from date, with right of maker to discharge in levee bonds at their face at maturity. Not having been so discharged, the maker was liable for the amount stated in money, and, this never having been paid or settled, the plaintiff is entitled to judgment for the full amount, and interest from date, and judgment ordered accordingly."

The word "payable," when used in commercial transactions, and in instruments like the one in suit, means "to be paid," rather than "which may be paid." Century, Dict. *Payable*. Both terms, when used in similar instruments, received an early construction by this court, which has not been departed from and to which we adhere. In *Day v. Lafferty*, 4 Ark. 450, the suit was in covenant upon the following instrument:

\$129.50. By the first of April next, we promise to pay Lorenzo D. Lafferty one hundred and twenty-nine dollars and fifty cents, for value received, payable in current Arkansas Bank notes. Witness our hands and seals this 24th December, 1840.

A plea of tender was set up and a demurrer was sustained to said plea by the lower court, one reason being "that tender was not made on the day of payment." In discussing this, the court, through Judge Dickinson, said: "We consider the law well settled that, if a party covenants to pay in specific articles, he must meet his contract at the time and in the manner specified. Tender cannot be made after the day, unless the damages are capable of being reduced to certainty, by computation; nor can it be pretended that it is possible to do so, in this instance, without the intervention of a jury." In *Gist v. Gans*, 30 Ark. 309. Chief Justice English, after quoting the above, said: "The effect of this decision is that the obligation sued on was not payable in money but in bank notes, the value of which would have to be assessed as damages." In *Dillard v. Evans*, 4 Ark. 176, the suit was in debt on a note payable "in the common currency of Arkansas," and it was held that the note sued on was not an obligation for the direct payment of money. See also *Hudspeth v. Gray*, 5 Ark. 157; *Graham v. Adams*, 5 Ark. 262; *Hawkins v. Watkins*, 5 Ark. 482; *Wallace v. Henry*, 5 Ark. 107; *Sims v. Whitlock*, 5 Ark. 103; *Wilburn v. Greer*, 6 Ark. 255, citing *Bizzell v. Brewer*, 9 Ark. 58. In the case of *Gregory v. Bewly*, 5 Ark. 318, the writing sued on was as follows:

One day after date we or either of us promise to pay to Hawkins Gregory, executor of

the estate of R. T. Banks, deceased, the sum of two hundred and twenty-seven dollars and twenty five cents, with interest at the rate of ten per cent. per annum, until paid, which may be discharged in Arkansas money.

In *Hoy v. Tuttle*, 8 Ark. 124, the writing sued on was a note in the ordinary form, for \$40, with this closing sentence: "This note may be paid in the currency of Arkansas." In these cases it was held that the words "may be discharged," or "may be paid," imported an alternative condition in the writing by which the maker might discharge his obligation for the payment of money at maturity, in the particular funds or property specified, but, if he failed to do so at maturity, the privilege was gone, and the obligation to pay in money or specie became absolute. There is no conflict between these cases and *Day v. Lafferty* and other cases *supra*, but a clear distinction, which Judge Sebastian recognizes in *Gregory v. Beily*, 5 Ark. 318, as follows: "The obliga-

tion here sued on is distinguishable from the case of one payable, primarily in common currency of Arkansas,"—citing *Dillard v. Evans*, 4 Ark. 176, and *Hudspeth v. Gray*, 5 Ark. 157. The obligation in the case at bar was payable primarily "in levee bonds of the state of Arkansas." There is nothing in the record to show that the term "payable" in the obligation sued on was used in any other than the sense in which that term is usually employed in ordinary commercial or other business transactions. The common acceptance of the term, when so used, is "to be paid" as indicated in the beginning of this opinion, and it does not signify any alternative condition, privilege, or option, but the positive and absolute condition of payment at the time, place, and in the specific funds named. The court, therefore, erred in its declaration of law.

We find no other error, but for this the judgment is reversed and the cause is remanded for new trial.

Rehearing denied.

CALIFORNIA SUPREME COURT (Department 1).

G. V. HANKINS *et al.*, *Respts.*,
v.

Adolph OTTINGER *et al.*, *Appts.*

(115 Cal. 454.)

1. **An agreement by the owners of race horses** entered at certain stake races to divide equally all premiums and stake moneys offered by the associations on such races awarded to any of the horses of either is not void as a wagering contract.
2. **A horse race given by an association with an offer of a purse** by the association to the successful contestant does not become a wager between the competitors because of a provision for dividing the entrance moneys between the first three horses in the race.

(December 31, 1886.)

A PPEAL by defendants from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to enforce a contract to divide money earned by running horse races. *Affirmed.*

The facts are stated in the opinion.

Messrs. Davis & Hill, for appellants:

The contract or arrangement recovered on is unlawful and against public policy. The racing of horses for moneys toward which the contestants contribute is a wagersous undertaking and cannot be enforced in a court of justice.

Whether what Ottinger and Johnson arranged and carried out is expressly prohibited by the statute or not, it is "otherwise contrary to good morals" and against public policy.

Beard v. Beard, 65 Cal. 355; *Bangs v. Dunn*, 66 Cal. 73; *Edwards v. Estell*, 48 Cal. 195; *Powell v. Maguire*, 43 Cal. 21; *Spence v. Harcey*,

22 Cal. 342; *Forbes v. McDonald*, 54 Cal. 99; *Fuller v. Dame*, 18 Pick. 472; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 267-272, 26 L. ed. 542-544; *Leland v. Talliaferro*, N. Y. Trans. App. 9, 1870.

In all cases *contra bonos mores* the court leaves the parties where it finds them.

Vulcan Powder Co. v. Hercules Powder Co. 96 Cal. 517.

Such contracts prove themselves out of court whenever their nature is disclosed.

El Dorado County v. Davison, 30 Cal. 524; *Bowman v. Gonegal*, 19 La. Ann. 328, 92 Am. Dec. 537; *Morrill v. Nightingale*, 93 Cal. 458; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 517; *Wyman v. Moore*, 103 Cal. 214; *People v. Sergeant*, 8 Cow. 140; *Hall v. Bergen*, 19 Barb. 126.

A sweepstakes is a race in which stakes are to be made by the owners of the horses engaged, and any such race is still a sweepstakes when money or other prize is added.

Such a sweepstakes is gaming, such moneys cannot be recovered. That other valuables are added does not remove the taint. It is still recovering a bet.

Gibbons v. Gouverneur, 1 Denio, 171; *Harris v. White*, 81 N. Y. 539; *Gahan v. Neville*, 2 Cal. 81; *Fuller v. Hutchings*, 10 Cal. 525, 70 Am. Dec. 746.

The whole transaction is vicious if a part of it is.

McGregor v. Donnelly, 67 Cal. 150; *Kreamer v. Earl*, 91 Cal. 116.

As to all such contracts and the incidents thereto the courts keep their hands off.

Martin v. Wade, 37 Cal. 174; *Hill v. Kidd*, 43 Cal. 615; *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110.

Messrs. Rothchild & Ach, for respondents:

The contract was executed, and, even though against public policy, the court will enforce payment of moneys due.

Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732;

NOTE.—As to legality of bets on horse race, see note to *Bernard v. Taylor* (Or.) 18 L. R. A. 859; also *Morrison v. Bennett* (Mont.) post, —, 40 L. R. A.

McDonald v. Lund, 18 Wash. 412; *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 639, 3 Inters. Com. Rep. 319; *Western U. Teleg. Co. v. Union P. R. Co.* 3 Fed. Rep. 423; *Central Trust Co. v. Ohio C. R. Co.* 23 Fed. Rep. 306.

The contract is not illegal or void.

The presumption of law is in favor of the legality of a contract.

Chitty, Contr. 977.

The illegality of an agreement, unless disclosed by the pleadings or the proofs of the party claiming through it, must, in order to be available to the adverse party, be specially pleaded.

Fitzgerald v. Fitzgerald & M. Constr. Co. 44 Neb. 463.

A defense that the contract sued on is in violation of public policy or public law is an affirmative defense, and must be pleaded to enable defendant to introduce evidence in support thereof.

Maitland v. Zanga, 14 Wash. 92; *Buchtel v. Evans*, 21 Or. 809; *Alh Doon v. Smith*, 25 Or. 89; *Sharon v. Sharon*, 68 Cal. 29.

The facts do not show a bet or a wager.

Alford v. Smith, 63 Ind. 58.

Plaintiffs can recover their share of the prize, even though the contract covered sweepstakes.

If the contract is in part bad, as being in violation of law, but good in part, and the good can be separated from the bad, that which is good will be enforced in law.

Jackson v. Shaul, 29 Cal. 287; *Granger v. Original Empire Mill & Min. Co.* 59 Cal. 679; *Norris v. Harris*, 15 Cal. 256; *Prost v. More*, 40 Cal. 347; *Treadwell v. Davis*, 34 Cal. 601, 34 Am. Dec. 770; *Santa Clara Valley Mill & L. Co. v. Hayes*, 76 Cal. 387; *Corcoran v. Lehigh & F. Coal Co.* 138 Ill. 390.

Van Fleet, J., delivered the opinion of the court:

It is contended that the contract sued on was without consideration, in that it was a mere wagering venture, which was void as against public policy, and not enforceable in a court of law. The contract, as alleged and found, was substantially this: The plaintiffs and the defendants, both owning race horses, and having them entered in certain stake races about to be given by the Pacific Coast Blood Horse Association and the California Jockey Club, made the agreement between themselves that they would pool all premiums and stake moneys offered by said associations on said races, which should be awarded to either or any of their said horses, and divide the same equally—one half to the plaintiffs and one half to the defendants. It was found that one of the defendants' horses was awarded a purse so offered, amounting to \$5,480, which defendants now refuse to divide. At common law a wager made in respect to matters not affecting the feelings, interests, or character of third persons, or the public peace, or good morals, or public policy, was valid and its payment could be enforced; but if it was of a kind to affect the interests or character of third persons, or was in relation to a matter which militated against good morals or sound public policy, it was void, and no action in 40 L. R. A.

affirmance of such a contract could be maintained. Whether betting on horse races was of a character to fall within the latter class at common law is a matter about which there is elsewhere some contrariety in the adjudged cases. But so far as this state is concerned, the question has been directly settled in the case of *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110, where it was held that such contracts are void, as contravening good morals, and cannot be enforced by the courts. It is well settled, however, that a bet or wager, such as comes within the rule of public policy and good morals invoked in that case and by the appellants here, is where the parties competing themselves each put up or bet a certain sum or valuable thing, which is to be taken by the winner and forfeited by the loser on the turn of the event. *Alford v. Smith*, 63 Ind. 58; *Harris v. White*, 81 N. Y. 532. Such a contract will not be affirmed by the courts, but the parties will be left for redress to their own code of ethics. But the contract presented for consideration was not such a contract. It related solely to purses or stake moneys to be paid by the associations offering them, and covered nothing which the parties themselves might see fit to hazard. There was no wager or bet of their own money to be lost by one and taken by the other, but only that of a third party offered for their competition. This did not constitute the transaction a wager. "There is a clear distinction," says the supreme court of judicature of Indiana in *Alford v. Smith*, 63 Ind. 58, "between a wager or a bet, and a premium or reward. In a wager or a bet there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished, who are the parties who must either lose or win. In a premium or reward, there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event. The two need not be confounded." That was a case where the winner of a purse offered by a trotting association on a race sued to recover the amount upon the association refusing to pay; the defense of the latter being that the purse was a mere wager, which did not constitute a valid consideration for their promise. It was held that the winner could recover. The distinction between a bet or wager and a premium or purse is thus given in *Harris v. White*, 81 N. Y. 532: "A bet or wager is ordinarily an agreement between two or more, that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain; and the stake is the money or thing thus put upon the chance. There is in them this element that does not enter into a modern purse, prize, or premium, viz., that each party to the former gets a chance of gain from others, and takes a risk of loss of his own to them. 'Illegal gaming implies gain and loss between the parties by betting such

as would excite a spirit of cupidity.' *People v. Sergeant*, 8 Cow. 189. A purse, prize, or premium is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered; and, if he abide by his offer, that he must lose it, and give it over to some of those contending for it, is reasonably certain." It is betting or wagering on the event of races which is regarded by the law as immoral, and which it undertakes to discourage by refusing its countenance in the way of legal redress to enforce such compacts. Trials of speed between horses, commonly denominated "horse races," are not in themselves, and apart from the improper purposes they may be made to subserve, discountenanced by the law. Nor is the giving of purses or premiums by associations or individuals, not themselves competing for the purpose of encouraging such contests, regarded as contrary to good morals or forbidden. Were these things unlawful our state and district agricultural societies which are fostered and encouraged by the laws of the state, would be compelled to forego one of their most popular and attractive features. The offering of a purse or premium for the fastest race horse is not distinguishable in principle, however it may be otherwise regarded, from the giving of a premium for the best qualities in other respects in the horse, as for draught or breeding purposes, or for the best breed of bulls or cows or other domestic animals. In the one case it encourages the breeding of the animal for his qualities of speed; in the other, it brings out the best draught horse or brood mare, or the most desirable breed of cattle, sheep, or hogs. And competing for such premiums or offerings, whatever may be their designation, is not competing for a bet or wager. As suggested in *Altord v. Smith*, 68 Ind. 58: "These premiums are certainly not wagers. As well might we call an insurance policy a wager, because it is to be paid on an uncertain event, as to call a premium a wager, because we do not know who will be entitled to it until the event happens." In the present case the evidence shows that the amount found to have been won by defendants was all money offered by the associations. The fact that the latter added to the \$5,000 purse the amount of the entrance money, to be divided between the first, second, and third horses in the race, did not tend to impart to the transaction the character of a wager between the competitors. This entrance money had been paid to the associations by the various persons desiring to compete in the race, respectively, not as a wager or bet, which might be withdrawn before the event, but as a fee for the privilege of entering in the race, which became and was the property of the association as much as the principal purse of \$5,000. It constituted, in no proper sense, a bet or wager between the parties.

The objection that the evidence does not sustain the finding that defendants were partners in the transaction is untenable. Under the evidence, the court was fully justified in finding the existence of that relationship; 40 L. R. A.

and also that Ottinger was authorized to enter into the agreement in behalf of the partnership.

The order denying a new trial is affirmed.

We concur: **Harrison, J.; McFarland, J.**

Rehearing in banc denied. **Beatty, Ch. J.**, dissenting.

(In Banc.)

COLFAX MOUNTAIN FRUIT COMPANY,
Respt.,

SOUTHERN PACIFIC COMPANY, Appt.

(118 Cal. 848.)

1. The liability of a carrier for passenger-train service continues to destination, under a contract to receive and forward fruit by such service to a connecting station on its road and from there "to forward" the property to destination, but providing that "its responsibility as a common carrier is to cease at the point where the freight leaves its road."

2. Variance between pleading and proof is not ground for reversal when no objection was made in the trial court.

(*McFarland, J., dissents.*)

(October 22, 1897.)

APPEAL by defendant from a judgment of the Superior Court for Placer County in favor of plaintiff in an action brought to recover damages for alleged breach of a carriage contract. *Affirmed.*

The facts are stated in the opinion.

Mr. William F. Herrin, with **Mr. Foshay Walker**, for appellant:

The instructions once having been given to the carrier to whom the forwarder delivers the goods, any failure in matter of complying with them on the part of the connecting carrier, either in transporting the goods in accordance therewith, or conveying the necessary information to the next connecting carrier, is alone chargeable to the particular connecting carrier at fault.

Nanson v. Jacob, 12 Mo. App. 127.

If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of forwarder by the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route beyond.

Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325.

If more is expected from the company receiving the shipment, there must be a special agreement for it.

Where an express company agrees to forward a package to a point beyond the terminus of its route, the contract expressly limiting its liability to that of forwarder, and through charges not having been paid, the liability of

NOTE.—As to liabilities of connecting carriers, see also *Chicago & A. R. Co. v. Mulford* (Ill.) 35 L. R. A. 699, and other cases cited in footnote thereto.

the company as a common carrier ceases at the end of its route.

Reed v. United States Exp. Co. 48 N. Y. 462, 7 Am. Rep. 561; *Van Santvoord v. St. John*, 6 Hill, 157; *Farmers' & M. Bank v. Champlain Transp. Co.* 18 Vt. 121; *Elmore v. Naugatuck R. Co.* 23 Conn. 457, 63 Am. Dec. 148; *Dillon v. New York & E. R. Co.* 1 Hill, 231; *Hempstead v. New York C. R. Co.* 28 Barb. 485; *Knott v. Raleigh & G. R. Co.* 98 N. C. 73; *Berg v. Atchison, T. & S. F. R. Co.* 30 Kan. 561; *Deming v. Norfolk & W. R. Co.* 21 Fed. Rep. 25; *Shiff v. New York C. & H. R. R. Co.* 16 Hun, 278; *Atchison, T. & S. F. R. Co. v. Richardson*, 53 Kan. 257; *Gulf, C. & S. F. R. Co. v. Tennant* (Tex. Civ. App.) 22 S. W. 761; *Wehmann v. Minneapolis, St. P. & S. S. M. R. Co.* 58 Minn. 22; *McEacheran v. Michigan C. R. Co.* 101 Mich. 264; *Gulf, C. & S. F. R. Co. v. Allcorn* (Tex. Civ. App.) 23 S. W. 186.

Messrs. Ben. P. Tabor and Charles Tuttle for respondent.

Garoutte, J., delivered the opinion of the court:

This is an action to recover damages. The case was tried upon an agreed statement of facts, and judgment went for plaintiff. This appeal is prosecuted from such judgment.

The important question presented here for consideration is, Does the judgment follow the findings of fact? And the determination of that question is dependent upon the construction to be given a certain contract entered into between the parties to the action. This contract was in the form of a shipping order, made out by plaintiff, and the parts thereof material for our consideration are as follows:

Shipping Order, Southern Pacific Company.
Colfax Station, October 24, 1890.

Delivered this day by the undersigned to the Southern Pacific Company the property herein described, in apparent good order, except as noted, to be forwarded with as reasonable despatch as its general business will permit to Ogden station, and there delivered in like good order, . . . on payment of charges, subject to the following conditions and agreements indorsed hereon: Consignee, marks and destination: Sgobel & Day, New York. [Here follows a description of the property consisting of fresh fruit.] Care C. & N. W. via Erie Dispatch, New York. Passengers train service, U. P. 32,009. Agent Southern Pacific Company will please forward, subject to conditions and agreements indorsed hereon. [Signed] C. M. F. Co., Shippers.

This printed contract, at the time of being signed and delivered by plaintiff to defendant, had indorsed upon the back thereof, among other printed conditions, the following: "That the company agrees to forward the property to the place of destination named, but its responsibility as a common carrier is to cease at the station where the freight leaves

this road, where the property is to be delivered to connecting roads or carriers." It seems that the characters "U. P. 32,009" meant Union Pacific car No. 32,009. Defendant transported the car in question by passenger train over its road to Ogden, and there delivered it to the Union Pacific Railway Company, the next connecting carrier, with a request that the last-named company "and its connection between Ogden and New York City should, until the arrival of said car at final destination, accord to it passenger train service." After delivery to the Union Pacific Company,—but on what line does not appear,—delay occurred in the transmission of the car, so that it was three days overdue on arrival at New York, and in consequence the fruit suffered decay, and was sold at a loss to plaintiff. This loss forms the basis of the judgment rendered.

It is contended by plaintiff that by the contract, which has been substantially set forth, defendant undertook to furnish passenger-train service for the car of fruit from Colfax to New York, and that the connecting lines were its agents for this purpose. It is claimed by defendant that under the contract, upon delivery of the car of fruit at Ogden to the Union Pacific Company, with instructions for continued passenger-train service, defendant's obligation under the contract terminated. There is no question but that the defendant had the power to enter into a contract with plaintiff, whereby it bound itself to carry this fruit from Colfax to New York city by passenger-train service. Such is the law everywhere, and this principle is directly recognized by § 2201 of the Civil Code, which, in effect, provides that the liability of a common carrier who accepts freight for a place beyond his usual route ceases upon delivery of the freight at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, unless he stipulates otherwise. There is no authority in the contract justifying the construction that its terms demanded "passenger service to Ogden, and a request simply to connecting carriers for passenger service thereafter." A shipper desirous of through passenger-train service would hardly be satisfied with such a contract. By that construction there would be no obligation upon the part of the Union Pacific Company to give passenger service, and its refusal to furnish it would create no liability either against it or defendant. The defendant's implied contract demanded that it deliver the fruit to the Union Pacific, with instructions to further transport it, but there would be no implied contract that this fruit should have passenger-train service thereafter. The law demanded no such request from defendant. The contract upon its face contains no covenant that a request for passenger-train service should be made by defendant of the Union Pacific Company. As to such service, the contract before us bears but one of two constructions: either it was an agreement upon the part of the defendant to furnish such service to Ogden, or an agreement to furnish such service to New York city. The contract is a

"(*) When freight is destined off or beyond the line of the Southern Pacific Company, agents will be careful to note that the name here inserted is the station at which freight leaves the road."

printed form, and is evidently used for regular freight service. It is also apparent that it is used for all freight service, whether or not the freight is transported beyond its own lines of road. For these reasons apparent inconsistencies arise as to some of its provisions. If the defendant agreed to transport this fruit to New York, there can be no question but that it also agreed to give it passenger-train service; for that the fruit was to have such service as far as the defendant agreed to carry it is and must be conceded. The contract is unilateral in form, and in three distinct and separate places therein we find an agreement as to the transportation of this freight: (1) Defendant agreed to forward it to Ogden station from Colfax, "with as reasonable despatch as its general business would permit." (2) Defendant agreed to forward it "subject to conditions and agreement indorsed hereon." (3) The defendant agreed to "forward the property to the place of destination named." The first provision is an agreement to carry the fruit from Colfax to Ogden; the second provision is clearly one to carry the fruit from Colfax to one of two places,—Ogden or New York; the third provision is one to carry the fruit from Colfax to Ogden, or from Colfax to New York, or it is an agreement to forward the fruit from Ogden to New York. It will be observed that the verb "carry" or "transport" is not used in this contract, but that the verb "forward" is used in the three provisions cited. It cannot be questioned that the defendant, in agreeing to forward the fruit, as the word is used in the first two instances found in the contract, stood in the position of a common carrier towards the plaintiff, and not in the position of a "forwarder." It must be true that it was treating with plaintiff in that capacity; and it is equally true that by the use of the verb "forward" it was understood by both parties that the defendant was to carry or transport the fruit. This is manifest when it is considered that the route from Colfax to Ogden is its own, and that the property was to be taken over that route by it. Hence, as a common carrier, it agreed to "forward" the fruit over its own road; in other words, carry or transport it. This brings us to a consideration of the meaning of the word "forward," as used in the last provision cited. When contracting parties use the same word three times in a contract, and in the first two instances its meaning is plain, other things being equal, it should be given the same meaning when used the third time. Any doubt or ambiguity as to the intention of the parties in the use of the word under such circumstances should be solved in favor of the construction conceded in other portions of the contract. Especially should such construction obtain when the word is a verb, and in each instance purports to deal with the same property. It follows that, if the verb "forward," as used in the contract, means to carry or transport in two instances, it not being apparent that any other meaning was intended when used a third time, we will give it the same meaning when so used. Upon such construction the last clause of the contract we have quoted binds the defendant to carry or transport the fruit to "the place of destination named;" and that place

was New York. It certainly cannot be contended that it was Ogden station, for it was shipped to New York. By the contract it was consigned to Sgobel & Day, New York. The contract in terms, declares its "destination" to be New York; freight was agreed to be paid upon it to that city; and the particular common carriers that were to transport it to that point are set forth upon the face of the contract. The provision of the contract which we have just been considering, quoted in full, is as follows: "That the company agrees to forward the property to the place of destination named, but its responsibility as a common carrier is to cease at the station where the freight leaves this road, when the property is to be delivered to connecting roads or carriers." Taking this provision alone, its natural and reasonable construction is an agreement to carry and transport this car of fruit from Colfax to New York. It is plain that the word "forward" is not used in its technical, commercial sense, and that by its use the defendant did not intend to assume the duties of a "forwarder." In the first place, the defendant, as a common carrier, received property consigned to New York, was bound by implied contract to forward that property from Ogden; hence the provision from such standpoint has no force. Second. If the agreement was simply to "forward" from Ogden to New York, all the latter portion of the provision has no force and effect; for, if the defendant was acting simply as a "forwarder" of freight, he would assume no liability as a common carrier after the fruit left Ogden. Section 2201 of the Civil Code so provides in terms. Third. This clause of the provision clearly applies to all freight handled by defendant, whether that freight be consigned to a point upon or beyond its route; hence the word "forward" must necessarily be deemed to be used in the sense of "transport" or "carry." If the provision be construed as alone referring to the forwarding of freight by defendant over another route, it would be inharmonious and inconsistent with the clause which follows, wherein it is provided that when the property is to be delivered to connecting roads or carriers defendant's liability as a common carrier ceases. By this clause of the provision it is clearly implied that property is "forwarded" to the place of destination when not delivered to connecting roads or carriers. For these reasons also we conclude that this provision of the contract contains an agreement to transport and carry this freight from Colfax to New York. The clause following, to the effect that it shall be relieved from liability as a common carrier while the goods are in transit between Ogden and New York, in no way effects the question under consideration, for the liability here sued upon is not the liability of a common carrier, but a liability incurred for breach of a special contract. By this conclusion the three provisions of this contract we have had under consideration are consistent and harmonious, and due force and effect are given to each. The defendant's contract being to carry this freight to New York, it necessarily follows that it was to give it passenger-train service to that point. It failed to render such service; hence there

was a breach, and a loss resulted to plaintiff by reason of that breach. The contract between the parties, as stipulated at the trial, varied from that alleged in the complaint, but it seems no objection was made by the defendant on this ground in the court below at any stage of the proceeding, and for this reason we will not now reverse the judgment upon

the ground of such variance. We find no substantial error in the record. For the foregoing reasons *the judgment is affirmed.*

We concur: **Van Fleet, J.; Harrison, J.; Temple, J.; Henshaw, J.**

I dissent: **McFarland, J.**

CONNECTICUT SUPREME COURT OF ERRORS.

Harry NICHOLS, *Appt.*,

v.

Cornelius PECK.

SAME, *Appt.*,

v.

Frank HUTCHINSON.

SAME, *Appt.*,

v.

Levi HUTCHINSON.

(70 Conn. 439.)

1. A barway connecting a right of way by prescription with a highway may be cut down by the owner of the easement to the grade of the highway when that is lawfully lowered by the public authorities.
2. The right of passage through a barway as part of a right of way by prescription is not lost by failure to use it for eleven years after the barway has been made impassable by the lowering of a highway with which it connected, by the public authorities, and the use as a substitute under an implied license of another barway about 70 feet distant.
3. A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject of review on proceedings in error.
4. The chaining and locking of a gate is a sufficient revocation of an implied license to use it arising from the owner's acquiescence for eleven years in its use by one who had a right of way across the premises, after a barway at some distance from it, through which he had a right to enter the highway, had been made impassable by the lowering of the highway by the public authorities.
5. One answering in the negative when asked if he had "a regular right of way" over a farm, without being informed of the purpose of the inquiry and with no intention of misleading, is not estopped to claim that he has a way by prescription as against a purchaser of the premises who does not appear to have relied upon the statement.

(March 24, 1898.)

APPEAL by plaintiff from judgments of the Court of Common Pleas for Hartford County in favor of defendants in actions brought to recover damages for trespass on plaintiff's real estate. *Reversed.*

NOTE.—As to the effect of nonuser of an easement, see *Welsh v. Taylor* (N. Y.) 18 L. R. A. 536, and *note*.

40 L. R. A.

The facts sufficiently appear in the opinion. **Mr. Cornelius J. Danaher**, for appellant:

The court has found that the plaintiff, Nichols, was, at the time of the acts complained of, the owner and possessor of the lands described in the complaint, and that the acts complained of were committed by the defendant.

From these acts the law implies damage, and consequently the plaintiff's right to recover.

Miller v. Bristol, 12 Pick. 550; *Swift's Digest*, 105, 512-514, 519; *Riley v. Gourley*, 9 Conn. 154.

The lowering of the highway gave defendant, Peck, no right to make the change of 73 feet.

3 Kent, Com. 557; 2 Bl. Com. 36.

In *Newkirk v. Sabler*, 9 Barb. 652, it is said that if a public highway is impassable, a traveler may go over the adjoining land. But this would not extend to a private way, for it is the owner's fault if he do not keep it in repair.

Taylor v. Whitehead, 2 Dougl. 745; *Henn's Case*, W. Jones, 296; *Pomfret v. Ricroft*, 1 Wms. Saund. 321.

Even a plea justifying under such a condition, if it would be a justification, is not pleaded in this case, and consequently falls in the same category as any other matter beyond the issues in the case.

Greenthal v. Lincoln, 67 Conn. 376.

That the defendant had a right of way 73 feet north of the point where we claim the trespass was committed is without the issue.

Greenthal v. Lincoln, 67 Conn. 376.

Easements lie only in grant.

6 Am. & Eng. Eng. Law, p. 143.

It must be a fixed way along definite lines.

Johnson v. Lewis, 47 Ark. 66; *Jones v. Percival*, 5 Pick. 485, 16 Am. Dec. 415; *Plimpton v. Converse*, 44 Vt. 166.

A way *ex vi termini* imports a right of passage in a particular line.

Comstock v. Van Deusen, 5 Pick. 168; 3 Kent, Com. 551; *Sargent v. Ballard*, 9 Pick. 251; *Davies v. Stephens*, 7 Car. & P. 570; *Livett v. Wilson*, 3 Bing. 119; 3 Kent, Com. 444; *Dodge v. Stacey*, 39 Vt. 568; *Tracy v. Atherton*, 36 Vt. 508; *Campbell v. Wilson*, 3 East, 294.

A right of way by prescription must be uninterrupted, adversely used, and held for the requisite length of time.

Hill v. Crosby, 2 Pick. 466, 13 Am. Dec. 448; *Blake v. Everett*, 1 Allen, 248.

And the same must have always been used without change or variation.

Lawton v. Rivers, 2 McCord, L. 264, 13 Am.

Dec. 741; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489; *Russell v. Napier*, 82 Ga. 770, 10 L. R. A. 484; *Curtis v. La Grande Hydraulic Water Co.* 20 Or. 34; *Shrewsbury v. Brown*, 25 Vt. 197; *Cotton v. Pocasset Mfg. Co.* 13 Met. 429; 3 Kent, Com. 596.

If the boundaries are not fixed by deed, they are fixed by the use of the way, and the use must be for a period of at least fifteen years.

George v. Cox, 114 Mass. 382.

Any entry on lands of another, unless justified, is a trespass.

26 Am. & Eng. Enc. Law, p. 570; 1 Bouvier, Law Dict.

There certainly is no plea of right of way by necessity, and even if there was, it would not avail the defendant, for the fundamental requisite of a right of way by necessity is absent here. That is, the common ownership of plaintiff's and defendant's lands.

Woodworth v. Raymond, 51 Conn. 70; *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. 621.

Nor was there a plea of license, and if the defendant relied upon license, it is absolutely necessary that he plead it.

Hill v. Morey, 26 Vt. 178; *Lockhart v. Geir*, 54 Wis. 133; *Senecal v. Labadie*, 42 Mich. 126; *Ruggles v. Leure*, 24 Pick. 187; Practice Act, p. 16, § 6; Practice Act, Forms, pp. 231, 238.

The defenses are entirely aside from the issue in the record.

Hill v. Morey, 26 Vt. 178; Practice Act, rule 4, § 6; *Greenthal v. Lincoln*, 67 Conn. 376.

If the court should find from the facts set forth in the finding, that the said Peck had the license to enter upon said land, and that said license should not be pleaded, then the license could not have carried with it any interest in the land.

Statute of Frauds, 1866; Cooley, Torts, 306; *Druse v. Wheeler*, 22 Mich. 439.

And was therefore revocable at will.

Cooley, Torts, 305; *Druse v. Wheeler*, 22 Mich. 439; *Wood v. Michigan Air Line R. Co.* 90 Mich. 334.

The act of the said Nichols in chaining up the lower barway, so-called, is a fact from which the court can find a revocation of the license.

Maxwell v. Bay City Bridge Co. 41 Mich. 466; Cooley, Torts, 304.

A way, whether public or private, is the right of going over another man's land.

2 Bl. Com. 84; *Hart v. Chalker*, 5 Conn. 818.

The extent of a right which is acquired in the land of another is determined by the use of the land in question.

Shrewsbury v. Brown, 25 Vt. 205; *Arbuckle v. Ward*, 29 Vt. 48.

The owner of the land retains all the title he ever had, with the right of passage, and may vindicate every damage to his property by an action of trespass.

Lade v. Shepherd, 2 Strange, 1004; *Stevens v. Whistler*, 11 East, 51; *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216.

A user of more than fifteen years is proper evidence of a grant, but then it proves a grant only commensurate with the user. It is this alone which determines what the terms of the grant were. It is the letter of the grant.

40 L. R. A.

Hart v. Chalker, 5 Conn. 814; *Boynton v. Longley*, 19 Nev. 69; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489; *Ballard v. Dyson*, 1 Taunt. 297; *Stanley v. White*, 14 East, 322; *Simpson v. Coe*, 4 N. H. 301; *Pierce v. Selleck*, 18 Conn. 321.

Selection of a right of way made by one to whom the right is conveyed, without designating the right, is conclusive as to his right, and will preclude his subsequent claim of a right to change a locality.

Palfrey v. Foster, 47 La. Ann. 939; *Illinois C. R. Co. v. O'Connor*, 154 Ill. 550; *Green v. Goff*, 153 Ill. 534.

To entitle a person to a right of way by prescription, he must show an uninterrupted adverse user for the requisite length of time, and that he has always used the same without change or variation.

Lawton v. Ritters, 2 McCord, L. 264, 18 Am. Dec. 741; *Jones v. Percival*, 5 Pick. 485, 16 Am. Dec. 415; 3 Kent, Com. 551; *Comstock v. Van Deusen*, 5 Pick. 168.

Ways by prescription depend upon the character of the user.

Pierce v. Selleck, 18 Conn. 331; *Robbins v. Wolcott*, 19 Conn. 367.

A common ownership of plaintiff's and defendant's lands is a fundamental prerequisite for the creation of a way of necessity.

Woodworth v. Raymond, 51 Conn. 75; *White v. Bradley*, 66 Me. 263.

Convenience alone is not sufficient to create or continue a way.

Nichols v. Luce, 24 Pick. 102, 35 Am. Dec. 302.

Individuals can acquire an easement only by grant or by prescription.

2 Washb. Real Prop. 340; *Lovell v. Smith*, 8 C. B. N. S. 120.

An easement is within the statute of frauds, and consequently cannot be acquired by a verbal agreement.

Pitkin v. Long Island R. Co. 2 Barb. Ch. 221, 47 Am. Dec. 820; Gen. Stat. § 1366.

Plaintiff did rely, and he had the right to rely, on Peck's statement, that he had not a right of way.

This was a fault on the part of Peck, and one which will result in injury to the plaintiff if Peck is permitted to say that he has a right of way by prescription, across said land of the plaintiff.

Morgan v. Chicago & A. R. Co. 96 U. S. 716, 24 L. ed. 743; *Sweeney v. Pratt*, 70 Conn. 274; *Preston v. Mann*, 25 Conn. 127.

When one of two innocent persons—that is, persons each guiltless of an intentional wrong—must suffer a loss, it must be borne by that one of them who by his conduct—acts or omissions—has rendered the injury possible.

North River Bank v. Aymar, 3 Hill, 362; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125; *Grinnold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Exchange Bank v. Monteath*, 26 N. Y. 505; 2 Pom. Eq. Jur. 262, 268; *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111; *Morgan v. Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 743; *Holmes v. Cromwell*, 73 N. C. 613; *Anderson v. Armstead*, 69 Ill. 452; *Voorhees v. Olmstead*, 3 Hun, 744; *Clark v. Coolidge*, 8 Kan. 189; *Kuhl v. Jersey City*, 23 N. J. Eq. 84; *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129;

Blair v. Wait, 69 N. Y. 113; *Manufacturers' & T. Bank v. Hazard*, 30 N. Y. 226; *Barnard v. Campbell*, 55 N. Y. 456; 2 Pom. Eq. Jur. 266.

Mr. Charles H. Sawyer for appellees.

Baldwin, J., delivered the opinion of the court:

In 1885 the defendant Peck had acquired, by an adverse user of forty years, a prescriptive right to a way about 48 rods in length, over a farm now owned by the plaintiff, between a certain lot called the "Jones Lot," which was wholly inclosed by that farm, and the highway. The way was not defined by any worn track, but had always been traveled in substantially the same course, running for half its length through a narrow swale, and connecting with the highway through a certain barway. In that year the grade of the highway was solowered by the town authorities as to make the barway useless, whereupon the then owner of the farm closed it, and opened a new entrance from the highway, by a barway set over 70 feet south of that formerly existing. For seven years thereafter the defendant used the new barway as belonging to his way, adversely, under a claim of right. Then the plaintiff bought the farm, and for four years more Peck continued to use the new barway, with his express approval. At the end of that period the plaintiff chained up and padlocked the gate of the barway, and now sues Peck for breaking the chain in order to get access to his lot.

The owner of land which is subject to a right of way is not bound, unless by virtue of some agreement, to keep the way in repair, or to be at any expense to maintain it in a passable condition. The owner of the right of way may repair it, and do whatever is reasonably necessary to make it suitable and convenient for his use. When the old barway became useless, it was therefore the right of Peck to lower it, and alter the level of his way to correspond with the new grade of the highway. *Smith v. Rome*, 19 Ga. 89. He preferred to make use of another barway set up by the owner of the farm, over 70 feet distant from the prescriptive bounds of his way, and to this no objection was made for eleven years. When the plaintiff chained up the gate, however, and locked it, he sufficiently manifested his intention that this use should be continued no longer, and effectually revoked any license implied from his previous conduct. "*Res ipsa loquitur*." *Fool v. New Haven & N. Co.* 28 Conn. 214, 223. A way by prescription, which runs in a defined course to a fixed point, is no more subject to variation by parol agreements, or by acts and conduct, than if it had been created and so described by deed. The finding of the trial court that the way used from 1885 to 1896 was substantially the same as that used from 1845 to 1885 is an inference from facts which do not warrant it. The law cannot regard a way joining a highway through a certain gate as substantially identical with a way joining it through another gate 70 feet distant. A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject of review on proceedings in 40 L. R. A.

error. *Winsted Hosiery Co. v. New Britain Knitting Co.* 69 Conn. 565, 575; *Nolan v. New York, N. H. & H. R. Co.* 70 Conn. 159. The right of way which existed in 1895 exists still. The disuse of part of the way which followed the change of the grade of the highway arose from circumstances which exclude any inference of an intent to abandon that part, unless by exchanging it for another way, the right to which should be equally secure. Such an abandonment might have been presumed, if Watrous, who owned the farm in 1885, had then given Peck a deed of the right to use the new barway, or had Peck's user been continued adversely, and under a claim of right, for fifteen years. But so long as it had no other justification than an implied license, or acquiescence for a shorter term, it could not avail to extinguish his original prescriptive right. Different rules might apply where one location of a highway is abandoned for another substituted for it, by acts of dedication, since a dedication once accepted is irrevocable. *Jones, Easem.* § 429. The defendant's remedy, when he found the gate chained against him, was to have recourse to the way he owned, and cut it down, at the point where the old barway was, to the grade of the highway. *Reignolds v. Edwards, Willes*, 282. The entrance from the old barway became impassable by the lawful act of the public authorities. The owner of the farm only closed it after it had thus become useless. Had he, without such cause, wrongfully closed it, in order to prevent its lawful use by Peck, and then allowed him for eleven years to pass through the new barway, it may be that in such case the latter could not have been excluded from that mode of access to his way, unless reasonable notice of the intended revocation of license had been previously given. *Hamilton v. White*, 5 N. Y. 9. But, as things stood, the defendants were guilty of a technical trespass in forcing their way through.

With respect to the claim of estoppel, it is found by the trial court that, before the plaintiff bought from Watrous, he asked Peck if he had "a regular right of way" over the farm, to which he replied in the negative; but that he was not informed of the purpose of the inquiry, and answered it with no intention of misleading, nor did it appear that the plaintiff relied upon the statement in completing his purchase. The question, being, not whether he had a right of way, but whether he had a regular one, was calculated to direct his attention only to the particular description of his right, and he might well have thought that a way acquired by adverse user was not entitled to the name of "regular." No estoppel can be founded on his reply. *Danforth v. Adams*, 29 Conn. 107. We perceive no reason for bringing separate suits against the Hutchinsens. If the plaintiff desired to establish his title against them also, he should have joined them as co-defendants with Peck. The three suits will be treated as consolidated in this court, and costs taxed in favor of the appellant in one only.

There is error in the judgment appealed from.

The other Judges concur.

GEORGIA SUPREME COURT.

WESTERN & ATLANTIC RAILROAD
COMPANY, *Plff. in Err.*,v.
J. C. MORRISON.

(.....Ga.....)

*1 **Where, in the trial of an action for damages against a railroad company for personal injuries,** the evidence as to the company's alleged negligence was conflicting, it was legitimate for the plaintiff's counsel to argue to the jury that the failure of the defendant to introduce and examine as a witness one of its employees, who was present at the time when the injuries in question were sustained, was a circumstance from which an inference could be drawn that, if this employee had been introduced, and been examined, he would have testified to facts prejudicial to the defendant. This is so, whether the counsel's contention as to this matter was, under all the circumstances in proof, well founded or not; nor was such argument out of order because defendant's counsel had caused the employee in question to be present in court, so that he could have been introduced and examined by the plaintiff's counsel.

2. **If, in view of the entire evidence, it was incumbent upon the court to give to the jury any instruction with reference to the defendant's failure to examine such employee as a witness,** it was certainly right to refuse to give in charge a request to the effect that the production of the employee in court by the defendant was sufficient to relieve it of any presumption or inference that, in case he had been examined, he would have sworn to facts showing negligence on the part of the defendant.

3. **There was no material error in admitting evidence;** the requests to charge, so far as pertinent and legal, were covered by the general charge given to the jury; there was, in view of the entire charge, no error in those portions of it complained of in the motion for a new trial; and the verdict was warranted by the evidence.

(Stimmons, Ch. J., dissenting.)

4. **It will impart no strength to a defense for the defendant to produce a witness not examined** by himself, call attention to his presence, and put him at the service of the plaintiff for examination; but, where this is done, such strength as the defense really has on the evidence before the jury is not subject to be impaired or discounted by any inference to its disadvantage similar to that which might have been drawn from the absence of this witness, had he not been produced or accounted for. If more evidence were needed to establish it, the defense would fail for that reason; if more were not needed, it could not, under these circumstances, be required. No unfavorable inference or presumption could arise from mere failure to examine the witness, and such failure was not legitimate matter for comment by counsel.

(August 5, 1897.)

*Headnotes by LUMPKIN, P. J.

NOTE.—The discussion by the opinions in the above case of the presumptions or inferences to be drawn from failure to examine a witness who is present in court is so full that no attempt to analyze L. R. A.

ERROR to the Atlanta City Court to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Payne & Tye** for plaintiff in error.Messrs. **Van Epps, Ladson, & Leftwich** for defendant in error.**Lumpkin, P. J. :**

We shall not discuss in detail the numerous grounds of the motion for a new trial, the overruling of which is the error complained of in the present bill of exceptions. It is a case where an employee of a railroad company, upon conflicting evidence, obtained a recovery for personal injuries. There are no important questions of law involved, except those specially dealt with in the headnotes. The plaintiff's right to a verdict did not turn upon any presumption of negligence raised by law against the defendant. It was a case in which he introduced evidence tending to prove the company's alleged negligence, to which it replied with evidence tending to show due diligence on its part; and it was therefore simply a matter for the jury to determine upon which side the evidence preponderated.

It appears from the record that one Waters, who was an employee of the defendant in the capacity of fireman at the time when the injuries in question were sustained, and who had excellent opportunities for knowing the truth of the matter, was not introduced as a witness at the trial. He was, however, at the instance of the company, present in court, and this fact was known to the plaintiff's counsel. The latter, in his argument to the jury, contended that the failure of the defendant to introduce and examine this witness was a circumstance from which an inference could be drawn that, if he had been so introduced and examined, he would have testified to facts prejudicial to the defendant. The court was requested to compel the plaintiff's counsel to desist from making such an argument, on the ground that it was improper and illegal, and was also requested to declare a mistrial because of such "improper argument." The court held that the argument was not improper, and refused to declare a mistrial because of it. It was urged here that these rulings were both erroneous, for the reason that when the defendant produced the witness in court, so that he could have been introduced and examined by the plaintiffs, if he had chosen to do so, there could be no proper inference that he knew anything which would be detrimental to the company. The court also refused to charge the following written request presented by counsel for the defendant: "As plaintiff's counsel have argued that

note the question will be made. For presumption from spoliation of evidence, see note to *Hay v. Peterson* (Wyo.) 34 L. R. A. 581.

as only the engineer was examined as a witness, and not the fireman, that this was a circumstance from which the jury might infer that, had the fireman been introduced, this testimony might have shown negligence on the part of the company, I charge you that when the defendant company, in open court, tendered this fireman Waters as a witness to be introduced by plaintiff, if he desired, this was sufficient to relieve defendant of this presumption." While the arguments of counsel should be confined within legitimate bounds, they should not be too greatly restricted. In *Spence v. Dasher*, 68 Ga. 432, Jackson, J., said: "Counsel should have ample latitude in argument, and this court will not interfere when it is allowed by the presiding judge, except in cases of clear abuse of discretion and serious damage to the party complaining." Again, in *Inman v. State*, 72 Ga. 278, Justice Blandford remarked: "Counsel are allowed the largest liberty in the argument of cases before juries, and whether the argument be logical or illogical, or whether the inferences and deductions drawn by them are correct or not, this court will have no power to intervene." And in *Taylor v. State*, 83 Ga. 659, the same justice remarked that a certain argument made by counsel "may have been very illogical, but the court could not prevent counsel from drawing illogical deductions from testimony which had been introduced." These are only a few of the instances in which it has been held that considerable latitude is to be allowed counsel in discussing their cases before juries. It is one thing for an attorney to contend that "such and such" a proposition is true, or that "such and such" an inference is deducible from a given state of facts or circumstances, and quite a different thing for the judge to inform the jury that the positions taken by the attorney are correct. If the law imposed upon the judge the duty of interfering with arguments before juries whenever, in his opinion, the reasoning of counsel was unsound, we apprehend that interruptions of this sort would be very frequent indeed.

It is not necessary to rule in the present case that the contention of plaintiff's counsel as to the effect of the defendant's failure to introduce the witness Waters was well taken. It was, after all, a matter to be passed upon by the jury. Nor do we think the argument upon this matter was out of order because the defendant's counsel had caused Waters to be present in court so that he could have been introduced and examined by the plaintiff's counsel. Presumptively, all persons will tell the truth when sworn to do so, but we know from experience that it is frequently unwise to call as a witness one who, for any good reason, is likely to be biased or prejudiced in favor of the opposite side. Every lawyer who has had much practice in the courts is well aware of this, and generally declines, unless compelled by circumstances so to do, to call a witness whom he has reason to believe is hostile to his client or friendly to the latter's adversary. Theoretically, one party may be under as much obligation as the other to introduce a witness who was present at a transaction or occurrence in dispute, and failure to do so may be said to cut as hard against the one as the other, or that

it should not cut against either, when the witness is in court and ready to be examined; but in spite of all the reasoning and refining which may be had on this subject, and notwithstanding intimations and expressions to the contrary by learned judges, the great fact remains that a large number of witnesses are, for various reasons, more or less biased, and it certainly is true that a party may with more safety introduce a friendly witness than one who is otherwise,—not, necessarily, from a desire to have perjury committed in his favor by the former, or from a fear that it will be committed against him by the latter, but because, as everybody knows, there is much in the manner in which a witness testifies, a great deal often depending upon his emphasis, upon the clearness or uncertainty of his recollection, upon his animus, and upon a hundred other things which cannot well be described, but can readily be imagined, all of which, without bringing him into the attitude of swearing falsely, affect and qualify the force of what he says. The above-mentioned theoretical rule is therefore too broad for universal application, and the lawyer who does not recognize that this is so is apt to make serious blunders in introducing testimony.

As an illustration of the matter with which we are now dealing, suppose there was a matter of fact in controversy between A and B the truth of which was known to no other persons except these two and C a brother of B. A goes on the stand and gives his version of what occurred. B, in his turn, gives an entirely different version, but does not introduce as a witness his brother, C, though the latter is present in court. Is it not a proper matter for contention by A that B failed to introduce his brother because he knew that the brother's testimony would prejudicially affect B's case? And if B's counsel should reply to this, "Why did not A introduce C, unless he feared C's testimony would be detrimental to his case?" could not A properly make reply, "I do not care to go into my opponent's family for a witness?" Other such instances might be given, but it is enough to say that in almost every trial the acts or conduct of either party, bearing directly upon the questions at issue, are legitimate matters of comment. Very frequently, of course, arguments of the nature above indicated should be given little weight, and in each case their value must necessarily depend upon the particular facts and circumstances in proof. We are of the opinion that the judges should have as little to say about matters of this kind as possible. They should not restrain counsel so long as their arguments are kept within reasonable and proper bounds, and they should also be careful not to usurp the functions of the jury in accepting or in disregarding what the counsel have to say. We therefore think, in the present case, that it was certainly right for the judge to refuse to give in charge the request above quoted. It was not for him to say what effect the production of the employee in court by the defendant ought to have had, and he was surely right in declining to instruct the jury that this, of itself, would be sufficient to relieve the defendant of any presumption or inference that, in case he had been examined,

he would have sworn to facts showing negligence on its part.

We do not think the case of *Davis v. Central R. Co.* 75 Ga. 645, relied on by the Chief Justice in support of his dissent, when this case was decided, is controlling upon the question in hand. No point was raised in that case as to the propriety of any argument submitted by counsel, nor did this court, in deciding that case, review any charge, or refusal to charge, by the trial court with respect to the failure of the defendant company to introduce its fireman as a witness. The plaintiffs evidently relied mainly, if not entirely, upon the legal presumption of negligence raised by law against the defendant, and, the verdict being against them, they sought a reversal of the judgment denying them a new trial. We understand their contention to have been that the railroad company could not successfully and completely demonstrate its diligence, and thus overcome the legal presumption against it, without calling as witnesses both the engineer and the fireman who were employed on the locomotive by the running of which the plaintiffs' bull was killed. This court held, as matter of law, that the testimony of a single witness, *viz.*, the engineer, was sufficient to acquit the company of negligence, if the jury chose to believe that witness, and Justice Blandford said they had the right to do this if they thought proper. It is true he did remark that "under the circumstances of this case, the fireman being present and open to plaintiffs, no inference could be drawn against defendant because he was not sworn;" but we are constrained to regard this remark as being merely *obiter*, the matter to which it relates not being one upon which it was necessary to pass. The real point ruled in that case was that a railroad company, sued for the killing of live stock, and being required to overcome a legal presumption of negligence, was not obliged, in order to do this, to call and examine as witnesses all of its employees who were or might have been cognizant of the facts of the occurrence. The decision rendered holds simply that, in such a case, the company may, if it so desires, rest its defense upon the testimony of a single employee, taking the risk of his being discredited by the jury; and, if the jury choose to believe him, the mere fact that the company did not introduce another of its employes was not, of itself, sufficient cause for setting aside the verdict and awarding a new trial. It will be noted that the headnotes in that case were made by the reporter, and that the opinion itself was the only official utterance of the court. We repeat that, in determining what effect the decision of that case should have on the case now in hand, it must not be overlooked that there was no question whatever with reference to the argument of counsel or to the court's charging, or refusing to charge, as to what weight or importance the jury should attach to the nonintroduction by the defendant of its fireman as a witness.

We deem it unnecessary to the purposes of this discussion to comment at length upon the decision of this court in the case of *Anderson v. Savannah Press Pub. Co.* (recently decided) 28 S. E. 216, to which, we are inclined

formed, the Chief Justice will refer in his dissenting opinion. We are unable to find in that case any intimation of a principle in conflict with what is here laid down; and, if the opinion of Justice Atkinson therein contains anything at all relevant to the present question, it supports the view of the same entertained by the majority, for the reason that in that case the rule is distinctly recognized that the nonproduction of evidence within the control of a party may authorize the jury to make inferences unfavorable to such party. The Chief Justice will, in his dissenting opinion, also refer to the cases of *Washington v. State*, 87 Ga. 12, and *Johnson v. State*, 88 Ga. 606, and make certain extracts from the opinion therein. Read with reference to the questions under discussion in those cases, it is hoped that the language then used was appropriate and pertinent; but, whether so or not, it is difficult to perceive how it can throw much light upon the present controversy, since the question it involves could not possibly have been in mind when those cases were being considered. It is not desired to comment further upon them except to say that in the former, which was a case of arson, the language of the writer which the Chief Justice will quote was used in endeavoring to establish the proposition that the trial judge erred in allowing the solicitor general in his argument to the jury to state "that frequent burnings had occurred throughout the country," and make this statement the basis of an argument for a strict enforcement of the law; and in the latter the question under discussion was whether an admission by the accused resulted, either from a failure of his counsel to examine the state's witnesses concerning a fact which the court had ruled to be inadmissible, or from a failure to introduce the same witnesses in behalf of the accused, for the purpose of proving this identical fact, after their exclusion as witnesses for the state. Immediately following that portion of the writer's opinion in the *Johnson Case* which the Chief Justice will quote are the following words: "Let us sum up the matter in a nutshell: The solicitor general offered to prove a fact by one witness, and stated he could prove it by several others. The opposing counsel objected to the testimony, and the court sustained the objection. Then, because this counsel declined to examine these witnesses on the very matter which, at his instance, the court had ruled was not then a proper matter for investigation, and because he refused to introduce these witnesses as his own and examine them about this very matter, it is argued that he thus admits for his client the truth of the thing he had induced the court to rule out. It would be dangerous, indeed, to object to testimony and succeed in having the objection sustained, or to decline to introduce hostile witnesses, if either of these things resulted in establishing, as against the party so objecting or declining the truth of that which from his standpoint and in the opinion of the court was inadmissible altogether." We do not think that any decision of this court, upon a careful examination thereof, will be found contrary

in principle to what is now decided upon the point in controversy.

Judgment affirmed.

Simmons, Ch. J., dissenting:

The controlling question presented for determination in this case is whether, under the circumstances attending the trial, the defendant can properly be said to have forfeited all right to have the merits of his defense passed upon in the light of the evidence submitted, unprejudiced by any imputation of bad faith and duplicity on its part, or was unjustly and undeservedly forced to go before the jury under the cloud of a suspicion that it had wilfully endeavored to conceal and suppress the truth, in the hope that it might thus be able to impose upon the court and jury and perpetrate a fraud upon its adversary.

Obviously, the solution of this question must depend upon whether or not the familiar maxim, *Omnia præsumuntur contra spoliatores*, as now liberally interpreted and applied, can be invoked in a case such as that with which we are called upon to deal. As a general rule it is the privilege of a party to rest his case upon such evidence only as he may deem proper and expedient to offer in his behalf. "All the law requires is sufficient proof; and a party is not bound to introduce all the witnesses to the facts." *Jackson v. State*, 77 Ala. 25, citing *Patton v. Rambo*, 20 Ala. 485. "It is the privilege of a suitor to call every person as a witness who may give material evidence in his favor, and, if he omits to do so, he does it at his peril; but there is no duty, and an omission to call all that are within reach does not necessarily imply a fraud, or a design to suppress the truth, or to impose a falsehood upon the jury." *Bleecker v. Johnston*, 69 N. Y. 309. As a matter of course, the evidence relied on must be competent and admissible, under the established rules of practice, one of which is that the best or highest evidence is always required. "This rule does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in possession of the party;" and "where there is no substitution of evidence, but only a selection of weaker, instead of stronger, proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed." 1 Greenl. Ev. § 82, citing numerous authorities. Nor is a party under any obligation to aid his adversary "in making out his case" (*Carter v. Chambers*, 79 Ala. 232, citing *McGar v. Adams*, 65 Ala. 106); and a bare suspicion that the defendant, if legally called upon to do so, would be unable to vindicate himself, does not amount to substantive proof of facts it is necessary for the plaintiff to affirmatively establish, and cannot supply the place of competent evidence (*Meagley v. Hoyt*, 125 N. Y. 771; *Norfolk & W. R. Co. v. Brown*, 91 Va. 668; *Diel v. Missouri P. R. Co.* 37 Mo. App. 454). "To so hold would be substituting conjecture for proof." *Arbuckle v. Templeton*, 85 Vt. 206. Indeed a defendant may, and frequently does, rest his defense on what he considers the weak-

ness of his adversary's testimony, as he interprets it, or on the exculpatory features it presents." *Carter v. Chambers*, 79 Ala. 232. In a word, a party is ordinarily left entirely free to conduct his cause in such manner, not contrary to the prescribed rules of practice, as he may deem best calculated to promote his interests. To this general rule there is but one exception, viz.: that principle of law which the maxim above quoted was intended to expound,—"Every presumption is made against a wrongdoer." Broom, *Legal Maxims*, 938. While under no duty to aid his adversary in making out his case, a party is not at liberty, by a resort to questionable means, to throw obstacles in his path. Hence, "if a man destroys a thing that is designed to be evidence against himself, a small matter will supply it," said Holt, Lord Ch. J., in *[Anonymous]* 1 Ld. Raym. 781. "This rule is evidently based on the principle that no man shall be allowed to take advantage of his own wrong." Chamberlayne's *Best*, Ev. § 412. Nor does it matter that resort is had to passive, rather than to active, measures calculated to defeat the ends of justice. Thus, wilfully withholding evidence is treated as an equivalent to an attempt to suppress or destroy it. Lawson, *Presumptive Ev.* 120 *et seq.*; Broom, *Legal Maxims*, *supra*. Especially, when the evidence withheld is primary, and weaker proofs are relied on; "for when it is apparent that better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated." 1 Greenl. Ev. § 82. "The conduct of a party in omitting to produce that evidence, in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumption against him, since it raises a strong suspicion that such evidence, if adduced, would operate to his prejudice." Starkie, *Ev.* p. 75. Accordingly, it has become a fixed rule that "the nonproduction of papers, essential in the trial of a cause, which are proved to be in the possession of one of the parties, unexplained, raises a presumption that they contain something which would tend to the disadvantage of the party retaining them if they were produced." *Eckel v. Eckel*, 49 N. J. Eq. 587. And since the privilege has been conferred upon parties of testifying in their own behalf, the rule has been extended so that "when one party to an action has in his exclusive possession a knowledge of facts which would tend, if disclosed, to throw light upon the transactions which form the subject of controversy, his failure to offer . . . [himself as a witness] may afford presumptions against him." *Kirby v. Tallmadge*, 160 U. S. 379, 40 L. ed. 468. To the same effect, see *Payne v. Crawford*, 102 Ala. 388; *Heffelder v. Detrick*, 27 W. Va. 16; *McDonough v. O'Neil*, 113 Mass. 92; *Leeper v. Bates*, 85 Mo. 228; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261; *Throckmorton v. Chapman*, 65 Conn. 442. But "the silence of a party to an action against whom damaging facts are called out in evidence is not equivalent to an admission of their truthfulness" (*Enos v. St. Paul F. & M. Ins. Co.* 4 S. D. 640), nor will it have the effect of shifting the burden of proof (*Werner v. Litzsinger*, 45 Mo. App. 106). For thus

applying the rule in cases where the party himself has an exclusive knowledge of material facts in controversy, but nevertheless declines to testify, there is much reason; for wilfully withholding evidence locked in one's breast tends as effectually to cast a suspicion upon the righteousness of his cause as would the suppression of documentary evidence securely hidden away in a secret drawer, or guarded by the locks and bars of a private vault. However, in a case where a person, not a party to the cause, is not produced as a witness, although probably cognizant of facts material to the issue, this rule may or may not be justly invoked, and therefore due caution should be observed in its application. Ordinarily, the failure to call as a witness one who is equally within the control of both parties will be no ground for any presumption against either party. *Diel v. Missouri P. R. Co.* 37 Mo. App. 454; *State v. Rosier*, 55 Iowa, 517; *Miller v. Dayton*, 57 Iowa, 423, 426, 427; *State v. Cousins*, 58 Iowa, 250; *Horowitz v. Hamburg-American Packet Co.* 18 Misc. 24; *People v. McWhorter*, 4 Barb. 438. Certainly, "the mere omission of a party to a civil action to call a witness who, at the most, has no other or better knowledge of the matter in dispute than those who are produced and give evidence, is not necessarily suspicious." *Bleeker v. Johnston*, 69 N. Y. 312. And to the same effect, see Will's Circumstantial Ev. 141, 142. "Whatever inferences may be drawn against a party by reason of his failure to produce evidence in his control are allowable only on the theory that he wilfully withholds such evidence." *Cartier v. Troy Lumber Co.* 138 Ill. 534, 14 L. R. A. 470. "The noncalling of a witness . . . will not justify an arbitrary presumption of suppression." 2 Whart. Ev. § 1267. Even though there be "a conflict of testimony, the nonintroduction by either party of a witness who, if he was called, could shed light on the matter in controversy, does not warrant a presumption in favor of either plaintiff or defendant. It only warrants a presumption against both" (19 Am. & Eng. Enc. Law, p. 72, note); for, as was pertinently remarked in *Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 363, if a person be "within reach of the process of the court," either party may, with abundant reason, be said to have "equal facilities for bringing . . . [him] into court as a witness; and the mere fact that either . . . [fails] to do so . . . [raises] no presumption that . . . [this person] would testify against their particular theory" of the case. The rule in question must be given "a reasonable construction;" and, "where the witness is 'subject to the call of either party,' no inference can be drawn from a failure to produce him." Taylor, Ev. 9th ed. 183⁴, note. In this view Mr. Lawson also concurs. Lawson, Presumptive Ev. 135, 137. "The presumption is always in favor of honesty and fair dealing, and remains available to the party in whose favor it arises, until overcome by countervailing evidence." 1 Rice, Ev. pp. 96, 97. Hence "it is error" to indulge any unfavorable "inference merely from the fact that a party fails to call a certain witness. No prejudice should arise from such failure, unless the witness be a material one, and presumptively under the

special control of the party." 8 Rice, Ev. § 158. Especially in the administration of criminal law is the rule "to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution." *Com. v. Webster*, 5 Cush. 316, 52 Am. Dec. 711.

The rule which authorizes unfavorable inferences to be drawn against a party who resorts to dishonest methods in the conduct of his cause rests upon the ground of "natural equity." Chamberlayne's Best, Ev. § 411. Such inferences can be indulged only upon the idea that they frequently become "essential to the pure administration of justice." Greenl. Ev. § 82; 1 Elliott, Gen. Pr. § 408. Where the reason of the rule ends, the rule itself must end also. Therefore it "ceases to operate when no presumption of fraud, or of sinister purpose, can arise." *Jackson v. State*, 77 Ala. 25. As where, for instance, a person not called would have been incompetent to testify (*Adams v. Main*, 3 Ind. App. 232); or could not do so with propriety (*Gardner v. Benedict*, 75 Hun, 204), or where a person had been subpoenaed, and was absent through no fault of a party (*Weatherford, M. & N. W. R. Co. v. Duncan*, 88 Tex. 611; *Manhattan L. Ins. Co. v. Alexander*, 89 Hun, 449), or could not be found (*McGuire v. Broadway & S. A. R. Co.* 42 N. Y. S. R. 824). A reasonable construction and just and intelligent application of the rule is to be found in the decisions of the supreme court of Louisiana. In *Day v. New Orleans P. R. Co.* 35 La. Ann. 694, where the plaintiff sought to recover for stock killed at night by one of the defendant's trains, —relying, perforce, upon circumstantial evidence only,—it was held that "the failure of a railroad company to introduce the testimony of its employees who were on the train at the time of the accident raises a presumption of negligence against the company." The defendant knew the particular train which killed the stock, and the names and identity of those of its employees who were on that train and witnessed the occurrence in question, and therefore had it peculiarly within its power to produce evidence in regard thereto. The plaintiff, on the other hand, was at a great disadvantage; for, while the process of the court was at his command, his ability to ascertain the names and whereabouts of the witnesses to the facts was by no means the same as that of the company, which could hardly have been expected to furnish him, in advance of the trial, with any information on the subject. In *Peetz v. St. Charles Street R. Co.* 42 La. Ann. 541, it did not, however, satisfactorily appear that the defendant was attempting to suppress evidence, and the court correctly held that the rule announced in *Day's Case* applied only where it was shown that persons in the employ of the defendant, but not produced as witnesses, were present and saw what occurred, or where it was "made evident that they had knowledge which the employer desired to conceal." And in the later case of *Sauer v. Union Oil Co.* 43 La. Ann. 699, this position was adhered to. All that appeared as suggesting any reason why a certain employee of the defendant should have been called was that the plaintiff testified that this employee "was within 25 feet of him when he was struck" on

the head by a piece of machinery alleged to have been defective. Accordingly, the court said: "It is not shown that . . . [this employee] remained in the employ [of the company], or was accessible, or was even living at the time of the trial; nor is there any showing that he was observing plaintiff when the accident occurred. It is plaintiff's case that needs additional proof, not defendant's. There is no ground for the application of any presumption in such a case." Under facts similar to those appearing in *Day's Case*, 35 La. Ann. 694, Judge Caldwell, in a case before the United States circuit court of appeals, held that the defendant's "failure to produce the engineer as a witness to rebut the inferences raised by the circumstantial evidence would justify the jury in assuming that his evidence, instead of rebutting such inferences, would support them." *Gulf, C. & S. F. R. Co. v. Ellis*, 10 U. S. App. 640, 54 Fed. Rep. 481, 4 C. C. A. 454. Analogous cases, in which the rule seems to have been understood and correctly applied, are *The Fred M. Laurence*, 15 Fed. Rep. 685, where the facts concerning a collision between two vessels were in dispute, and *Schuler v. New York C. & H. R. R. Co.* 90 N. Y. 558, where an infant was injured by the running of defendant's locomotive. In *Bent v. Lewis*, 88 Mo. 462, the rule was invoked against the plaintiff, who relied "on evidence circumstantial in kind and of a vague and indefinite character, when, by his own admission, he . . . [had] it in his power to produce positive and direct proof of the facts." In *Cole v. Lake Shore & M. S. R. Co.* 81 Mich. 156, and *Id.* 95 Mich. 77, the plaintiff absented herself from the trial although she was the only person able to give direct and positive testimony concerning the effect of a fall she received, which she alleged was the result of the defendant's negligence, and the court justly held that her unexplained absence authorized an unfavorable inference as to the justice of her cause, since she voluntarily chose to rely on circumstantial, in lieu of direct, proof that this fall, rather than other natural causes, produced the peculiar affliction from which she suffered. On the other hand, there are decisions which more than justify the observation that, "however salutary, and in general equitable, the maxim, *Omnia præsumuntur contra spoliatores*, must be acknowledged to be, it has been made the subject of very fair and legitimate doubt whether it has not occasionally been carried too far." Chamberlayne's Best, Ev. § 414. Apparently, without regard to whether the evidence could properly be said to be within the exclusive control of one party, and not accessible to his adversary, it has been held that an unfavorable presumption arises merely from the nonproduction of an employee (*Whitney v. Ticonderoga*, 127 N. Y. 40; *Wimer v. Smith*, 22 Or. 469), or husband (*Toomey v. Lyman*, 40 N. Y. S. R. 611), or father of the prosecutrix (*Rice v. Com.* 102 Pa. 408), or father and grantor whose deed is attacked (*Hall v. Vanderpool*, 156 Pa. 132), or alleged paramour of a party, in a libel for divorce on the ground of adultery (*Kenyon v. Kenyon*, 88 Hun. 211). It has even been held that, as the "plaintiffs had a right to call upon defendants to produce" certain documentary evidence in their exclusive possession, "and not having

given them that notice, the defendants . . . [were] entitled to whatever benefit . . . [might] be derived from that omission." *Prick v. Barbour*, 64 Pa. 120. And in *Seward v. Garlin*, 33 Vt. 584, it was held that an unfavorable inference would arise from the failure of a party to interrogate a witness concerning a matter as to which "the party himself had testified, and that such omission might "be weighed by the jury as a circumstance tending to show that the testimony of the party upon such point . . . [was] not true." The supreme court of West Virginia seems to have adopted the arbitrary rule that the duty of calling a witness accessible to either side invariably devolves exclusively upon the party carrying the burden of proof, and that a failure to produce such a witness, unless explained, "raises the conclusive presumption that . . . [his] testimony, if introduced, would be adverse to the pretensions of such party." *Union Trust Co. v. McClellan*, 40 W. Va. 405.

To hold that, merely because a person be in the employ of one of the parties, he belongs to or is "evidence within the exclusive control" of such party, "not accessible to the other side," offends reason and perverts the truth. "Neither slavery nor involuntary servitude, except as a punishment for crime, . . . shall exist within the United States." To swear in behalf of his master is not—at least, ought not to be—a duty within the scope of a servant's employment. So it cannot be arbitrarily assumed that his employer has hired or purchased outright his testimony, and therefore controls or owns it absolutely. Nor, ordinarily, can a party's relatives logically be considered as being in his exclusive possession, and unavailable as witnesses to his adversary. An omission to call a relative is not necessarily even suspicious; certainly it does not amount to substantive or persuasive proof of an attempt to suppress evidence. There may often be cogent reasons, into which no improper motive enters, why a party may not wish to vouch for the credit of a person who, through perhaps no fault of his own, happens to be related to him, by blood or marriage, in a more or less remote degree. Only in a measure more absurd is the arbitrary rule that it is incumbent upon a party claiming under a deed to call as a witness his grantor, in the event the other side may choose to make an attack upon its validity. By a parity of reasoning, one's tailor becomes one's bounden witness if, perchance, one's clothes become the subject-matter of controversy in a contest with one's adversary. None of the other very remarkable decisions last above cited can with profit be seriously discussed.

A review of the Georgia decisions bearing on the subject now under investigation shows that, thus far, this court has succeeded admirably in steering clear of the judicial blunders into which some of the courts of this country have fallen. In *Doe, Hollis, v. Roe*, 36 Ga. 468-473, Walker, J., announced the general rule that "a party has the right to select such competent testimony as he may see proper, and if he can, by any legal testimony, establish the truth of his allegations, the jury should not be told that the introduction of such testimony, rather than some other testimony which

the opposite party insists would be stronger, is a circumstance against the party. Parties have the right to introduce legal testimony to establish the truth of their cases. If the evidence be competent, pertinent to the issue to be tried, and makes clear the point in controversy, this is sufficient, and the jury ought not to be told that it is of an unreliable character." The exception to this general rule, viz., that "failure to produce evidence within the power of a party" raises a presumption "that the evidence if produced, would be prejudicial to the party," was recognized and correctly applied in *Nicol v. Crittenden*, 55 Ga. 497. "The evidence showed that Kimball had made to Crittenden a bill of sale for the property in dispute, or for a part of it at least; that bill of sale was not produced on the trial, and no attempt was made to account for its nonproduction." See page 501. So, also, in *Davis v. Alston*, 61 Ga. 225, where it appeared that a receipt contained "the contract in the main on which the issue in the case" depended, the court properly held that if this paper was in the "possession of defendant or his counsel, and not produced, counsel for plaintiff . . . [might] call the attention of the jury to the fact as a suspicious circumstance, unless the court had ruled that it need not be produced." Again, in *Gainesville, J. & S. R. Co. v. Wall*, 75 Ga. 282, where the plaintiff sought damages for the killing of a cow by one of the company's trains, it was held: "Where the engineer and fireman were always present on the engine, but only the former was sworn as a witness, and the absence of the latter was not accounted for, this was a circumstance from which the jury might infer that, had the other witness been introduced, his testimony might have shown negligence on the part of the company." This was a case similar to that of *Dry v. New Orleans P. R. Co.*, discussed above, where it was peculiarly within the power of the defendant to produce direct and positive evidence of the facts in issue. This is true, also, of the case of *Hoffer v. Gladden*, 75 Ga. 532, where it was said that "failure to produce testimony is a badge of fraud, where the bona fides of the transaction is in issue, and witnesses who ought to be able to explain it are in reach." There, certain creditors attacked as fraudulent a mortgage executed by their debtor, a corporation. "The same counsel represented the mortgagor as well as the mortgagee," but neither the latter, nor any officer or agent of the mortgagor, was present to testify, nor did counsel offer in evidence the interrogatories of his clients, although it was peculiarly within their power to explain the suspicious circumstances under which the mortgage was executed, if in fact it evidenced a bona fide transaction. On the other hand, there are a number of cases reported wherein it was ruled that this exception to the general rule did not apply. One of these is *Schnell v. Toomer*, 56 Ga. 168, in which it was said: "Where it does not appear that the party holds back evidence within his power to produce, the nonproduction of more full and definite evidence that he presents, raises no presumption against him." Another is the case of *Savannah, F. & W. R. Co. v. Gray*, 77 Ga. 440, in which the subject is fully and in-

telligently discussed by Mr. Justice Hall. His statement of the rule governing a case wherein it appears that a party has wilfully withheld or suppressed evidence is now to be found embodied in § 5163 of our new Civil Code. As to the application of that rule, he says: "Ordinarily, and except in specified cases, one credible witness would be deemed sufficient to establish a fact. Code, §§ 3754, 3755. Generally it would seem that all persons having knowledge of the transaction need not be produced. . . . and that an inference unfavorable to the party repelling . . . [a disputable presumption relied on by his opponent] would not be warranted because he failed to produce on the trial all persons who were cognizant of the facts from which the presumption to be rebutted arose. . . . The objection here urged seems to be as to the deficient quantity rather than the quality of the testimony. That all the evidence which would have repelled the presumption raised by the casualty against the railroad was not produced, would, upon principle, scarcely seem to warrant a presumption that the company purposely withheld" evidence from the jury. "The principle relied on in this case is, at most, an exception to the general rule, and should be resorted to only in cases where the facts are similar to those in which it has been recognized and enforced." Neither the engineer nor the fireman was produced. It appeared, however, that the former had left the service of the company, had removed to another state, and could not be located; "and that the fireman, at the time the damage was done, was on the bottom of the tender, attending to his duties, and could not have seen the animal [plaintiff's colt] on the track as the train approached it." Our decisions are all fully in accord with the doctrine, above announced, that, where it does not appear that a party is acting in bad faith in selecting and offering the evidence upon which he elects to rely, no unfavorable inferences can be drawn against him. Thus, in *Harrison v. Kiser*, 79 Ga. 588, it was held that the defendant could not be said to be withholding evidence simply because she did not produce a written contract in her possession, when the plaintiff himself had proved that the writing contained a stipulation the effect of which would be to relieve her from all liability. *East Tennessee, V. & G. R. Co. v. Kane*, 92 Ga. 188-193, 22 L. R. A. 315, it was ruled that, as the plaintiff herself had alleged a fact upon which the company based its defense, "the defendant consequently had a right to rely upon this allegation as an admitted fact, and no unfavorable inference could therefore be drawn against the company because of any failure on its part to call as witnesses its own employees to prove this fact." And, in order to remove any suspicion as to his good faith in conducting his cause, it is always the right of a party to explain his failure to call as a witness a person who, though shown to be cognizant of facts material to the issue, is not produced by him. *Richmond & D. R. Co. v. Garner*, 91 Ga. 27. If the foregoing decisions can possibly be regarded as failing to dissipate all doubt as to the law on this subject which obtains in Georgia, a casual examination of the recent case of *Anderson v. Savannah Press*

Pub. Co. (Ga.) 28 S. E. 216, in which Mr. Justice Atkinson, in behalf of a full bench as at present constituted, pronounced the opinion of the court, will suffice to relieve the matter of all difficulty.

In the present case, the plaintiff, who, at the time of the injury complained of, was in the employ of the defendant in the capacity of "coupler and switchman," testified: "Dora Maner was my conductor. . . . The balance of the crew were Lawrence Milam, engineer; Wallace Waters, fireman; Mullins, coupler; and one Mr. Pitman was the other helper." Though he knew each and all of these persons perfectly well, the plaintiff did not undertake to assign any reason why he could not have secured the presence in court of any one of them whom he may have desired to appear as a witness in his behalf,—did not even pretend that any one of them was inaccessible to him. He did call as a witness Mullins, the coupler, and elected to stand on the latter's testimony, in addition to his own, with respect to the cause of the injury. The company introduced its conductor, who had, if anything, even a better opportunity than did the plaintiff's witness to observe everything that occurred; also its engineer, who was charged with negligently running its locomotive, and certainly ought to have known the manner in which it was run; also Pitman, the helper, who was at the time on the engine, and had equally as good an opportunity to know the truth in this regard. In addition, the defendant put upon the stand a number of expert witnesses, whose testimony tended to show that it was a physical impossibility for the casualty to have happened from the causes and in the manner testified to by the plaintiff and his witness. The defendant did not, however, introduce its fireman, Waters, who, upon the occasion in question, appears to have been at his post of duty on the engine. There was no showing on the part of the plaintiff that this witness had, at any time prior to or up to the date of the trial, been inaccessible to him. Indeed, the plaintiff closed his case without any attempt to show that Waters was within the jurisdiction of the court, or longer in the company's employ, or within its reach, or even in life. This being so, could it be said, with any degree of honesty and fairness, that a reasonable suspicion of duplicity and cunning artifice hung over the defendant, and cast a legitimate doubt upon the righteousness of the cause it was endeavoring to sustain?

This inquiry, though it seems naturally to suggest itself in this connection, is not, however, the precise question presented by the case at bar. Consequently it need not be discussed, as any attempt to arrive at a satisfactory conclusion in regard thereto might be considered as partaking of the nature of "obiter." It further appears from the record now before us, under the certificate of the presiding judge, that "counsel for defendant, just before the close of testimony for defendant called into the court-room a witness who had been sworn and put under the rule. When he appeared in the presence of the court and jury, counsel for defendant stated: 'This is the fireman of the crew, and we tender him to the plaintiff only to relieve ourselves from the

presumption that would be against us if we did not produce him. If we put him up, it would be cumulative.'" At the risk of being understood as undertaking to decide a question not presented, it may here be remarked, parenthetically, that the closing sentence of the above statement was grossly improper. See *Johnson v. State*, 88 Ga. 606. This fact should not, however, influence our decision of the point actually made. *Johnson v. Slappey*, 85 Ga. 576; *Bennett v. State*, 86 Ga. 401-405, 12 L. R. A. 499. The question is: The plaintiff having declined to avail himself of the opportunity thus presented of adding to the evidence already introduced by him, did the mere failure of the company to itself put Waters on the stand indicate and furnish proof of an intention on its part to wilfully suppress the truth, or to withhold from its adversary the means of possessing himself of evidence by which the truth could be established? The correct answer to this question is to be found in the decision rendered by this court in the case of *Davis v. Central R. Co.* 75 Ga. 645, wherein it was said: "If the fireman had not been accounted for by the defendant, then the jury, on the trial of the case, might have inferred that he had been kept away because he knew something which might have been damaging to defendant. . . . But, under the circumstances of this case, the fireman being present and open to plaintiffs, no inference could be drawn against defendant because he was not sworn." As the official report sufficiently indicates (and as the record of file in this court conclusively shows), there was in that case, as in the present, "a painful, square conflict" in the testimony. Nevertheless, as it had a right to do, the company chose to rely upon a single witness,—its engineer,—though its fireman was also at hand. It was insisted by the plaintiff in error that the company, in order to fully vindicate its diligence, was under a positive legal duty to also introduce its fireman; but the court held that this was not so. Quite naturally, this decision called for the expression of some legal reason upon which it could rest. Accordingly, the rule of law was invoked that, unless certain evidence be peculiarly within the control of one of the parties and inaccessible to the other, no duty devolves itself upon the one rather than upon the other to produce such evidence or to lay it before the jury, and a mere failure to do so will not justify an unfavorable inference against either party. Incidentally, of course, this involved the decision of the collateral question presented by the peculiar facts of that case, *viz.*, whether a person in attendance upon the court as a witness, and known to both sides, can properly be said to be accessible to either, not under the exclusive control of one only of the parties. The decision in that case follows the doctrine laid down in *Emory v. Smith*, 54 Ga. 273, which was a suit defended by an executrix, who "was present in court at the trial," but was not introduced as a witness. It did not appear that she had any personal knowledge of the facts in controversy, and consequently it could not with fairness be said that her failure to offer herself as a witness amounted to a wilful attempt to withhold evidence from the jury. Accordingly it was held reversible er-

ror for the trial judge "to charge the jury, in effect, that if the executrix could, by going on the stand as a witness, clear up any doubts there might be in the case, the jury might take her failure thus to be a witness into consideration, and might infer from such failure against her." Commenting upon this branch of the case, McCay, J., pertinently remarked: "The plaintiff had a right to call her; why not put the presumption on him also?" In *Thompson v. Davitte*, 59 Ga. 473, it was held: "There is no invariable presumption of law that evidence is true because a party does not rebut it when in his power. Nor is a party to the cause bound to offer himself as a witness at the peril of having everything taken against him which he might, as a witness, contradict." The trial judge was requested but refused to charge "that if a party has it in his power to deny or rebut evidence which tends to disprove his case, and does not do so, the presumption is that such evidence is true,—the propounder, Jacob S. Davitte, being in the court and attending the trial, but not testifying in the case." It did not appear that this party had any better knowledge of the facts in issue than did the witnesses upon whose testimony he chose to rely, nor that he had an exclusive knowledge of facts he desired to conceal. Therefore this court held that the trial court properly refused to charge as requested. The decision rendered in *Bird v. State*, 50 Ga. 585, is also in point. There the court held that the omission of the accused "to avail himself of the privilege allowed by statute to make a statement to the jury . . . [was] not a matter to be considered by them in determining defendants' guilt," and it was error for the trial judge to charge that the jury might take that fact into consideration, in passing upon the case.

The position taken by this court in the cases above cited is in perfect accord with outside authority. Thus, in *Seovill v. Baldwin*, 27 Conn. 316, a leading case which has been extensively cited as laying down the correct rule, it was held: "The omission of a party to call a witness who might equally have been called by the other party is no ground for a presumption that the testimony of the witness would have been unfavorable. The jury have no right to presume anything as to his knowledge of any facts important to the case." In *Bates v. Morris*, 101 Ala. 282, it was ruled that "where a person, whose evidence would be competent for either party in an action, was in court during the trial and equally accessible to both parties, it is error to charge the jury that they could draw an unfavorable inference against one of the parties for failing to call such person as a witness; and this is true notwithstanding the witness referred to was the husband and grantor of the claimant in a claim suit, where the transfer from him is attacked as fraudulent." The reasoning employed by Chief Justice Stone, who pronounced the decision of the court, is simply unanswerable. The following brief extract from the opinion filed by him will suffice to justify this broad assertion: "The husband was in court, accessible to either party, and a competent witness to the same extent for the one party

as for the other; and it is difficult to assign any just reason for imputing the failure to examine him as a witness, as a matter of evidential inference, or as ground of unfavorable presumption for or against the one party, which would not apply to the other." For other cases precisely in point, see *Pollak v. Harmon*, 94 Ala. 420; *Haynes v. McRae*, 101 Ala. 318; *Crawford v. State*, 112 Ala. 3; *Nelms v. Steiner Bros.* 113 Ala. 562-576; *People v. Sweeney*, 41 Hun, 833-843.

It cannot be said in the present case that the defendant, having "more certain and satisfactory" proof within its power, relied upon evidence of a "weaker and more inferior nature" (*Savannah, F. & W. R. Co. v. Gray*, 77 Ga. 444; *Haynes v. McRae*, 101 Ala. 318; *Mooney v. Holcomb*, 15 Or. 639; *Wills, Circumstantial Ev.* 142); for "all the evidence was the same in degree, and that of the absent defendant [fireman] would but have been cumulative" (*Bleeker v. Johnston*, 69 N. Y. 812). Of course, an unfavorable inference may arise where it appears that a party "in selecting his witnesses to reply to" evidence introduced on the other side deliberately "chose those who did not know the material facts, rather than those who did, though the latter were equally accessible. *Stevenson v. State*, 88 Ga. 575. The same is true where a person having full and positive knowledge of the matter in question is not called as a witness, though within reach of the defendant who introduces no direct proof whatever in reply to positive evidence adduced against him, but confines his defense to an attempt to successfully attack the credit of the witnesses sworn in behalf of his adversary. *Hunt v. State*, 81 Ga. 140-143. As was said by Lord Mansfield in *Blatch v. Archer*, 1 Cowp. 63: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." Obviously, however, this maxim can have no application to a case, like the one at bar, where both parties deliberately declined to avail themselves of identically the same evidence, equally within the power of either to introduce; for the omission of the one party to offer such evidence is fully met and evenly counterbalanced by a like omission on the part of his opponent. Suppose the interrogatories of a material witness, sued out at the instance of one party, had been duly returned into court, but were not introduced by such party, nor by his opponent, though equally accessible to the latter, or suppose it appeared on the trial that one of the parties had in his possession a paper which would probably throw light on the issue, which, though he did not elect to introduce it in his own behalf, he produced and tendered to the opposite side, who, without even glancing at the contents of the paper, declined to lay it before the jury; in neither event would there be ground for suspicion that either party was endeavoring fraudulently to suppress the truth or to gain an unconscionable advantage over the other. On principle, the present case cannot be distinguished, for the plaintiff was afforded full opportunity to "examine" the witness tendered him and thus ascertain his

evidentiary contents. This, counsel for the plaintiff deliberately made his election not to do, fearing, as he practically confesses in his written argument presented to this court, that the "bearded stranger" convoyed "inside the bar," and indented by defendant's counsel, "with unsworn lips" (but standing in his place) "as the one who was fireman on the engine on the night of the injury," would not testify to facts prejudicial to the company, and that the latter, in thus offering this witness to its adversary, planned to entrap the plaintiff into a misadventure. Nevertheless, counsel for the plaintiff, in argument before the jury, insisted, with unbecoming inconsistency, "that the thing that showed that plaintiff had the best end of this case was the production of Waters by the defendant, and defendant's failure to put him up as a witness; . . . that the failure by defendant to introduce Waters as a witness was an inference of negligence on defendant's part, and a presumption that Waters knew something which, if he told, would hurt defendant's side." Defendant's counsel promptly "requested the court to stop plaintiff's counsel from making such an argument, as it was improper and illegal," and "also requested the court to order a mistrial by reason of this improper argument." But "the court held that plaintiff's counsel had the right to make such an argument, and allowed plaintiff's counsel to proceed with his argument on this line, and refused to declare a mistrial, or correct or stop plaintiff's counsel from further argument on this line." Subsequently, at the proper time, defendant presented to the court, in writing, a request to charge, expressed in language which was appropriate and entirely in accord with the law as above announced, to the effect that "when the defendant company, in open court, tendered this fireman, Waters, as a witness to be introduced by plaintiff, if he desired, this was sufficient to relieve the defendant" of the unfavorable presumption insisted on by plaintiff's counsel in his argument to the jury. Not only was this request refused, but the trial judge failed to give its equivalent, or, indeed, any charge whatsoever upon the subject.

The duty of a trial judge in cases where counsel oversteps the bounds within which it is his legal duty to confine his professional zeal is thus plainly pointed out in § 4419 of the Civil Code: "Where counsel, in the hearing of the jury, make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same; and, on objection made, he shall also rebuke the same, and by all needful and proper instructions to the jury endeavor to remove the improper impressions from their minds; or, in his discretion, he may order a mistrial, if plaintiff's attorney is the offender." The question, therefore, resolves itself into the inquiry whether or not, as is claimed, the plaintiff's counsel, "in the hearing of the jury [made] statements of prejudicial matters which [were] not in evidence." It must not be overlooked that "counsel should have ample latitude in argument." *Spence v. Dasher*, 68 Ga. 432. To confine counsel to

the restricted realms of logic would be a practical denial of this privilege. So it was said in *Taylor v. State*, 83 Ga. 659, that "the court could not prevent counsel from drawing illogical deductions from testimony which had been introduced." As a matter of course, facts not proved cannot be discussed;" only "illogical conditions from facts proved may be insisted on (*Inman v. State*, 72 Ga. 278); for there is a line of practice in this state to the effect that counsel are not at liberty to "travel outside the case." See *Young v. State*, 65 Ga. 595; *Wade v. State*, 65 Ga. 756; *Johnson v. Slappey*, 85 Ga. 576; *Metropolitan Street R. Co. v. Powell*, 89 Ga. 601; *Port Royal & W. C. R. Co. v. Davis*, 95 Ga. 293. This rule was thus stated by Mr. Justice Lumpkin in *Washington v. State*, 87 Ga. 15, 16: "It is the well-settled policy of this court that counsel in the argument of cases should confine their remarks to the law and the evidence, and that in no instance should they be permitted to comment upon extraneous facts prejudicial to the interests or rights of a party, over his objection, unless such facts be of a kind of which judicial cognizance may be taken without proof." The following instances in which the above rule has been invoked will serve to illustrate its intent and meaning, and throw some light upon the question whether or not it is applicable to the facts of the case at bar. In *Bailey v. Ogden*, 75 Ga. 877, counsel for plaintiff insisted upon a right to comment, in his argument before the jury, "upon the law that, when a paper under which a party claimed rights was proved to exist and the same was not offered in evidence, the legal presumption was that it contained something adverse to the" interests of such party: but the trial judge stopped him saying: "All the evidence concerning a will in this case was ruled out on your motion, and, unless you consent for that to go in, you are not authorized to discuss that question, and the jury cannot consider it." The ruling of the trial judge was upheld by this court. In *Blackman v. State*, 78 Ga. 592, where before the jury was impaneled, the defendant made a motion for a continuance on the ground of the absence of witnesses, and the court delayed the case and sent for and procured such witnesses, but on the trial they were not introduced, it was held error to permit state's counsel, over objection, "to refer in his argument to what defendant, in his motion for continuance, had said he could prove, and to mention that the defendant had failed to make such proof, and insist upon this as an evidence of guilt." A new trial was ordered by this court solely upon the ground of the error thus committed. In *Robinson v. State*, 82 Ga. 535, it was held that state's counsel had no right to "argue to the jury from the omission of the accused to make a statement;" it having been previously ruled in *Bird v. State*, 50 Ga. 585, that no unfavorable inference could properly be drawn from such omission. In *Johnson v. State*, 88 Ga. 609, the solicitor general "argued that the fact that accused's counsel, after hearing the testimony of the prosecutor that . . . [certain witnesses in attendance upon the court] had seen him with a hundred dollar bill [a material fact

in the case], failed thereafter to introduce them as witnesses for the accused to disprove this statement, was a conclusive admission that the witnesses did see him with the bill." In dealing with this point, Mr. Justice Lumpkin, speaking for this court, said: "We feel constrained to allow the accused another hearing. The conclusions drawn by our able, gifted, and eloquent Brother Wright from the premises stated were unauthorized, and were highly injurious to the accused." The case of *Chase v. Chicago*, 20 Ill. App. 274, is also in point, and may be referred to as persuasive authority. The plaintiff did not introduce as a witness her husband. He was, however, present in court. Counsel for defendant, after characterizing plaintiff's case as "a blackmailing scheme to extort money out of the city," turned upon her counsel and demanded: "Why didn't you put Mr. Chase upon the witness stand, John Gibbons?" Twice echoing this demand, counsel continued: "I will tell you why. Because you knew that that old, gray-haired man would not perjure himself for you, and you could not perpetrate this fraud and conspiracy with his assistance." The report of the case describes this scene as having been "dramatic." The appellate court added a fitting finale by ordering a new trial on the sole ground that this argument was improper. The case of *Crawford v. State*, 112 Ala. 1, is, upon its facts as well as the principle involved, so analogous to the case at bar, it may likewise be cited in this connection. The evidence disclosed that one Boman was an eyewitness to the tragedy under investigation, but, though present in court, he was not called to the stand by either side. "One of defendant's counsel, in his argument, said, in substance, that the state had failed to examine . . . [this] eyewitness to the homicide, and who knew more about it than anybody else present at the time of the killing, and that this was a circumstance to be considered by the jury in favor of the defendant." On objection by the solicitor, the court ruled that this argument was improper, and "to this action of the court the defendant duly excepted." See pages 10, 11, 112 Ala. Dealing with this point the reviewing court said (page 23, 112 Ala.): "It was proper to restrain the counsel of the defendant from the proposed argument to the jury, that the failure of the state to examine Boman as a witness was a circumstance for their consideration. The argument was not legitimate, whether applied to the state or to the defendant; and with equal propriety, if there had been propriety in it, it could have been applied as well to the one as to the other. Boman was in court, as accessible to the one party as to the other; and all that can be properly said is, that neither party deemed it necessary to place him on the stand, adding his testimony to that which had been adduced."

To allow counsel in the present case, after expressly declining the aid of the additional testimony tendered him, to attempt to make capital out of the fact that this identical testimony was not offered by the other side, would seem not only opposed to reason and justice, but violative of the policy of the law as declared in the rule that the best, or highest,

evidence of any given fact is required. So long as it was within the power of the plaintiff to show absolutely and conclusively what the fireman knew and would testify in regard to the casualty under investigation, the plaintiff could not, without infringing this imperative rule of evidence, rely upon a mere inference or conjecture as to what this eyewitness of the occurrence would swear if put upon the stand. There is another rule of law which may, without discussion, be adverted to as having a bearing upon the present case, because limiting in a measure the right of counsel to indulge in argument of questionable propriety. "It is the duty of attorneys at law . . . to employ, for the purpose of maintaining the causes confided to them, such means only as are consistent with truth, and never to seek to mislead the judges or juries by any artifice or false statement of the law." Civ. Code, § 4427. It cannot be deemed the intent and policy of the law, in expressly conferring any given privilege upon a suitor, to attach thereto a condition that, if such privilege is exercised by him, his conduct will be regarded with distrust and the righteousness of his cause looked upon with suspicion. As the writer had occasion to remark in the recent case of *McBride v. Publishing Co.* (Ga.): "No unfavorable inference can arise against a party so long as he is acting strictly within his legal rights." For instance, a defendant has a legal right to demur to his opponent's petition; to file inconsistent pleas; to object to illegal evidence when offered; to cross examine his opponent's witnesses at length, or only as to a single point, or not at all; to make a motion for a nonsuit at the close of the plaintiff's case; to stand on the case as made out by the latter, or attempt to vindicate himself by the introduction of competent evidence. His election to avail himself of any or all of these legal rights cannot be regarded as furnishing the basis for any inference that he resorts to these means of defense only because he knows that, upon the real merits of the case, he cannot but fail. For counsel to argue to the jury that they should reach their conclusion by resort to a test or process not sanctioned by law is not only "traveling outside the case," but falls little short of contempt of court. It is not the right of a party or his counsel to arraign the law itself and attack its wisdom; certainly not when such party voluntarily goes into court and asks that the law—as it stands, and not as he may think it should be—shall be fairly, impartially, and correctly administered. There was, in the present case, not a scintilla of evidence even vaguely tending to show a disposition on the part of the defendant to withhold or suppress the truth. As has been seen, the law itself did not supply, in lieu of such proof, any presumption or inference whatsoever upon which counsel could rely as a basis for his attack upon the defendant concerning its motive in not introducing all the evidence within its reach. Accordingly, the good faith of the latter in selecting and offering the evidence upon which it elected to stand was not ever so remotely brought into issue, and a totally unfounded suspicion in regard thereto could serve as no proper guide

to the jury in reaching their conclusion upon the questions actually presented and legitimately before them for determination. That the unwarranted argument of plaintiff's counsel was calculated to unduly prejudice the defendant's cause there can be no reasonable doubt; that it actually had this effect is evidenced by the fact that, although the great preponderance of proof was apparently on the side of the defendant, the jury nevertheless returned a verdict which utterly repudiated its claim that its defense was righteous and meritorious."

Maggie HENDERSON, by Next Friend, *Plff.*
in *Err.*,
v.

DADE COAL COMPANY *et al.*

(100 Ga. 568.)

*1. As a general rule persons in charge of a state convict, whether their custody and control of him be lawful or otherwise, are not liable in damages for a criminal tort committed by him while at large, although his being at large was by their permission, or because of their negligence in failing to keep him safely confined. Ordinarily, under such circumstances, the convict's wrongful act would be too remote a consequence of his keeper's misconduct in the premises to render them responsible to the person injured. This rule would, of course, be varied if they were in any way connected with the perpetration of the tort, or had reasonable grounds for apprehending that it would be committed.

2. The present case falls within the general rule, and not within the exception indicated. Its material facts are summarized, and the conclusion therefrom stated, in the next note.

3. That a "felony" convict, about thirty-seven years old, who had been continuously in the penitentiary for about twelve years, and who had five times escaped therefrom, was "a man in robust and vigorous health, immoral, brutish, devilish, of vicious habits, of violent passions, prone to desire for sexual intercourse," and a person "not restrained by any convictions of right and wrong, or governed by any principles of morality," and that "all of these conditions and things" concerning him "were well known, and were understood" by his custodians, "or ought to have been, because of what they knew of his said person, history, character, and surroundings," did not, without more, afford such cause for apprehending that he would, when an opportunity occurred, commit the crime of rape upon an unprotected woman, as to subject his custodians to liability in damages for the perpetration by him of this offense at a time when, because of their fault, he was at large and in the unrestrained control of his own movements.

(March 12, 1897.)

*Headnotes by LUMPKIN, P. J.

NOTE.—For a case in which negligence was held to exist in respect to allowing a man of savage and vicious propensities to be where he might 40 L. R. A.

ERROR to the Atlanta City Court to review a judgment in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Watkins & Dean, Dean & Dean, N. J. Hammond, and T. A. Hammond*, for plaintiff in error:

It is immaterial what is the intermediate cause between the act complained of and the injurious consequence, if such act is the efficient and proximate cause and the consequence was the probable result.

1 Sutherland, Damages, § 37.

Any wrongful act which exposes one to injury from rain, heat, fire, water, the known vicious disposition or habits of animals, or any other natural cause, under circumstances which render it probable that such an injury will occur, is the primary, efficient, and proximate cause if harm ensues.

1 Sutherland, Damages, ¶ 38; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 846, 49 Am. Rep. 168.

The innocent or culpable act of a third person may be the immediate cause of an injury, and still an earlier wrongful act may have contributed so effectually to it as to be regarded as the efficient and concurrent responsible cause.

1 Sutherland, Damages, § 40.

The mere circumstance that there have intervened between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained.

1 Sutherland, Damages, p. 23, § 17.

It need not be certain that such damage will ensue. It is required that the act have a tendency and be likely to cause such damages, but not that they be certain to follow; in this respect they are generally contingent and by possibility may not happen.

1 Sutherland, Damages, p. 47, § 27.

The party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the probable result of the act done.

3 Sutherland, Damages, p. 714, note 3, § 1244; *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 183; 1 Sedgw. Damages, ¶ 129; *Addison, Torts*, 8d ed. p. 5; *Henry v. Dennis*, 98 Ind. 452, 47 Am. Rep. 382; 2 Thomp. Neg. p. 1084.

The proximate cause of any injury may in general be stated to be that act or omission which immediately causes, or fails to prevent, an injury, an act, or omission occurring or concurring with another, if which had not happened, the injury would not have been inflicted, notwithstanding the latter.

Deming v. Merchants' Cotton-Press & S. Co., 90 Tenn. 358, 18 L. R. A. 518; *Andrews v. Mason City & Ft. D. R. Co.* 77 Iowa, 669; *Putnam v. New York C. & H. R. Co.* 47 Hun, 439; *Bunting v. Hogsett*, 139 Pa. 363, 12 L. R. A. 268; *Clyde v. Richmond & D. R. Co.* 59 Fed.

cause injury, see *Dean v. St. Paul Union Depot Co.* (Minn.) 5 L. R. A. 442.

Rep. 894; *Knapp v. Sioux City & P.R. Co.* 65 Iowa, 91, 54 Am. Rep. 1; *Campbell v. Stillwater*, 52 Minn. 308, 50 Am. Rep. 569; *West v. Ward*, 77 Iowa, 323; *Ahern v. Oregon Teleph. & Teleg. Co.* 24 Or. 276 and 293, 22 L. R. A. 635 and 640; *Ryan v. Miller*, 12 Daly, 17; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, and 157, 17 L. R. A. 33, and 65; *Powers v. Thayer Lumber Co.* 92 Mich. 583; *La Duke v. Ezeler Twp.* 97 Mich. 450; *McKeller v. Monitor Twp.* 78 Mich. 485.

There is a plain difference between a wrongful act and its consequences, for when a wrongful act is done the wrongdoer must answer for all the proximate consequences, although he may not have foreseen or anticipated the particular form or character of the resulting injury.

Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544; *Mexican Nat. R. Co. v. Mussetts*, 86 Tex. 708, 24 L. R. A. 642; *Derry v. Flitner*, 118 Mass. 131; *Hill v. Winsor*, 118 Mass. 251; *Baxter v. Chicago, R. I. & P. R. Co.* 87 Iowa, 488; *Chicago & N. W. R. Co. v. Prescott*, 19 U. S. App. 291, 59 Fed. Rep. 237, 8 C. C. A. 109, 23 L. R. A. 654; *Gibson v. Delaware & H. Canal Co.* 65 Vt. 213; *Bigelow, Torts*, 277; *Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 384.

Courts cannot be ignorant of the nature of men, and must attribute to them the ordinary passions and weaknesses inherent in human nature. It has been expressly adjudged that courts may presume that domestic animals will act in conformity to their usual propensities and habits, and, surely there is stronger reason for extending this principle to beings of reason, intelligence, and affections.

Whart. Neg. §§ 100, 107; *Smethurst v. Proprietors of Independent Cong. Church*, 148 Mass. 261, 2 L. R. A. 695; *Weick v. Lander*, 75 Ill. 93; *Binford v. Johnston*, 82 Ind. 428, 42 Am. Rep. 512; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Moore v. Central R. Co.* 47 Iowa, 688; *Forney v. Geldmacher*, 75 Mo. 113, 42 Am. Rep. 392; *Lowery v. Manhattan R. Co.* 99 N. Y. 153, 52 Am. Rep. 12; *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236.

If defendant's animal breaks enclosure, he is liable to plaintiff, whether guilty of negligence or not.

Bigelow, Torts, 275, and note.

A depot company incorporated for the purpose of furnishing depot and station-house accommodations for carriers is guilty of negligence in allowing the continuance in its depot of an employee, or its tenant renting a room in which to check parcels, who is a man of savage and vicious propensities and in the habit of attacking and beating people; and it will be liable for injuries to one who is, without his own fault, attacked and beaten by such employee.

Dean v. St. Paul Union Depot Co. 41 Minn. 360, 5 L. R. A. 442.

Whether the trespasser who draws the crowd after him is responsible for the injuries done by it depends upon whether his act was of the nature to attract a destructive crowd, and this is a question for the jury.

Fairbanks v. Kerr, 70 Pa. 86, 10 Am. Rep. 40 L. R. A.

664; *Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 378; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11; *Lane v. Atlantic Works*, 111 Mass. 136; *Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 447, 5 Am. Rep. 57; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 228, 7 Am. Rep. 69.

It is a question for the jury as to whether defendant's negligence was the proximate cause.

Olson v. Chippewa Falls, 71 Wis. 558; *Yeaw v. Williams*, 15 R. I. 20; *Clemens v. Hannibal & St. J. R. Co.* 53 Mo. 366, 14 Am. Rep. 460; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Atchison, T. & S. F. R. Co. v. Bates*, 16 Kan. 252; *Perry v. Southern P. R. Co.* 50 Cal. 578; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. 122, 35 Am. Rep. 644; *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239.

Defendants' contract placed the defendants in such relation to the state as to create certain legal duties, the failure to observe which gives cause of action to this plaintiff.

Code 1882, §§ 2953, 2954; *Western & A. R. Co. v. Strong*, 52 Ga. 461; *City & Suburban R. Co. v. Brauss*, 70 Ga. 377; *Grenade v. Hardaway*, 73 Ga. 526.

If the penitentiary companies are not corporations then they are either joint-stock companies or partnerships. In either event, the members thereof are liable for the acts and torts of each other done in the course of business.

1 Bates, Partn. §§ 72, 73; *Dacey, Partn.* p. 467; *Hawes, Parties to Actions*, 89 (13); *Roberts v. Johnson*, 58 N. Y. 618; *Barbour, Parties to Actions*, 2d ed. p. 350, note.

Mr. S. Wright also for plaintiff in error. *Messrs. Ellis & Gray*, for defendants in error:

Where a sheriff negligently permits one in his custody under an indictment for an assault with a deadly weapon upon B, with intent to inflict a bodily injury, to escape and go at large, and such person makes a further assault upon A, and threatens to take his life, whereby A is put to expense in having him bound over to keep the peace, A cannot maintain an action on the case against the sheriff for the escape, nor for damages from the subsequent acts of the escaped prisoner, as they are not the natural and probable consequence of the escape.

Hullinger v. Worrell, 83 Ill. 220.

Damages traceable to the act, but not its legal or natural consequence, are too remote and contingent.

Western Railway of Alabama v. Mulch, 97 Ala. 194, 21 L. R. A. 316; *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 361; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 656; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89.

Messrs. John L. Hopkins & Sons, Bishop, Andrews, & Hill, and Burton Smith also for defendants in error.

Lumpkin, P. J., delivered the opinion of the court:

The declaration now under review discloses

one of the very saddest cases with which it has ever been our fortune to deal. The plaintiff, Miss Maggie Henderson, was, at the hands of a brutal convict, subjected to injury, wrong, and agony, both mental and physical, a recital of which would make one of the darkest pages in our reports. Every member of this bench was deeply moved and affected by the account which the declaration gives of her blighted life. There is not, perhaps, in the annals of litigation a story of wrong which appeals more pathetically for human sympathy. Were we to follow the instincts of our hearts, we would be under the strongest impulse to sustain the plaintiff's action; but as magistrates, under the solemn duty of enforcing what we conscientiously believe to be the law of the case, we are compelled to hold that the trial court did not err in sustaining the various demurrers alleging that no cause of action was set forth. Omitting any mention of numerous questions the decision of which is not, in the view we take of the case, in the least degree essential to its determination, we shall confine ourselves to a very brief discussion of the proposition announced in the headnotes, from which the nature of the case, so far as now material, will be readily apprehended. The case, at least, depends upon the question whether the custodians of such a convict as is described in the third headnote are legally responsible in damages for the consequences of crimes committed by him while at large, and in the unrestrained control of his own movements, by their permission, or because of their negligence in failing to keep him safely confined. We have no doubt that, as a general rule, a criminal tort committed by such a convict would be too remote a consequence of his keepers' misconduct in the premises to render them responsible to the person injured. While cases may arise in which this general rule should be varied,—as where it appears that the custodians of the convict were in some way connected with the perpetration of the tort, or had reasonable grounds for apprehending that it would be committed,—nothing is alleged in the present declaration to bring this case within such an exception. The direct and proximate cause of the injuries inflicted upon Miss Henderson was the independent action of the convict himself. He, though vicious, brutal, and infamous, was nevertheless an accountable human agent. While, according to the plaintiff's averments, he was not restrained by any convictions of right and wrong, nor governed by any principles of morality, the declaration does not attempt to allege that he was not a rational person, fully amenable to the laws both of God and man. That he was prone to a desire for sexual intercourse did not, by any means, render him an exception to a law of nature which universally prevails in the animal kingdom, whether as applied to human beings or animals of lower orders. Vile as this man was, it cannot be held that the defendants could reasonably have anticipated that he would, upon the first opportunity, assault and ravish any defenseless woman whom he might encounter. He was equally liable to commit some other heinous crime; and they were not bound to presume that he would commit any crime at all. The

state requires the lessees of convicts, at the expiration of their terms, to furnish them transportation to the counties in which they were convicted. Thus the law clearly contemplates that these criminals shall be set at liberty in the very communities whence they came. It can hardly be questioned that scores, perhaps hundreds, of convicts, just as bad as the one now under consideration, are, from time to time, set at large by the law's command. If there was reason to apprehend that convicts of this depraved type would, upon regaining their liberty, commit such crimes as that complained of in the present case, it would seem that the true policy of the law would be to keep them imprisoned during their lives. That such is not the policy of the law is due to the fact that reason for apprehending such outrages does not really exist.

The true rule applicable in a case like the present was recognized and stated by this court in the case of *Perry v. Central R. Co.* 66 Ga. 751, wherein it was said that, in order to entitle a party to recover damages on account of the negligence of another, it should appear that the damages were the natural and proximate result of such negligence; "for should it appear that but for the intervention of a responsible third party, the defendants' negligence would not have caused damage to the plaintiff, then the defendant is not liable to plaintiff, for the reason that the causal connection between negligence and damage is broken by the interposition of an independent, responsible human action." In support of this doctrine, Judge Stewart, who presided in the place of Chief Justice Jackson, disqualified, cited *Field, Damages*, §§ 13, 32, 52, 53, 78; *Wayne [Mayne], Damages*, § 25; *Whart. Neg.* § 134; *Wait, Act. & Def. title Damages*. It is true that in the case just cited the action was based upon a tort of an altogether different character, but the principle announced controls the case at bar. The case of *Belding v. Johnson*, 86 Ga. 177, 11 L. R. A. 53, also has some bearing upon the question at issue, it being there held that the death of the plaintiff's husband, who was killed by a man under the influence of liquor, who, when in this condition, was violent and dangerous, was not occasioned by the act of a barkeeper who had furnished liquor to the slayer when he was already drunk, and had failed to protect the deceased from the homicidal assault made upon him in the barkeeper's place of business. Although the latter violated a penal statute of this state in so furnishing the liquor, it was, in effect, held that he was not bound to anticipate that this unlawful conduct on his part would result in a homicide. A somewhat similar question was dealt with in *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 859. There the person furnished with the intoxicating liquors was himself, in consequence of abusive language used to another, assaulted and killed. In a sense, the furnishing of the liquor was an indirect cause of his death, but the court held it was not the efficient and proximate cause. In a case decided by the supreme court of Minnesota (*Swinfin v. Lowry*, 37 Minn. 345), it appeared that a minor person of the age of eighteen upon invitation of the defendants, drank intoxicating liquors with them and their

friends at divers saloons several times during the same evening, some of the liquor being ordered and paid for by the defendants themselves. "He became intoxicated and quarrelsome, and committed an assault upon plaintiff, resulting in serious injury to him," but "was not incited thereto by the defendants, and it was his own voluntary act. In an action against them by the plaintiff for damages on the ground that the assault was the result of their acts in furnishing the liquor supplied to the minor," the reviewing court held "that the damages were too remote, and were not to be deemed the natural and proximate result of the alleged wrongful acts of the defendants." A case which, upon its facts, is still more closely in point, is that of *Hullinger v. Worrell*, 83 Ill. 220. It was there held that a sheriff who negligently permitted the escape of a prisoner in his custody under an indictment for an assault with intent to murder was not liable in damages for the consequences of a subsequent assault by the escaped prisoner upon the same person upon whom the indictment in question charged that the original assault had been com-

mitted. This decision was based explicitly upon the proposition that the act of the prisoner, after regaining his liberty, was not the natural and probable consequence of the escape. Cases more or less resembling the foregoing are quite numerous, but it would not be helpful to multiply citations on this line. The rule of law that damages arising *ex delicto* are not recoverable unless they spring from the negligence or misconduct of the defendant is as well settled as any legal principle. The difficulty arises in its application to given cases. We have been unable to find any case precisely like the present, but our minds have, without difficulty, reached the conclusion that none of the lessees of penitentiary convicts named as defendants can be made liable for the crime committed in this instance. Nothing they did or omitted was its efficient or proximate cause. It was the independent act of another, not standing in any relation to the defendants which would render what he did imputable to them. The court below was right in sustaining the demurrers and dismissing the action.

Judgment affirmed.

ILLINOIS SUPREME COURT.

George M. WELTY, *Appt.*,
v.

H. R. JACOBS *et al.*

(171 Ill. 624.)

1. **A contract will not be specifically enforced** unless it has such mutuality that it may be enforced by either party.
2. **Particular stipulations of a contract** will not be specifically enforced apart from the rest of the contract, where they do not clearly stand by themselves, unaffected by other provisions.
3. **An injunction against the proprietor of a theater will not be granted**, to prevent his breach of a contract to furnish the theater and its equipment, including light, heat, music, ushers, etc., to the manager of a company for a certain time, and to prevent him from furnishing the theater to a rival company during that period; nor can the contract be partly enforced by injunction limited to the use of the building and furnishings.

(February 14, 1898.)

NOTE.—For mandatory injunction to compel specific performance of contract, see note to *Moundsville v. Ohio River R. Co.* (W. Va.) 20 L. R. A. on page 167.
40 L. R. A.

A PPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of defendants in a suit brought to enjoin defendants from opening an opera house with another show during a week for which it has been leased to complainant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bulkley, Gray, & More, for appellant:

The court below erred in dismissing the bill of complaint for want of equity, for the reason that the complainant has an adequate remedy at law, or, because the contract is of such a nature that a court of equity will not enforce it.

Lacy v. Heuck, 12 Week. L. Bull. 209.

A court of equity will enforce specific performance of a contract indirectly by enjoining a breach of its negative covenants when from the nature of the contract it could not enforce specific performance directly.

2 High, Inj. 2d ed. §§ 1134, 1150 *et seq.*; *Lumley v. Wagner*, 1 DeG. M. & G. 604; *Montague v. Flockton*, L. R. 16 Eq. 189; *Great Northern R. Co. v. Manchester, S. & L. R. Co.* 5 DeG. & S. 138; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.* 24 Fed. Rep. 516; *Singer Sewing Mach. Co. v. Union Button-hole & E. Co.* Holmes, 253; *Fredericks v. Mayer*, 13 How. Pr. 566; *Daly v. Smith*, 6 Jones & S. 158; *Western U. Teleg. Co. v. Union P. R. Co.* 3 Fed. Rep. 423; *Wells, Fargo, & Co.*

v. Oregon R. & Nav. Co. 18 Fed. Rep. 517; *Wells, Fargo, & Co. v. Northern P. R. Co.* 23 Fed. Rep. 469; *Wolverhampton & W. R. Co. v. London & N. W. R. Co.* L. R. 16 Eq. 483.

If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason or policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it.

Singer Sewing Mach. Co. v. Union Button-hole & E. Co. Holmes, 253; *Western U. Teleg. Co. v. Rogers*, 43 N. J. Eq. 811; *Bernstein v. Meech*, 180 N. Y. 354; *Long v. Beard*, 4 N. C. (Taylor's N. C. Term Rep. 256) 684; *Warner v. McMullen*, 181 Pa. 370; *Brush Electric Light Co.'s Appeal*, 141 Pa. 574; *Griffin v. Colver*, 16 N. Y. 491, 69 Am. Dec. 718; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Guerand v. Dandeleit*, 32 Md. 561, 3 Am. Rep. 164; *Spiet v. Lambdin*, 45 Ga. 319; *Leavers v. Cleary*, 75 Ill. 349; *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *German-American Incest. Co. v. Youngstown*, 68 Fed. Rep. 456; *New York Academy of Music v. Hockett*, 2 Hilt. 218; *Schmitt v. Cassilius*, 31 Minn. 7; *Butler v. Burleson*, 16 Vt. 176; *McClurg's Appeal*, 58 Pa. 51; *Manhattan Mfg. & Fertilizing Co. v. New Jersey Stock Yard & Mkt. Co.* 23 N. J. Eq. 161; *Legg v. Horn*, 45 Conn. 415; *Ellsler v. Brooks*, 22 Jones & S. 73; *Cort v. Lassard*, 18 Or. 221, 6 L. R. A. 653; *Lanahan v. Heaver*, 79 Md. 413; *Frazier v. Miller*, 16 Ill. 48; *Morris v. Thomas*, 17 Ill. 112; *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776.

Messrs. Partridge & Partridge, for appellee N. D. Newell:

The complainant was guilty of such laches in filing his bill as to preclude him from relief in equity.

2 Pom. Eq. Jur. § 976.

The complainant utterly failed to show compliance on his part with the contract.

He who seeks the aid of equity to enjoin the violation of an agreement, or for the protection of his contract rights, must himself come into court with clean hands, and to entitle himself to relief he must have carried out, so far as possible, his own part of the contract.

2 High, Inj. § 1119; 3 Pom. Eq. Jur. § 1407; *Bernstein v. Meech*, 180 N. Y. 354.

Profits were recoverable as damages in a suit at law.

Dennis v. Marfield, 10 Allen, 138.

Mr. James E. Purnell, for appellee H. R. Jacobs:

This contract is in violation of Hurd's Rev. Stat. (Ill.) chap. 38, § 261.

Where a contract is contrary to statute it is void, and the courts will not aid it by injunction.

3 Am. & Eng. Enc. Law. p. 872, ¶ 49; *Workingmen's Bkg. Co. v. Rautenberg*, 103 Ill. 460, 42 Am. Rep. 26; *Fennell v. Ridler*, 5 Barn. & C. 406; *Smith v. Sparrow*, 4 Bing. 84; *Northrup v. Foot*, 14 Wend. 248; *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302; *Story v. Elliott*, 8 Cow. 27, 18 Am. Dec. 423; *Lindenmuller v. People*, 33 Barb. 548; *Brunnett v. 40 L. R. A.*

Clark, Sheldon, 501; *Com. v. Weidner*, 4 Pa. Co. Ct. 437.

The consideration upon the part of the appellant is that he was to produce his company for the purpose of giving performances commencing on Sunday, December 29, 1895. If that portion of said contract was illegal and in violation of the statutes, then the whole contract is void.

Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 117; *Tenny v. Foote*, 95 Ill. 99.

To entitle a party to an injunction *pendente lite* in this class of cases, the plaintiff must bring himself clearly within the principles upon which exceptional jurisdiction rests.

Injunction is only issued where the injury is irreparable from breach of contract.

Strobridge Lithographing Co. v. Crane, 20 N. Y. Civ. Proc. Rep. 24.

Carter, J., delivered the opinion of the court:

This was a bill for an injunction filed December 28, 1895, in the superior court of Cook county, by the appellant, in which he alleged that he was a theatrical manager and proprietor; that on April 9, 1895, he entered into a written contract with H. R. Jacobs, manager, and representing M. J. Jacobs, proprietor, of the Alhambra theater, in Chicago, to play his company in the "Black Crook" at such theater for seven consecutive nights, commencing December 29, 1895; that Jacobs was to furnish the house, well cleaned, lighted, and heated, together with the stock, scenery, and equipments contained therein, stage hands, stage carpenter, fly men, regular ushers, gas man, property man, janitor, ticket seller, doorkeepers, orchestra, house programmes, licenses, billboards, bill posting, distribution of printed matter, usual newspaper advertisements, and the resources of the theater in stage furniture and properties not perishable; that Welty was to furnish a company of first-class artists, to the satisfaction of Jacobs, together with special scenery, calcium lights, etc., and also, ten days in advance, certain printing, prepaid and free from all charges, consisting of a variety of bills, etc.; that appellant was to receive 60 per cent of the gross receipts up to \$5,000, and 70 per cent on all over \$5,000; that if the company should not prove satisfactory to Jacobs, whose judgment was to be conclusive, or if the company should prove not to be as represented, then Jacobs should have the right to cancel the contract by giving appellant at least one week's notice, by mail or otherwise; that appellant's company was not to appear at any other house in the city prior to the date of the performance specified; that if, by any unforeseen accident, fire, or for any reason whatever, Jacobs could not furnish the house for said performance the contract was to become null and void. The bill further alleged that appellant had kept and performed all his covenants; that he had tendered the printing as required, and that he was ready to furnish a satisfactory company; that he had received no notice from Jacobs that his company was not satisfactory nor as represented, and had been given no notice of the termination of his contract as therein provided; that within the then last thirty days Jacobs had entered into a contract with U. D.

Newell for the Alhambra Theater for the same week that appellant's contract provided for; that Newell claims to be the manager of another company, also engaged in producing the "Black Crook;" that Jacobs and Newell were combining and confederating to injure and defraud appellant, as Newell had agreed to produce the play for a less percentage than appellant; that appellant had forty performers under contract, and would be obliged to pay them their salaries whether they performed or not, and that he could procure no other place for his performance during said time, and would be compelled to remain idle at great expense; that the money value of his contract could not be determined, either actually or approximately, in any other manner than by carrying out and fully performing it according to its conditions; that Jacobs and Newell had announced their intention of keeping appellant out of the possession and use of said theater; that appellees were financially irresponsible. The bill prays for an order enjoining appellees from hindering appellant and his company from taking possession of the Alhambra theater, its appurtenances and stage property, and from hindering, delaying, interfering with, or preventing appellant from producing said play in accordance with said contract, and also restraining appellees from using or occupying said theater, its stock, scenery, and equipments, during said period of seven days, and from allowing any other person or company to use or occupy the same; and also restraining and enjoining appellees from refusing to furnish to appellant, during such period, the usual and necessary light, heat, music, regular stage hands, stage carpenter, etc., and for general relief. The injunction was granted, and served on appellees December 28, 1895. On December 30, 1895, a rule was entered on appellees to show cause why they should not be punished for contempt of court in violating this injunction. The next day an order was entered modifying the injunction so as to permit Newell to produce the play at the Alhambra theater and Jacobs was ordered to pay into court 60 per cent of the entire receipts received by him at the Alhambra for the week, and to pay to Newell 30 per cent of such receipts, and the cause was continued to January 3, 1896. On that day both appellees answered, replication was filed, and Newell moved for a dissolution of the injunction. Appellee Jacobs in his answer admitted the making of the contract with appellant, but denied that appellant's company was satisfactory or as represented, and alleged that he had notified appellant thereof, and had canceled the contract; denied all combination to injure appellant; admitted that he had made a contract with Newell for the same week he had formerly contracted to appellant; denied that appellant had furnished the printing as required; and that he was without remedy except in a court of equity. Appellee Newell in his answer alleged that he had been informed that appellant's contract had been canceled; that on November 29, 1895, he had made a contract with Jacobs to play the Tompkins Black Crook Company in the Alhambra for seven successive nights, beginning December 29, 1895, the contract being in all particulars like appellant's, except as to the percent-

age of receipts; that as early as December 27, he had removed to the Alhambra a number of articles belonging to his company, and had taken possession of the same; alleged various communications and negotiations between all the parties to this suit from December 16 until the bill was filed; that, becoming alarmed that Jacobs would close up the Alhambra entirely during that week, he (Newell) had procured an injunction from the circuit court on December 27, 1895, and had it served on Jacobs the same day, restraining Jacobs from closing up the theater during said week and excluding his company from presenting their play; charges appellant with laches and bad faith in suppressing all information in regard to such first injunction, and alleged that appellant's contract was in violation of the statutes, which forbid any amusement or diversion on Sunday, so that specific performance could not be enforced.

The cause was heard by the court, and a decree entered finding that the injunction had been violated by appellees, and that under the order modifying the injunction there had been paid into court \$1,134.75; that the equities were with the appellees; and that the appellant had a complete and adequate remedy at law, and that the injunction was improvidently issued; and the bill was therefore dismissed, and the money ordered returned to Jacobs. Appellant appealed, and asked that the money be retained in the clerk's hands pending the appeal, which was allowed, and the money ordered left with the clerk until the final determination on appeal. The appellate court affirmed the decree, and appellant has further appealed to this court.

There was no sufficient proof that Jacobs canceled his contract with Welty on any of the grounds stipulated in it, and the question is not whether Jacobs was justified in violating the contract, but whether his bill of complaint for equitable relief can be sustained or he should be remitted to his action at law. Strictly speaking, the bill was not one for specific performance, but for injunction only. It is clear from its allegations and the authorities bearing upon the question that specific performance of the contract could not be decreed. It is not, and cannot be, contended that appellant could have been compelled, by any writ the court could have issued, to occupy the theater with his company of actors and give the performances contracted for, any more than a public singer or speaker can be compelled specifically to perform his contract to sing or speak. Negative covenants not to sing or perform elsewhere at a certain time than a designated place have been enforced by the injunctive process, but further than this such contracts have not been specifically enforced by the courts, by injunction or otherwise. *Lumley v. Wagner*, 1 De G. M. & G. 604; *Daly v. Smith*, 6 Jones & S. 158. In *Lumley v. Wagner* there was an express covenant not to sing elsewhere than at the complainant's theater, and the injunction was placed on that ground.

But it is urged that negative covenants may be implied as well as expressed, and, when necessarily implied from the terms of the contract, they will be enforced in like manner; citing the follow cases: *Mon-*

tague v. Flockton, L. R. 16 Eq. 189; *Great Northern R. Co. v. Manchester*, S. & L. R. Co. 5 De G. & S. 188; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.* 24 Fed. Rep. 516; *Singer Sewing Mach. Co. v. Union Button-hole & E. Co.*, Holmes, 253; 2 High. Inj. 2d ed. § 1150; *Fredricks v. Mayer*, 13 How. Pr. 566. While there was a negative covenant in the contract under consideration against Welty, it is not important to consider whether or not appellant might have been enjoined from performing elsewhere than at Jacobs' theater at the time in question. For it is manifest he could not have been compelled to perform at said theater. Before a contract will be specifically enforced there must be mutuality in the contract, so that it may be enforced by either; and, as this contract was of such a nature that it could not have been specifically enforced by appellee Jacobs, it should not be so enforced by appellant. *Lancaster v. Roberts*, 144 Ill. 223; Fry, Spec. Perf. §§ 440, 441; Waterman, Spec. Perf. § 196; *Cooper v. Pena*, 21 Cal. 411.

But it is urged that courts of equity will by injunction restrain the violation of contracts of this character in many cases where they cannot decree specific performance, and the following among other cases are referred to: *Western U. Teleg. Co. v. Union P. R. Co.* 3 Fed. Rep. 423-429; *Wells, Fargo, & Co. v. Oregon R. & Nav. Co.* 15 Fed. Rep. 561, and 18 Fed. Rep. 517; *Wells, Fargo, & Co. v. Northern P. R. Co.* 23 Fed. Rep. 469. Without determining whether there may not be exceptional cases not falling within the general rule, we think the rule is as stated in *Chicago Municipal Gaslight & Fuel Co. v. Lake*, 180 Ill. 42, and the authorities there quoted. It was there said (page 60, 180 Ill.): "The bill of complaint in the case, though not strictly a bill for the specific performance of a contract, is, in substance, a bill of that kind. In 3 Pom. Eq. Jur. § 1841, it is said: 'An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules;

and it may be stated, as a general proposition, that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit.'" It is plain that, as a general rule, to enjoin one from doing something in violation of his contract is an indirect mode of enforcing the affirmative provisions of such contract, although such an injunction may often fall short of accomplishing its object. It is obvious from what has been said and from the authorities that to enjoin appellee Jacobs, as prayed in the bill, from refusing to furnish the usual and necessary light, heat, music, regular stage hands, stage carpenter, ushers, equipments, etc., provided for in the contract, would be the same, in substance, as to command him to furnish them, and without them the use of the theater building would seem to be of little use. It is practically conceded by counsel for appellant that this part of the contract could not be specifically enforced as prayed, or otherwise, in equity; but it is contended that this part of the contract is merely incidental to the more important part of it, which was the right to occupy and use the theater and its furnishings, and give therein the performances provided for, and to exclude from a like occupation and use the other appellee, Newell, and that the injunction was proper for that purpose. This would have been an indirect method of enforcing a part performance of the contract, and courts will not enforce specific performance of particular stipulations separated from the rest of the contract, where they do not clearly stand by themselves, unaffected by other provisions. *Baldwin v. Fletcher*, 48 Mich. 604. Even if such a decree might have been sustained, we are satisfied the sound legal discretion of the court was not violated in refusing it, or in dissolving the injunction after it was granted. Appellant's remedy, if any he had, was at law.

The judgment of the Appellate Court is affirmed.

INDIANA SUPREME COURT.

PITTSBURG, CINCINNATI, CHICAGO,
& ST. LOUIS RAILWAY COMPANY,
Appl.,
v.

Thomas F. MAHONEY, Admr., etc., of Oscar
P. J. Romich, Deceased.

(148 Ind. 186.)

1. A contract by which an employee assumes all liability for injuries by reason of the employer's negligence or otherwise is not against public policy.

2. Notice of a contract between an ex-

press company and a railroad company to the effect that the former will hold the latter harmless against claims by the express company's employees for negligence of the railroad company or otherwise is chargeable to one of such employees who goes upon the tracks of the railroad company in the course of his employment under the license given to the express company by the contract.

3. An assumption of risks by express contract of a local employee of an express company includes the risk of injuries by cars of a railroad company with which the express company does business.

4. A release by an employee of an ex-

NOTE.—As to public policy respecting contracts against liability for negligence in cases which do not involve the liability of carriers or any other 40 L. R. A.

similar liability, see also Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. (C. C. App. 8th C.) 30 L. R. A. 193, and other cases cited in footnote thereto.

press company of all liability for injuries sustained by negligence of the employer "or otherwise" includes the liability of the express company to hold a railroad with which it does business harmless against claims by the express company's employees for injuries, and precludes an action against the railroad company for causing his death by suddenly closing the opening between parts of a train while he was passing between them.

(April 22, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Howard County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. N. O. Ross, George W. Funk, and Bell & Purdum for appellant.

Messrs. M. F. Mahoney, Kistler & Kistler, Blackledge & Shirley, F. Winter, and M. Winfield, for appellee:

No error can be predicated upon the ruling upon the demurrer to the complaint, as the facts alleged to be omitted in the complaint are fully found by the special verdict.

Ross v. Banta, 140 Ind. 123; *State, Marks, v. Vogel*, 117 Ind. 188; *Martin v. Cauble*, 72 Ind. 67; *Douthit v. Douthit*, 133 Ind. 26; *Reddick v. Keating*, 129 Ind. 128; *Fuller v. Cor*, 135 Ind. 46; 1 *Woolen's Digest*, p. 585.

The complaint is good against general demurrer. Each paragraph contains the averment that the deceased was killed by the carelessness and negligence of the appellant and without fault upon his part.

Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551; *Cincinnati, H. & D. R. Co. v. Chester*, 57 Ind. 297; *Jones v. White*, 90 Ind. 255; *Cleveland, C. C. & I. R. Co. v. Wynant*, 100 Ind. 160; *Louisville, N. A. & C. R. Co. v. Krimming*, 87 Ind. 351; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Cincinnati, I. St. L. & C. R. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep. 334; *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 44; *Deller v. Hofferberth*, 127 Ind. 414; *Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 194; *Indianapolis, P. & C. R. Co. v. Keely*, 28 Ind. 133; *Indianapolis, C. & L. R. Co. v. Hamilton*, 44 Ind. 76; *Ohio & M. R. Co. v. Seiby*, 47 Ind. 471, 17 Am. Rep. 719; *Louisville, N. A. & C. R. Co. v. Cauley*, 119 Ind. 142; 2 *Woolen's Digest*, § 14604; *Cincinnati, I. St. L. & C. R. Co. v. Darling*, 130 Ind. 378; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 535; *Stewart v. Pennsylvania Co.* 130 Ind. 242; *Wabash v. Carrer*, 129 Ind. 552, 13 L. R. A. 851; *Pennsylvania Co. v. Horton*, 132 Ind. 189; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404.

The record affirmatively shows, in the special verdict, the fact that these contracts were executed and in force at the time of the death of the appellee's decedent.

Nixon v. Campbell, 106 Ind. 47; *Davis v. Reamer*, 105 Ind. 318; *Cleveland C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312; *Fouser v. Cunningham*, 21 Ind. 200.

The paper purporting to be an affidavit set out in the third paragraph of answer as a part 40 L. R. A.

of the contract alleged to have been entered into by appellee's decedent is not signed by appellee's decedent, and is no part of the alleged contract.

Avery v. Dougherty, 102 Ind. 443, 52 Am. Rep. 680; *Bayless v. Glenn*, 72 Ind. 5; *Cotton v. State, Roberts*, 64 Ind. 573.

The contract of appellee's decedent was only that the express company should not be liable to him or his personal representatives. It did not relieve appellant from responsibility to appellee or his personal representatives for an injury caused by appellant's negligence.

Brewer v. New York, L. E. & W. R. Co. 124 N. Y. 59, 11 L. R. A. 483; *Kenney v. New York C. & H. R. R. Co.* 125 N. Y. 422.

It is not averred in the answer, or shown in the contract of appellee's decedent, that he had notice or knowledge of the contract between the express company and appellant, or that, to his knowledge, said contract formed any part of the consideration of the contract between him and the express company.

Brewer v. New York, L. E. & W. R. Co. 124 N. Y. 59, 11 L. R. A. 483; *Kenney v. New York, C. & H. R. R. Co.* 125 N. Y. 422.

It is not shown in the answer that appellant at any time had notice or knowledge of the contract between appellee's decedent and the express company.

Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 38 L. R. A. 93.

Contracts to relieve in advance for liability for negligence should be strictly construed. The contract of appellee's decedent cannot be extended by construction to liability of the express company for negligent acts of appellant assumed by force of its contract with appellant.

Kenney v. New York C. & H. R. R. Co. 125 N. Y. 422; *Perkins v. New York C. R. Co.* 24 N. Y. 196, 82 Am. Dec. 281; *Blair v. Erie R. Co.* 66 N. Y. 313, 23 Am. Rep. 55; *Mynard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180, 27 Am. Rep. 28; *Roesner v. Hermann*, 8 Fed. Rep. 732; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471; *Purdy v. Rome, W. & O. R. Co.* 125 N. Y. 409; *Runt v. Herring*, 2 Misc. 105; *Newport News & M. V. Co. v. Eijfort*, 15 Ky. L. Rep. 600; *Mancy v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105; *Jacksonville S. E. R. Co. v. Southworth*, 135 Ill. 250; *Hissong v. Richmond & D. R. Co.* 91 Ala. 514; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548; *Johnson v. Richmond & D. R. Co.* 86 Va. 975; *Kansas P. R. Co. v. Pearey*, 29 Kan. 169, 44 Am. Rep. 630; 2 *Thomp. Neg.* 1025.

In the absence of the contract effective to put appellee's decedent in a different relation, he is to be considered as being rightfully upon the tracks of appellant and entitled to protection against its negligence.

Blair v. Erie R. Co. 66 N. Y. 313, 23 Am. Rep. 55; *Brewer v. New York, L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Union P. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475; *Yeoman v. Contra Costa Steam Nav. Co.* 44 Cal. 71; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Hammond v. North Eastern R. Co.* 6 S. C. N. S. 130, 24 Am. Rep. 467; *Chamberlain v. Milwaukee & M. R. Co.* 11 Wis. 248.

Hackney, J., delivered the opinion of the court:

In December, 1894, Oscar P. J. Romick was an employee of the Adams Express Company, at the city of Logansport, caring for express matter entering and going from said city on the line of the appellant's railway. Between 2 and 3 o'clock on the morning of the 13th of said month, while passing from the south side of appellant's two parallel tracks, near the passenger depot, and from the express company's storeroom to the north side of said tracks, said Romick entered between two cars of a passenger train, separated by a space of from 6 to 10 feet, just as additional cars were driven against those of one division of said train, and he was caught and crushed between said two cars. From his injuries he died, and the appellee, charging the appellant with negligence in driving in said additional cars without warning and without a watchman at the point of the cut in the train, sued the appellant for damages.

The appellant's third answer to the complaint alleged a special contract between the appellant and said express company, whereby the former agreed to carry upon its passenger trains the express matter and messengers of the latter, said express company supplying its own servants, and handling the express matter by its own agents; that, as a part of said special contract, the express company agreed "to assume all risks of loss or damage that may arise out of or result from its operations under this agreement, and to save and hold harmless" the railway company "against the same, and especially to protect" it "against claims that may be made upon it for loss or damage either to the employees of the" express company, "or the property in its charge, whether the loss may occur through the gross negligence of the" railway company "or its employees, or otherwise." It was alleged also that between Romick and the express company existed the following contract: "Whereas, O. P. J. Romick, the undersigned, has made application to be employed by the Adams Express Company, as a servant of said company at a stipulated rate of compensation for his services, which rate said company is willing to pay only if the undersigned will assume all risks of said employment, and release said company therefrom, as hereinafter set forth. Now, therefore, in consideration of such employment, to be given by said company, and the compensation to be paid therefor and in consideration of \$1, lawful money of the United States, paid by the Adams Express Company, to the undersigned, the receipt whereof is hereby acknowledged, the undersigned, for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees that in no case shall said company be liable by reason of any act or negligence of its agents, servants, or employees, or any of them, or otherwise, causing any injury to his person or property, or causing his death, while he shall remain in its employ; and he accepts said employment with full knowledge and notice of all the risks involved therein, which he assumes. And the undersigned hereby releases said company from any and all liability for and in respect of any such damage, injury, or death, by reason of negli-

gence or otherwise." Said contract was signed by said Romick, was duly attested, and had appended thereto the following statement, made and sworn to by said Romick concurrently with said contracts:

"State of Indiana, Cass County. O. P. J. Romick, being duly sworn, says that he is the individual who executed the foregoing release and contract; that he has read or heard read the same before execution, and understands that, by signing such contract, he has released the Adams Express Company and all other carriers employed by it from all liability to him for his death or personal injury from any cause, whether negligence of either of said companies, or their servants or agents, or otherwise." Upon motion of the appellee, the trial court struck out said contracts as exhibits to said answer and the allegations of the answer pertinent to said contracts, and thereafter sustained a demurrer to said answer, which answer, denuded of said allegations, was not more than an admission of the injuries, and a denial of negligence. These rulings are urged as error, and appellee's learned counsel concede in oral argument that if the language of the contracts is sufficiently direct and comprehensive to include a release, on his part, of a right of action for injuries from the appellant's negligence, said rulings were erroneous, and the judgment should be reversed.

It had been urged in the briefs for appellee that a contract of release from the results of negligence was void, as against public policy, and the following authorities were cited in support of that proposition: *Roesner v. Hermann*, 8 Fed. Rep. 782; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471; *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Kansas P. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Johnson v. Richmond & D. R. Co.* 86 Va. 975; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548; *Hissong v. Richmond & D. R. Co.* 91 Ala. 514; 2 Thomp. Neg. 1025; 1 Cent. L. J. 465; *Arnold v. Illinois C. R. Co.* 83 Ill. 273, 25 Am. Rep. 386; *Jacksonville S. E. R. Co. v. Southworth*, 135 Ill. 250; *Purdy v. Rome, W. & O. R. Co.* 125 N. Y. 209; *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105; *Newport News & M. F. Co. v. Elfort*, 15 Ky. L. Rep. 600; *Runt v. Herring*, 2 Misc. 105. These authorities probably sustain the proposition stated when applied to exemption against negligence in the discharge of a public or quasi-public duty, such as that owing by a common carrier to an ordinary shipper, passenger, or servant. In a recent decision of this court, however, that of *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, we recognized the well-established rule that railway companies, although public or common carriers, may contract as private carriers, such as that of transporting express matter for express companies, as such matter is usually carried, and in that capacity may properly require exemption from liability for negligence as a condition to the obligation to carry. See also *Express Cases*, 117 U. S. 1, 29 L. ed. 791; *Hosmer v. Old Colony R. Co.* 156 Mass. 508; *Bates v. Old Colony R. Co.* 147 Mass. 255; *Chicago, M. & St. P. R. Co. v. Wallace*, 24 U. S. App. 539, 66 Fed. Rep. 506, 30 L. R. A. 161; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374; *Forepaugh*

v. Delaware, L. & W. R. Co. 128 Pa. 217, 5 L. R. A. 508; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62, 80 L. R. A. 193; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846; *Muldoon v. Seattle City R. Co.* 10 Wash. 311; *Griswold v. New York & N. E. R. Co.* 58 Conn. 371, 55 Am. Rep. 115.

Contracts of exemption from such liability have been upheld for many years in the courts of New York, without regard to the distinction between exemptions from those duties arising from the obligations of common carriers and those which the carriers are not required to perform, but may perform upon terms prescribed by them. In that state, however, impressed perhaps by the question of public policy which in other states defeats contracts of exemption from the consequences of neglecting quasi public duties, it has been held that contracts of exemption must be strictly construed, and with all presumptions indulged against an intention to exempt liabilities for negligence. Some of these cases are *Kenney v. New York C. & H. R. R. Co.* 125 N. Y. 422; *Breuer v. New York, L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483; *Mynard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180, 27 Am. Rep. 28. In the early case of *Wells v. Steam Navigation Co.* 2 N. Y. 204, it was held however, that the right to contract for a restricted liability existed with reference to private carriers.

Learned counsel for the appellee insist that the rule of strict construction should be applied to the contracts before us, and that, under the rule, the contract between the Adams Express Company and the appellant is one of indemnity only; that the contract between Romick and the express company exempted only the express company, and extended but to the ordinary risks of the employment with that company, not including the negligence of that company or of the appellant; and that, in construing the contract between Romick and the express company, the sworn statement of Romick should be cast out, because it does not contain his signature, and because it was not embodied in the contract. The only reason assigned, in the motion, for striking out the exhibits, was that they were void as against public policy. This reason upon the authorities we have cited, was not sufficient, and should not have prevailed; but if the exhibits, for any other reason, should have been stricken out, the ruling was probably harmless. There was no separate specification in the motion directed to the verified statement of Romick, and it went out under the general motion. There is no contention that the exhibits should have been stricken out, because not the basis of the answer, and therefore not properly capable of becoming a part of the answer by exhibit; nor is it claimed that they were immaterial to the answer upon the theory thereof. The latter claim could not be sustained under the rule recently announced in *Atkinson v. Wabash R. Co.* 143 Ind. 501, where it was said that "it is settled that where averments or matter in a pleading are in any way material, they ought not to be struck out on motion, and the recognized test of their materiality is to inquire whether they tend to constitute a cause of action or defense. If they do, they are not irrelevant, and ought not to be suppressed,"—

citing authorities. That the exhibits tended to constitute and to support a cause of defense is without serious doubt, and, when we observe the character of attack made upon them in this court, their sufficiency to constitute a defense is the question, and not whether they tend to do so. In other words, the argument here is that which would apply to a demurrer, and has no place upon the motion. While regarding the ruling upon the motion as an error for which the judgment should be reversed, the force and effect of the contracts will necessarily arise upon another trial, and seem now to arise upon the appellant's motion for judgment on the special verdict, it having been found that Romick's only rights upon and about the tracks and right of way, on the occasion of his injury, were by the terms of said two contracts, not including the verified statement. In an interpretation of the language employed in the contracts, we are to be controlled by the usual rules for the ascertainment of the intention of the parties, looking to the words in their ordinary meaning, and not by the rule of strict construction here insisted upon, and that adopted in New York, with reference to contracts restricting liability of common carriers. As said in *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 36 U. S. App. 152, 17 C. C. A. 62, 70 Fed. Rep. 201, 30 L. R. A. 193: "The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy."

We have held the contracts before us not against public policy, and we must therefore subject them to the same tests of interpretation that other lawful contracts should receive. As between the express company and the appellant, their contract, saving the latter from liability for injuries to the former's servants, could not, in its very nature, be more than an assumption or indemnity, as there could be no waiver of a right belonging to another, standing independent of them. But it yet remains to determine whether Romick stood independent of the contract and the parties thereto. That contract, whether an assumption, indemnity, or waiver, included the demand sued upon in this case, for it covered a claim for damage to an employee of the express company, alleged to have occurred through the negligence of the railroad company, taking the very words of the clause quoted above from that contract. By the provisions of that contract, the rights of the express company were fully measured. Its only right to be upon the tracks and right of way, through and by its servants, was by the provisions of that contract. Its license came only from the contract, and the appellee introduced the contract in evidence to show the right of his decedent to be upon the tracks. The express company operating by servants, was present on the occasion in question, by Romick, its agent. His rights were those of the express company, and could not be greater. He was there by the license given the express company, and he could not accept the license and reject the condition upon which it was granted. It is said, however, that it does not appear from allegation or proof that he knew of the condi-

tions upon which the license was given, and we are aware that it was decided in *Brewer v. New York, L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483, that the express agent must have notice of the contract of exemption to be bound thereby. But with what reason can it be said that the railroad company should have given notice to the employees of the express company of the particular provisions of the contract under which they were admitted upon, and permitted to use, the property of the railroad company? Since the contract is the basis of rights which he assumes and exercises, it should rather be said that he must inform himself of its provisions. Unlike the theory of the holdings in New York, our court holds such contracts as standing, not upon the relationship of a common carrier, but as existing only in the private agreements of the parties. Therefore, when Romick took employment with the express company he was obliged to know that his rights and privileges did not depend upon the law as to common carriers, nor upon public or quasi-public duty of the railroad company, but that they rested upon private contract, to which he became subject in the performance of his duties for the express company in its relations to the appellant. He did not therefore occupy a position with relation to the railroad company independent of the contract between said two companies, but was chargeable with knowledge of the limitation upon the appellant's liability. If we accept the construction of the contract between the companies that it was an assumption or an indemnity, which supplied a liability to the appellant for any claim it might be required to pay on account of an injury inflicted, and we then look to the contract between Romick and the express company, we find that he there assumed all the risks of the employment, released the express company from any and all liability on account of his injury or death from negligence or otherwise, and agreed that in no case should the express company be liable for his death or injury from any act or negligence of any agent, servant, or employee of such company or otherwise. While it is not clear that the words "agents, servants, or employees," used in this contract, related directly to the appellant, since it was but in a limited sense an "agent, servant, or employee" of the express company, yet when we have charged the decedent with notice of the contract between the two companies, creating an obligation on the part of the express company to pay for the injury or death of its employees, the last clause in his contract is more than a general restatement of what is particularly stated before. He "released said company from any and all liability for and in respect of any such damage, injury, or death, by reason of negligence or otherwise." The words "such damage, injury, or death" refer to the stated damage to property, injury to person, or to his death, but they are not confined to the special negligence previously stated, but to negligence generally or otherwise. The word "otherwise" includes such liability as might arise from any other cause or in any different manner. A contract assuming or releasing the employer from the ordinary risks of a service would be a useless ceremony, for it could but

do that which the law does without it. Giving the parties credit for a purpose to create an effective and rational contract, we would naturally look for a purpose not already accomplished; and, when we consider the two contracts before us in the light of such an object or purpose, we gather strength in the conclusion that the parties were contracting against unusual risks and liabilities. The word "otherwise," as it is twice employed in Romick's contract, must be deemed to include some liability not expressly mentioned, or such as might arise out of the relations of the parties, and within the general scope of his service and connection with them. Giving the word such force, it would reach liabilities beyond those expressly mentioned, and beyond those claims for damages, injuries, or death arising from the ordinary hazards of the service, for such claims present no liability. It would include "all the risks involved," ordinary as well as extraordinary; and it would include the assumption by the express company in favor of the appellant. So that to treat the contract with the railroad company as a release, accepted by the decedent, and acted upon, or as an assumption or indemnity, the decedent, by his contract, took the place of the express company, assumed its liability, and released it from the same. Appellee's decedent could not collect for the death a sum which the decedent, by the terms of his contract, agreed to release and assume.

We do not understand that a statement under oath may not be an affidavit without the signature of the affiant. *Turpin v. Eagle Creek, & L. W. L. Gravel Road Co.* 48 Ind. 45; *Bonnell v. Ray*, 71 Ind. 141; 1 Enc. Pl. & Pr. p. 315, and authorities there cited. We offer no suggestion as to the effect of the statement, with proper allegations as to the construction of the contract in case of ambiguity, but its relevancy to the defense pleaded was such that it should not have been stricken out, but should have received construction upon demurrer. In view of the fact that the special verdict contains findings relative to the contracts which were not within the issues, we do not make any direction as to the motion for a *venire de novo*, and for judgment in favor of the appellant.

The judgment of the Lower Court is reversed, with instructions to overrule the appellee's motion to strike out parts of the answer.

Motion to modify mandate overruled June 18, 1897.

Oslander K. RITCHEY *et al.*, *Appts.*,
v.

Mary E. WELSH.

(.....Ind.....)

1. A way of necessity is created on the partition of lands, in the absence of anything in the record to the contrary, if such way would have been created in favor of one of the

NOTE.—As to right of way by necessity, see cases collected in note to *Logan v. Stogdale* (Ind.) 8 L. R. A. 58; *Kingsley v. Gouldsboro Land Improv. Co.* (Me.) 25 L. R. A. 502.

parcels by its conveyance or devise by the common ancestor.

2. **A way of necessity once selected cannot be changed by either party without the consent of the other.**
3. **The right to locate a way of necessity belongs to the owner of the land over which it is to pass,** provided he exercises it in a reasonable manner, having due regard to the rights and interests of the owner of the dominant estate; but if he fails to select it when requested the party who has the right thereto may select a suitable route, having due regard to the convenience of the owner of the servient estate.
4. **The offer of a substitute for a right of way by necessity** in favor of one over another parcel of lands partitioned, which would consist of a private way over other lands that constituted no part of the estate held in common, need not be accepted by the owner of the right of way.

(January 4, 1898.)

APPEAL by defendants from a judgment of the Circuit Court for Jasper County in favor of plaintiff in an action brought to establish a right of way of necessity. *Affirmed.*

The facts are stated in the opinion.

Messrs. Seller & Uhl and R. W. Marshall, for appellants.

Messrs. Frank Folts, Charles G. Spiller, and Harry R. Kurrie, for appellee.

When a complaint is good on one of two theories the trial court is permitted to construe it upon the theory most clearly outlined by the facts stated, and require a trial on such theory.

Batman v. Snoddy, 132 Ind. 480; *Monnett v. Turpie*, 133 Ind. 434.

There is nothing in the record that shows that the title to any part of the estate was put in issue in the partition action. And the nature of the action does not put the title to land affected by it in issue. Neither does it put in issue any appendant right to any title.

Gullett v. Miller, 106 Ind. 75; *Davis v. Lennen*, 125 Ind. 185; *Baumgardner v. Edwards*, 85 Ind. 117.

A way of necessity is not an interest or an estate in the land over which it passes. It is no part of that title, but it is only a part of the title, as an incident of the dominant estate.

Davidson v. Nicholson, 59 Ind. 411; *Morgan v. Moore*, 3 Gray, 319; *Sanray v. Hunger*, 42 Ind. 44; *Sedgwick & Wait, Trial of Title to Land*, §§ 132, 147; *Moore v. Crose*, 43 Ind. 30.

A way of necessity, so far as it concerns the servient estate, is a mere privilege, which continues so long as the necessity which creates it exists.

Home v. Richards, 4 Call. (Va.) 441, 2 Am. Dec. 574; *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 94; *Nesbitt v. Trumbo*, 39 Ill. 116; Washb. Easements & Servitude, 2d ed. p. 3; *Atkins v. Bordman* (Mass.) 4 Lead. Cas. Am. Law of Real Prop. p. 216; *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107.

A way of necessity arises in the broad equitable ground that every transfer of property is presumed to include the enjoyment of the property, so far as the owner possesses the right of enjoyment himself, and if the incidents

that are essential to its enjoyment are not specifically mentioned, they are presumed to pass as a part of that which is expressly granted.

"Whoever grants a thing is supposed to tacitly grant that without which the grant would be of no effect."

Broom's Legal Maxims, 196; *Morgan v. Mason*, 20 Ohio, 403, 55 Am. Dec. 464; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107.

The appellee had a right to assume that the conveyance included a way, in view of the necessity, and especial mention of a way would have been mere surplusage.

Atkins v. Bordman (Mass.) 4 Lead. Cas. Am. Law of Real Prop. p. 193; *Pernam v. Wead*, 2 Mass. 203, 8 Am. Dec. 43; *Blum v. Weston*, 102 Cal. 362; *Ellis v. Bassett*, 128 Ind. 118; *Nichols v. Luce*, 24 Pick. 402, 35 Am. Dec. 302; Washb. Easements & Servitudes, pp. 41, 88, 85.

When the appellants permitted appellee to use and occupy this particular way described in the complaint for a number of years, and to erect a gate on her own land in reference thereto, with the maintenance of the gate at the other end of the route that had been erected by the common ancestor, the way became selected, and is not subject to change except with her consent.

19 Am. & Eng. Enc. Law, p. 106; *Lawton v. Tyson*, 12 Rich. L. 88; *Miller v. Garlock*, 8 Barb. 153.

When the location is once fixed it binds both the dominant and servient owner.

Atkins v. Bordman (Mass.) 4 Lead. Cas. Am. Law of Real Prop. p. 200; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Smith v. Lee*, 14 Gray, 473; *Wynkoop v. Burger*, 13 Johns. 222; *Karnuller v. Krotz*, 18 Iowa. 352; *Garraty v. Duffy*, 7 R. I. 476; *Kraut's Appeal*, 71 Pa. 64; *Jennison v. Walker*, 11 Gray, 427; *Jones v. Percival*, 5 Pick. 483, 16 Am. Dec. 415; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; Washb. Easements & Servitudes, 2d ed. p. 223, § 10.

The appellant has the right to select the way in the first instance, but even then he must select one that is practicable.

Monks, J., delivered the opinion of the court:

This action was brought by appellee against the appellants to enforce a way of necessity. The demurrer to the complaint was overruled. The court made a special finding of facts, and stated its conclusions thereon in favor of appellee, to each of which appellants excepted. Final judgment was rendered in favor of appellee. The errors assigned, and not waived, call in question each conclusion of law and the action of the court in overruling the demurrer to the complaint. It appears from the special finding that Mary C. Ritchey died intestate, the owner of a body of land bounded on the west and south by a highway; that afterwards, in 1887, partition was made of said real estate, so that the real estate allotted to each was bounded on the west or south by said highway. The 18 acres set off to appellant Oslander K. Ritchey was 36 rods wide north and

south, and divided the 53 acres set off to Samuel W. Ritchey, husband of said deceased, from the 29 acres set off to appellee. Afterwards said Samuel W. Ritchey died the owner of said 53 acres, and in 1891, in an action for partition, the same was divided in such a manner that the part set off to appellant Osiander K. Ritchey was between the public highway and the part set off to appellee, so that the tract set off to appellee could not be reached from a public highway over said 53 acres, except by crossing over the part thereof set off to said Osiander K. Ritchey. No mention was made in said partition proceedings of a way from appellee's tract to any highway. Samuel W. Ritchey occupied said 53 acres from the time the same was set off to him until his death, and entered from the highway through a gate on the part of said land afterwards set off to said appellant Osiander K. Ritchey, going over the land in the most convenient route. After the partition of the 53 acres, a gate was still maintained upon said land at the highway for the convenience of appellee, she going thence north to a point west of the southwest corner of her said tract; thence east to her land. The part of the 53 acres set off to appellee was not fenced in until 1898, when she erected a gate at the southwest corner thereof, and has since used said gate, and a route extending directly west therefrom to the east line of the southwest quarter, and thence south to the gate at the highway, the entire way so used being upon the part of said 53 acres set off to appellant Osiander K. Ritchey, and with his consent. Appellant Osiander K. Ritchey, before the commencement of this action, offered to appellee the privilege of passing over the 18 acres which were set off to him in the partition of his mother's land, in 1887, from north to south. By the way so offered, appellee could go from the 25 acres set off to her in the partition of her father's land, in 1891, to the 29 acres set off to her in the partition of her mother's land, in 1887, which last-named tract was bounded on the west by a highway. Appellants insist that the court erred in overruling the demurrer to the complaint, and in each of the conclusions of law; because—"First, a right of way of necessity does not arise out of partition proceedings; second, appellee had another way offered before this action was commenced; third, appellants had selected another way."

It is settled law that if one conveys a part of his land in such form as to deprive himself of access to the remainder, unless he goes across the land sold, he has a way of necessity over the portion conveyed. This is because the law presumes an understanding of the parties that the one selling a portion of his land shall have a legal right to access over the part sold to the remainder, if he cannot reach it in any other way. If the part conveyed is in such form that the grantee cannot reach the same except over the part not conveyed, such grantee has a way of necessity thereto over the land of the grantor not conveyed for the reason that the law presumes that one would not sell his land to another without an understanding that the grantee should have a legal right of access thereto over the part not conveyed. *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61, and cases

cited; *Stewart v. Hartman*, 46 Ind. 331, 341, 342; *Logan v. Stogsdale*, 123 Ind. 372, 376, 377, 8 L. R. A. 58; *Ellis v. Bassett*, 123 Ind. 118, and cases cited; *Kimball v. Cochesho R. Co.* 27 N. H. 448, 59 Am. Dec. 387; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43; *Pinnington v. Galland*, 9 Exch. 1; *White v. Bass*, 7 Hurlst. & N. 732; Washb. Easem. **164, 166. These presumptions prevail over the ordinary covenants of a warranty deed. *Brigham v. Smith*, 4 Gray. 297, 64 Am. Dec. 76. The rights of the grantor and grantee would not be different or any more extensive if by the terms of the deed express provision was made for such way of necessity (*Viall v. Carpenter*, 14 Gray, 126; *Blum v. Weston*, 102 Cal. 362; *Brigham v. Smith*, 4 Gray, 297, 64 Am. Dec. 76); the law thus giving effect to such grant according to the presumed intent of the parties. Appellants contend that this right of a way of necessity can only exist when there is a grant by one owning both the dominant and servient estate. This right, however, has not only been raised between parties to the conveyance of one or more parts of land, when the part granted or retained can only be reached over the other part, but also where a part of a tract of land has been sold or set off on execution or by an executor or administrator. *Ellis v. Bassett*, 123 Ind. 118; *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43; *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107; *Russell v. Jackson*, 2 Pick. 574; *Schmidt v. Quinn*, 186 Mass. 575; *Smyles v. Hastings*, 22 N. Y. 217; *Hoveton v. Frearson*, 8 T. R. 50. It has been held that such a right exists in partition proceedings in favor of any tract allotted which is not accessible except over the part or parts of the tract allotted to others. *Viall v. Carpenter*, 14 Gray, 126; *Blum v. Weston*, 102 Cal. 362. See also *Goddard, Easem, Bennett's ed.* 348. Under the authorities it is clear that if the parts of said real estate allotted to appellant Osiander K. Ritchey and appellee, respectively, had been conveyed or devised to them by Samuel W. Ritchey, their common ancestor, a way of necessity would have been created in favor of the part conveyed or devised to appellee. The reason for the doctrine of a way of necessity is thus stated in *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61: "And although it is called a way of necessity, yet, in strictness, the necessity does not create the way but merely furnishes evidence as to the real intention of the parties. For the law will not presume that it was the intention of the parties that one should convey land to the other in such manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder." The reasons given to support a way of necessity, in case of a grant, support such a rule with equal force, when there is partition of land by deed or by a proceeding in court. In *Viall v. Carpenter*, 14 Gray, 126, the lands of a testator were so divided by proceedings in the probate court that parcels of land set off to some of the devisees were not accessible from the highway without crossing one of the parcels set off to other devisees. The committee making the

division made no express provision concerning the parcels of land which they assigned in severalty. The court held that the right of way of necessity attached to the lands assigned without any express provision therefor. The court said; "The court do not doubt that, by the division of the real estate of Thomas Carpenter, deceased, in the probate court, his heirs, to whom specific portions of that estate were assigned, acquired a right of way to those portions over other lands which had been their ancestor's. And whether they acquired this right solely as of necessity, without any provision therefor in the language of the division, or by the effect of the language used by the committee in the making the record of the division, seems to us to be unimportant.

A reservation, in terms, of a way of necessity' would confer no further right than would be conferred by operation of law, without those words." In *Ellis v. Bassett*, 128 Ind. 118, a part of the land of an estate fronting on the highway was set off to the widow in a proceeding for a partition, and afterwards the administrator, by order of court, sold the remainder. It was held that the purchaser had a right of way of necessity over the part set off to the widow. This court said: "A right of way, upon a severance of the estate by partition between heirs, sometimes arises when it would not exist in case of a conveyance of one portion of the premises." *Blum v. Weston*, 102 Cal. 362, fully sustains our conclusion that the doctrine of a way of necessity applies in partition of lands made by deed or by proceedings in court. The presumption is, unless the contrary clearly appears from the record in the partition case, that the shares were allotted with the understanding that the parcel allotted to appellant Osiander K. Ritchey was subject to the easement of a way of necessity in favor of the parcel set off to appellee. Appellee's right to a way of necessity is the same as if provision had been made therefor in the report of the commissioners and decree of the court. *Viall v. Carpenter*, 14 Gray, 126; *Blum v. Weston*, 102 Cal. 362. Appellants contend that they had the right to choose where the way should be located. When no prior use of the way has been made, and the same is to be located for the first time, the owner of the land over which the same is to pass has the right to choose it, provided he does so in a reasonable manner, having due regard to the rights and interest of the owner of the dominant estate. But, if the owner of the land fail to select such way when requested, the party who has the right thereto may select a suitable route for the same, having due regard to the convenience of the owner of the servient estate. *Holmes v. Seely*, 19 Wend. 507, 510; *Russell v. Jackson*, 2 Pick. 574; *Capers v. Wilson*, 3 McCord, L. 170; *Goddard, Easem. Bennett's ed.* 348, 350. When the way is once selected, it cannot be changed by either party without the consent of the other. *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Holmes v. Seely*, 19 Wend. 507, 510; *Morris v. Edgington*, 3 Taunt. 23; *Goddard, Easem. Bennett's ed.* 351.

It is shown by the special finding that Samuel W. Ritchey, the one from whom said appellants and appellee inherited their respective

interests in said 53 acres of land, entered upon the part thereof afterwards set off to appellant Osiander K. Ritchey through a gate at the highway, going thence over the land on the most convenient route; that after the partition was made appellee had access to the 25 acres set off to her over the part of said 53 acres set off to said appellant on the route set forth in the special finding, and that she erected a gate upon her said 25 acres where she entered thereon from said way, and that the way was so used with the consent of said appellant. This was clearly a selection of the way over said appellant's land to the land of the appellee by the agreement of both parties. The way having been selected and used by the agreement of both parties, said appellant could not afterwards, without appellee's consent, change the route, and require said appellee to use the way offered over the 18 acres set off to him in the partition of his mother's land, in 1887. Appellee was not entitled to a way of necessity over said 18-acre tract, which divided her 25 acres from her 29 acres, for the reason that it was no part of the estate owned by said appellant and appellee as tenants in common. She would have no more right to insist on a way of necessity over land of said appellant, other than that inherited by them from their father, than one receiving a grant of land from another could claim a way of necessity over the land of a stranger. Even if there had been no selection of a way by both or either of said parties, we do not think said appellant could compel appellee to accept a private way over said 18-acre tract. Said appellant could not deprive appellee of her right to a way of necessity over the land set off to him by offering her a private way over other lands owned either by himself or others. If he had opened a public highway, running from the existing highway over said 18-acre tract or any other land, so that appellee could thereby have access to the 25-acre tract, there would have been no necessity for a way. But no such case is presented by the facts found.

Appellants next insist that the complaint is to enforce an oral contract between said appellant Osiander K. Ritchey and appellee for a private way, made pending a petition for partition, and that the special finding does not find that there was such an agreement. It is true that the complaint alleges that, when the commissioners filed their report of the partition of the lands of Samuel W. Ritchey, said appellant and appellee agreed that appellee should have a private way from the land set off to her over the land set off to said appellant to the highway, but, disregarding the allegations concerning such agreement, the averments were sufficient to entitle appellee to a way of necessity over the lands set off to appellant. The cause was tried, and a judgment rendered, upon the theory that the complaint sought to enforce a way of necessity. There was no error in the court so treating the complaint. It follows, therefore, that the court did not err in its conclusions of law nor in overruling the demurrer to the complaint.

Judgment affirmed.

George MILLER, *Appl.*,
v.

STATE of Indiana.

(.....Ind.....)

1. **Cruel and unusual punishment** is not made by an indeterminate sentence, not more than the maximum nor less than the minimum prescribed by statute for the specified crime.
2. **The constitutional right of an accused person to trial by jury** is not violated by taking away from the jury the right to fix his punishment.
3. **Judicial power is not given** to a board of managers of a reformatory by authorizing them to shorten the term of service of a convict in case of his reformation, where his sentence is indeterminate between the maximum and minimum prescribed by statute.
4. **The failure of the court to assess** disfranchisement as part of the punishment of a convict is not an error of which he can complain.
5. **The remedy for refusal by the trial court to furnish a transcript of the stenographer's notes** to a person convicted of crime is an application to the supreme court for an order requiring it to do so.

(Howard, Ch. J., and Jordan, J., dissent.)

(March 8, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for St. Joseph County convicting him of burglary. *Affirmed.*

The facts are stated in the opinion.

Messrs. Talbot & Talbot, for appellant:

This law contravenes that part of that section of our Constitution which provides: "All penalties shall be proportioned to the nature of the offense."

Ind. Const. art. 1, § 13, Bill of Rights, being Rev. Stat. 1894, § 61.

The legislature has no power to make the length of a convict's term of imprisonment depend on anything but the offense of which he has been convicted.

If the legislature had intended to pass an act making the maximum term the punishment in all cases, it would have provided that the court should sentence for the maximum term by statute provided, and then would have conferred power on the board of managers to parol and discharge.

People v. Cummings, 88 Mich. 256, 14 L. R. A. 285; *State, Atty. Gen., v. Peters*, 48 Ohio St. 629.

This act, if upheld, will make the punishment of a convict depend upon other things than the nature of the offense of which he has been convicted, *viz.*: his conduct subsequent to his conviction; under § 10 of the act, on the determination of the board of managers; that he is incorrigible or that his presence in the reformatory is detrimental to the welfare of the other inmates; under § 11, on the ability of the prisoner or his friends to furnish the board with satisfactory evidence that arrange-

ments have been made for the convict's honorable and useful employment for at least six months while upon parole, in some suitable occupation, failing in which he cannot be paroled, but must serve the maximum term provided for his offense; under § 12, his age, nativity, nationality, education, the nature or history of his parentage, occupation, and early social influences as seem to indicate the constitutional and acquired defects and tendencies of the prisoner, his physical condition, his improvement or deterioration of character, all alterations affecting the standing or situation of such prisoner, any subsequent facts of personal history which may be brought to the knowledge of the superintendent.

Any charge of any character which may be made against any prisoner is thus made to effect the duration of his term of imprisonment.

No man shall have criminal punishment inflicted upon him for anything but a crime of which he has been convicted after trial and public conviction on an impartial and public trial in the county in which the crime is charged to have been committed, in which trial he shall have had an opportunity to meet his accusers and to prove any defense which he might have.

Ind. Const. §§ 58, 61.

This act is in violation of § 58 of the Constitution in this: It makes the punishment of the prisoner depend upon the determination of a board of managers, arrived at in an *ex parte* manner and upon hearsay evidence in a county other than that in which the offense was committed, without giving him a trial by an impartial jury, in deprivation of his right to be heard by himself and counsel.

Cooley, Const. Lim. **812, 342, 348.

This act conflicts with § 161 of the Constitution, which is as follows: "The judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish." Burns's Ind. Rev. Stat. 1894, § 161.

A court is the sitting or meeting of persons legally appointed for the judicial determination of any cause.

1 New Rev. Encyclopædic Dictionary, p. 1818, sub. B, ¶ 4.

A court is a place where justice is judicially administered.

Co. Litt. 58; 8 Bl. Com. 23; *White County Comrs. v. Gwin*, 136 Ind. 562, 22 L. R. A. 402; *Waldo v. Wallace*, 12 Ind. 569.

It attempts to confer judicial powers upon the board of managers and general superintendent of said reformatory.

Neither the governor nor the legislature can select persons to assist the courts in the performance of their judicial duties.

State, Hovey, v. Noble, 118 Ind. 850, 4 L. R. A. 101.

The legislature has no power to confer judicial authority upon master commissioners.

Shoults v. McPheeters, 79 Ind. 878; 5 American Lawyer, p. 252.

The act in question contravenes that constitutional provision prohibiting the vesting of judicial power in a ministerial body, as well as that constitutional provision providing that all punishments shall be proportioned to the nature of the offense.

NOTE.—As to suspension of sentence of prisoner, see note to *People v. Cummings* (Mich.) 14 L. R. A. 285; also *State v. Voss* (Iowa) 8 L. R. A. 767; *People, Forayth, v. Monroe County Court of Sessions* (N. Y.) 23 L. R. A. 856; *Re Webb* (Wis.) 27 L. R. A. 366; *State v. Crook* (N. C.) 29 L. R. A. 280.
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People, Henning, v. Allen, 29 Chicago Legal News, 176.

Mr. F. M. Jackson, also for appellant:

In every government there are three sorts of powers: The executive, the legislative, and the judicial.

When the legislative and the executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the executive power, the judge might behave with all the violence of an oppressor.

Montesquieu, *Spirit of Laws*, chap. 6 (1748).

In the law under consideration it will not be questioned that this board of managers is purely an administrative body, and not a judicial body, and any attempt of the legislature to confer judicial authority upon an administrative body will be held unconstitutional under art. 3, § 1, of the Constitution (Rev. Stat. 1894, 96.)

The administration of law implies the judicial function.

The judicial function implies question and debate; and, in this sense, it includes a bar, trained and skilled in the principles and processes of the law. A body of men, trained to the knowledge and practice of the law, learned in its principles and processes, to interpret the law to society; to guide the business of society and its members; to look to the intelligent and faithful course of judicial proceedings; and to stand, charged with the holy office of the administration of God's justice among men.

Donovan, *Modern Jury Trials*, p. 551.

Under the new régime, the board of managers may find that the court and jury trying the cause were mistaken, and change the punishment from a term in the reformatory to the maximum term in the state prison. Or, in like manner, the defendant may have proof positive at home in his own county, where his friends and neighbors live, that he had never before been convicted of anything, that he had always borne a good reputation, and, if given an opportunity to be heard and cross examine the witness against him, may show the testimony to be unreliable and worthless. Yet, this new tribunal is given power to determine that fact adversely to the defendant, in his absence without his consent, and upon any kind of evidence, and the witnesses are not required even to go through the formality of taking an oath before giving their evidence.

Trial by jury as contemplated by the Constitution is an indispensable part of the machinery of justice.

The hard sense and courageous firmness of English juries more than once preserved the liberties of the English people against the combined attack of the King and his servile judges.

Trial of Penn and Mead, 6 How. St. Tr. 951.

Right of trial by jury must be preserved inviolate as it was in use when the Constitution of the state was adopted; but this relates only to trials in criminal cases and suits at common law.

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Scudder v. Trenton Delaware Falls Co. 1 N. J. Eq. 694, 23 Am. Dec. 756.

Messrs. Thomas W. Slick, William A. Ketcham, and Merrill Moores for the State.

McCabe, J., delivered the opinion of the court:

The appellant was charged in the indictment with burglary and larceny, on May 3, 1897. On a trial of the charge, the jury found him guilty of burglary by their verdict, reading thus:

We, the jury, find the defendant, George Miller, guilty of burglary, as charged in the indictment, and that his age is eighteen years.

John Valentine, Foreman.

And the following judgment was rendered upon said verdict, to wit: "And the defendant, being asked if he has any legal cause to show why the judgment of the court should not be pronounced upon the verdict of the jury, stands mute; and thereupon it is considered and adjudged by the court that the defendant be, and is hereby, sentenced to the custody of the board of managers of the Indiana Reformatory or at such place as may be designated by said board of managers, as guilty of the crime of burglary, and that he be confined therein for a term of not less than one year or more than fourteen years, as a punishment for said offense, according to the rules and regulations established by such board of managers, and that the sheriff of this county is charged with the execution of this sentence." The errors assigned call in question the action of the circuit court in overruling appellant's motion for a new trial, and in refusing appellant's request to be furnished with a longhand transcript of the evidence given in said cause at the expense of St. Joseph county. The ground specified in the motion for a new trial is that the verdict is contrary to law.

The objection to the verdict would perhaps be fatal, in that it would be contrary to and unauthorized by law as it stood prior to April 1, 1897, because it does not "state . . . the amount of fine and fix the punishment to be inflicted." Rev. Stat. 1894, § 1906 (Horner's Rev. Stat. 1897, § 1887; Rev. Stat. 1881, § 1837). But it is contended on behalf of the state that the verdict is not contrary to, and is authorized by, law, to wit, § 8 of the reformatory act, approved February 26, 1897 (Acts 1897, p. 69). That act does authorize just such a verdict and judgment in such a case. The learned counsel for appellant contend, however, that so much of the reformatory act as authorizes such a verdict and judgment is unconstitutional. The section in question reads thus: "In all cases of felony tried hereafter before any court or jury in this state, if the court or jury find the person on trial guilty of a felony, it shall be the duty of such court or jury to further find and state whether or not the defendant is over sixteen (16) years of age and less than thirty (30) years of age. If such defendant be found to be between said ages, and he be not guilty of treason or murder in the first or second degree, it shall only be stated in the finding of the court or verdict

of the jury, that the defendant is guilty of the crime charged, naming it, and that his age is that found by it or them to be his true age, and the court trying such person shall sentence him to the custody of the board of managers of the Indiana Reformatory to be confined at the Indiana Reformatory or at such place as may be designated by such board of managers where he can be most safely and properly cared for, as guilty of the crime found in such finding or verdict, and that he be confined therein for a term not less than the minimum time prescribed by the statutes of this state, as a punishment for such offense, and not more than the maximum time prescribed by such statutes therefor, subject to the rules and regulations established by such board of managers, and it shall be the duty of the board of managers of said reformatory to receive all such convicted persons, and all existing laws requiring the courts of this state to sentence such persons to the penitentiaries or prisons of this state are hereby modified and changed so as to make it the duty of such courts to sentence such prisoners to the Indiana Reformatory. The board of managers may terminate such imprisonment when the rules and requirements of such reformatory have been lived up to and fulfilled, according to the provisions of this act." The next section makes it the duty of the clerk of the court in which the case is tried, where there is a conviction, to send along with the commitment a record containing a copy of the indictment or information filed in the case, the name and residence of the judge presiding at the trial, the names of the jurors and witnesses serving at the trial, with a statement of any fact or facts which the presiding judge may deem important or necessary for the full comprehension of the case. Section 11 provides that "the said board of managers shall have power to establish rules and regulations under which prisoners in the reformatory may be allowed to go upon parole outside the reformatory building and inclosure, but to remain while on parole in the legal custody and under control of the board of managers and subject at any time to be taken back within the inclosure of said reformatory; and full power to enforce such rules and regulations to retake and imprison any inmate, so upon parole, is hereby conferred upon said board, whose order, certified by its secretary, and signed by its president, with the seal of the reformatory attached thereto, shall be a sufficient warrant for the officers named in it to authorize such officer to return to actual custody any conditionally released or paroled prisoner: . . . provided, that no prisoner shall be released on parole until the said board of managers shall have satisfactory evidence that arrangements have been made for his honorable and useful employment for at least six months while upon parole, in some suitable occupation." The 12th section provides for certain rules by which the reformation is to be sought by the board of managers, among which is a record in which is to be entered every fact connected with the history of every prisoner when he enters the reformatory, together with his subsequent conduct affecting his standing, and any facts or personal history which may come to the knowledge of the general superintendent officially,

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bearing upon the question of parole or final release of the prisoner. And the section then provides: "And it is hereby provided that whenever in the opinion of the board of managers any prisoner on parole has violated the conditions of his parole or conditional release, by whatever name, as affixed by the managers, he shall by a formal order entered in the manager's proceedings, be declared a delinquent, and shall thereafter be treated as an escaped prisoner owing the service to the state and shall be liable when arrested to serve out the unexpired term of his maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of time served." Section 18 provides that "it shall be the duty of the general superintendent to keep in communication, as far as possible, with all prisoners who are upon parole, and when in his opinion any prisoner has for one year so conducted himself as to merit his discharge, and has given evidence that is deemed reliable and trustworthy, that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the general superintendent shall make a certificate to that effect to the board of managers, and after written notice to all of the managers, the board shall, at the next meeting thereafter, consider the case of the prisoner so presented; and when said board shall find that said prisoner has so done, he shall be entitled to his final discharge."

It is contended on behalf of appellant, first, that these provisions violate § 16 of art. 1 of the Bill of Rights in our Constitution, providing that "cruel and unusual punishment shall not be inflicted. All penalties shall be proportioned to the nature of the offense." Burns's Rev. Stat. 1894, § 61 (Rev. Stat. 1881, § 61; Horner's Rev. Stat. 1897, § 61). Frequent attempts have been made in this court to reverse judgments in criminal cases because the punishment adjudged was cruel and excessive. But it has invariably been held that, no matter how harsh and severe it might seem to this court, yet, if it was within the limits prescribed by statute for the punishment of such crimes, this court could not interfere nor reverse the judgment. *Siberry v. State* (Ind.) 47 N. E. 458; *Ledgerwood v. State*, 134 Ind. 91; *McLaughlin v. State*, 45 Ind. 838; *McCulley v. State*, 62 Ind. 428; *Shields v. State* (at this term) 49 N. E. 351. In none of these cases was the validity of the statute questioned. In the last case cited, this court said: "It is also urged as a reason for reversal that the punishment is excessive. The only limitations to the power of the legislature to fix the punishment for crimes are those imposed by the Constitution of this state and the United States. Section 16 of article 1 of the Constitution of this state, which provides that cruel and unusual punishment shall not be inflicted, has reference to the statute fixing the punishment and not to the punishment assessed by the jury within the limits fixed by the statute. If the statute fixing the punishment is not in violation of said section of the Constitution, then any punishment assessed by a court or jury within the limits fixed by the statute cannot be adjudged excessive by this court, for the rea-

son that the power to declare what punishment may be assessed against those convicted of crime is not a judicial power, but a legislative power, controlled only by the provisions of the Constitution."

The question, then, is whether the provisions of the act quoted authorize the infliction of cruel and unusual punishment. The legislation was an attempt on the part of the legislature to obey the mandate contained in § 18 of art. 1 of the Constitution, demanding that "the Penal Code shall be founded on the principles of reformation, and not of vindictive justice." And yet the duty to carry out one provision of the Constitution does not authorize the legislature to violate another. The question still remains: Does the statute inflict cruel and unusual punishment? The appellant was convicted of burglary, and the punishment prescribed therefor by the Criminal Code of 1881 was imprisonment in the state prison for any determinate period, at the discretion of the jury, of not less than two years and not more than fourteen years. Burns's Rev. Stat. 1894, § 2002 (Rev. Stat. 1881, § 1929; Horner's Rev. Stat. 1897, § 1929). Under that statute, if the evidence had shown that the appellant was guilty of breaking into an old outhouse, with intent to commit a felony, though he found nothing therein on which to commit the felony, and though the outhouse was practically worthless, yet the jury, in their uncontrollable and unbridled discretion, could send him up to the state prison for fourteen years, and he would be without remedy. Certainly, that is more cruel punishment than that provided by the reformatory act. Under the law prior to that act, when the ponderous iron doors of the prison close on the convict, it not only shuts him in, and shuts out the bright angel of liberty, but it also shuts out of the convict's heart all hope, which is the anchor of the soul, because in the absence of such legislation he is utterly powerless by any amount of good conduct or penitence to assuage or mitigate the severity of his punishment. Is it at all strange that, with liberty and hope gone, the convict's heart should break, or that he should, in his helpless condition settle down to the belief that society was his bitter hating enemy; and thus brooding over the subject through the long years of his prison toil without recompense, and tears all in vain, is it at all strange that he should, at the expiration of his term, come out of prison the bitter-hating enemy of society? Clearly not. It was to remedy this manifest evil to society and to the criminal classes themselves that the legislation in question was enacted. So that, when the convict is brought within the prison walls, if his crime be not treason or murder in the first or second degree, the hope of liberty is not shut out of his heart, the anchor of his soul is not taken away, but society whispers in his ear the brotherly message, through the statute in question, that "the restoration of your liberty is largely in your own hands." "Your own good conduct and reformation may restore you to liberty and to society as a useful citizen, even before you have served the minimum or shortest time fixed in the Criminal Code for the punishment of your crime, namely, in one year after your imprisonment begins," because

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the minimum term of imprisonment prescribed by the Criminal Code for a large majority of the felonies falling within the reformatory act is two years, and some three years. The minimum term in a small number is three years, and in a still smaller number it is one year, and in a very few cases it is six months. And we are gravely told by appellant's learned counsel that this act violates the Constitution in placing it within the convict's power, by good conduct, fidelity, and trustworthiness while on parole, to mitigate the severity of his punishment by being restored to liberty conditionally, and, it may be, finally discharged, long before the very shortest term he would be compelled to serve under the old law, because such provision is cruel punishment. To say so would require us to turn back the hands on the dial of human progress a hundred years. To call these provisions "cruel punishment" is to mock at all humanizing efforts. It is to cast a stigma on all our benevolent institutions, which stand as noble monuments of the goodness of the human heart. In short, it is to deny the fatherhood of God and the brotherhood of man.

Appellant's contention, substantially, though not in words, that that part of the act authorizing a judgment for the maximum term of imprisonment specified in the section of the Criminal Code under which he was convicted must be looked to alone in determining the question whether the punishment prescribed is cruel or not, is not tenable. The whole of the act bearing on the question of punishment must be looked to in construing the different parts. In upholding the constitutionality of a similar act of the Illinois legislature, the supreme court of that state, in the course of a very learned opinion, said: "We think that the judgment and mitimus in this case must be read and interpreted in the light of and under the restrictions imposed by the statute upon which they are based. The statute provides that, although the sentence is a general sentence to imprisonment, yet that 'such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced.' This provision, and others of like import, being read into the judgment and mitimus, we think that it should be regarded that the judgment and commitment in this case were for twenty years, that being the maximum term provided by law for the crime of burglary." *People, Bradley, v. Illinois State Reformatory*, 148 Ill. 420. In *Woodward v. Murdock*, 124 Ind. 439, involving the validity and construction of the act of 1883, relating to shortening the prisoner's term by deductions therefrom, this court said, on page 444, 124 Ind., that "the law allowing him credit for good time entered into the judgment as if written therein, and, therefore, by the very language of the judgment the appellant's time expired on the 18th day of December, 1889." And so here the reformatory act may be read into the judgment wherever necessary to make the meaning of the judgment clear or make it effectual. In construing this provision of the Constitution in *Hobbs v. State*, 183 Ind. on pages 408, 409, 18 L. R. A. 774, this court said: "The second point,

that the act is in violation of the provisions of the Constitution that 'cruel and unusual punishment shall not be inflicted,' has the merit of possessing some originality; but the position assumed seems to be without authority to support it. We have been unable to find but a single instance in which this provision of the Constitution has been in question before this court, and then the question was regarded as possessing no merit, and was disposed of without serious consideration. This provision of the Constitution is found also in the Constitution of the United States in the same words, and Mr. Story, in his work on the Constitution, says: 'It is an exact transcript of a clause in the Bill of Rights framed at the revolution of 1688.' He says, further, that 'the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. It was, however, adopted as an admonition to all departments, . . . to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of the Stuarts.' . . . The word 'cruel,' when considered in relation to the time when it found place in the Bill of Rights, meant, not a fine or imprisonment, or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel, etc. The word, according to modern interpretation, does not affect legislation providing imprisonment for life or for years, or the death penalty by hanging or electrocution. If it did, our laws for the punishment of crime would give no security to the citizen. Neither is punishment by fine or imprisonment 'unusual.'" The same doctrine was applied to a similar constitutional provision, in upholding the constitutionality of the reformatory act of Illinois, in all material respects like our own, in the case of *People, Bradley, v. Illinois State Reformatory*, 148 Ill. 420; also in *George v. People*, 167 Ill. 447. The only plausible objection that could be urged in reason to the act as to the character of the punishment when mitigated as provided in the act is that it is too mild, instead of being cruel. That, however, is a legislative, and not a judicial, question. Nor do we think the act conflicts with that clause of § 16 of the Bill of Rights requiring the punishment to be proportioned to the nature of the offense. The supreme court of Illinois on that point says: "We think that from the fact that the statute here in question imposes the maximum term of imprisonment provided by law for the crime for which the prisoner is convicted, it does not follow that such statute is in violation of the constitutional requirement that all penalties shall be proportioned to the nature of the offense." *People, Bradley, v. Illinois State Reformatory*, 148 Ill. 420. The same doctrine was in effect held in *George v. People*, 167 Ill. 447. We therefore hold that the act does not violate § 16 of the Bill of Rights.

It is also contended that the act violates § 13 of the Bill of Rights, in that it does not allow the defendant a trial by jury, because, as is contended, it makes the punishment depend upon the determination of a board of managers, arrived at in an *ex parte* manner,

and upon hearsay evidence, in a county other than that in which the offense was committed. But the trial and finding of the guilt or innocence of the accused are authorized to be by a jury in the county where the offense is alleged to have been committed. But, because the jury are not allowed to fix the amount of the punishment which is to be inflicted, it is contended that the reformatory act deprives the accused of a jury trial, in violation of said § 13 of the Bill of Rights. This very objection to a similar act, under a similar constitutional provision in the Constitution of Illinois, in *People, Bradley, v. Illinois State Reformatory, supra*, at page 422, 148 Ill., was held not good. It was there said: "Nor is it true that a prisoner on trial for burglary and larceny, or for any other violation of the criminal law, has a constitutional right to have the quantity of punishment fixed by a jury. At common law the jury either returned a special verdict, setting forth all the circumstances of the case and praying the judgment of the court thereon or a general verdict of guilty or not guilty. The punishment was fixed by the court, and governed by the laws in force. Bl. Com. bk. 4, p. 361. . . . The constitutional right of trial by jury is limited to the trial of the question of guilt or innocence, and we think there can be no question of the validity of the sections of the statute to which we have made reference in this connection." The supreme court of Illinois again decided the same way in 167 Ill. 447, in *George v. People, supra*. We therefore conclude that the act does not deprive the defendant of a jury trial, in violation of the Constitution. The only difference between the procedure in felonies under the reformatory act and that under the Criminal Code prior thereto is that the jury only find whether the defendant is guilty, and his age, but do not, as before, also fix the punishment. The judge now fixes not only the punishment as to imprisonment, but as to all other penalties prescribed by the section of the Criminal Code with the violation of which the defendant was charged. In this case, the court, in addition to the imprisonment, ought to have adjudged as part of the punishment that appellant be disfranchised and rendered incapable of holding any office of trust or profit for some determinate period. In fixing the imprisonment, the court has no discretion, but must adjudge the same as fixed by the reformatory act. The amount of fine or length of disfranchisement is to be determined and fixed by the court in its discretion, within the limits fixed by the statute prescribing the punishment for the particular offense. No question, however, has been made as to the failure of the court to assess disfranchisement as a part of the punishment. And it is settled that such failure is not an error of which appellant can complain. *State v. Arnold*, 144 Ind. 651, 659, and authorities there cited.

It is next contended that the act violates § 1 of article 7 of the Constitution, providing that "the judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish." And that it violates § 1 of article 3, providing that "the powers of the government are divided into

three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." Appellant's contention on this point is thus stated by his counsel: "It attempts to confer judicial powers upon the board of managers and general superintendent of said reformatory, by permitting them to consider and determine whether or not he has ever before been convicted of a felony; whether or not the jury who found the prisoner's age were or were not mistaken; what his personal history has been; whether or not it has been good or bad; and what his conduct has been in the reformatory; and, taking these things into consideration, determine the length of time for which the prisoner shall be confined or punished." None of these considerations have anything whatever to do with the defendant's guilt, nor with the question as to what judgment should be pronounced upon a finding or verdict that he is guilty of the crime charged in the indictment, nor with the amount or quantity of punishment to be inflicted on him by the judgment. The Constitution of Illinois, as to the division of the powers of government, is precisely like ours; and the supreme court of that state, in *George v. People*, 167 Ill. 447, as to the point now in question said: "It is also claimed that the act is unconstitutional, because it attempts to divest the judicial department of certain of its powers, and confer those powers on the executive department, in violation of article 3 of the Constitution." After quoting that article, the court proceeds: "It may be conceded that it is beyond the power of the legislature to invest ministerial officers with judicial powers. If the act therefore confers upon mere ministerial officers judicial powers it cannot be sustained. . . . While it might be a difficult matter to draw a line of distinction between judicial and ministerial functions which would fit every case which might arise, yet we think it can be determined from the authorities, without much uncertainty, to which the duties conferred on the prison board and the warden properly belong." Then the court goes into an exhaustive review of the authorities upon that subject, the statute there and ours being practically the same, and the court then says: "After due consideration, we have reached the conclusion that it does not confer judicial power on the warden or the prison board." To the same effect is *People, Bradley, v. Illinois State Reformatory*, 148 Ill. 420. The same conclusion was reached by the supreme court of Ohio in upholding a reformatory act of that state similar to our own, in *State, Atty. Gen. v. Peters*, 43 Ohio St. 629-650; *Com. v. Brown*, 167 Mass. 144; *Conlon's Case*, 148 Mass. 168. Both of the latter cases uphold the constitutionality of a similar statute in Massachusetts. In the case in 167 Mass. it is said: "It is suggested, again, without argument, that Stat. 1895, chap. 504, under which the defendant was sentenced, is unconstitutional. This statute requires the sentence in certain cases to be for a term of not less than two and a half years, and not more than a maximum fixed by the court,

and not longer than the longest term fixed by law for the punishment of the offense. Such a sentence is in effect a sentence for the maximum fixed by the court, unless a permit to be at liberty is issued as provided by § 2." So that the judgment of guilty and sentence is complete and effective, so as to warrant and require the convict to remain in prison to the end of the maximum term fixed in the judgment of conviction, unless ministerial or administrative officers, the board of managers acting under the authority of the act, shall shorten the term of service in case a reformation of the convict is effected. The power to do this is not judicial power, but is a purely ministerial or administrative power. It is no more the exercise of judicial power than the power of the governor to "grant reprieves, commutations, and pardons, after conviction." Const. art. 5, § 17. Nor is it the exercise of the pardoning power. Pardon is remission of guilt; amnesty, oblivion, or forgetfulness. *Anderson, Law Dict.* 745. The act of the board only shortens the term prescribed by the sentence, and leaves the conviction of guilt unaffected. The act of the board of managers in shortening the term of imprisonment is the exercise of the exact same kind of power authorized by act 1888, § 8238 (*Burns's Rev. Stat.* 1894), in which it is provided that for the first year of good conduct of the convict he was allowed a credit of one month, two, three, and four months for the second, third, and fourth years, respectively, and five months additional for each succeeding year. These credits, thus shortening very materially the term of the sentence, are given, not by the court, nor by the governor under his power of pardon, but purely and simply by administrative officers,—the prison board. And, although such laws have been in force in this state for over a quarter of a century, it has never been suggested that they either conferred judicial powers on administrative officers, or interfered with the judgments of courts or the pardoning power of the governor. On the contrary, the validity of such legislation was upheld by this court in *Woodward v. Murdock*, 124 Ind. 439, *supra*. We therefore conclude that the act does not violate the section of the Constitution referred to.

The only other error alleged is the court's refusal to furnish appellant with a longhand manuscript of the evidence, he having made a proper showing, bringing himself within the provisions of the statute requiring the court to so furnish such manuscript at the expense of the county. But such refusal was after the trial and judgment, and therefore the court's action did not affect the trial. The seventh ground for a new trial specified in the Criminal Code is "error of law occurring at the trial." This error did not occur at the trial. Nor does the error fall within any of the other eight grounds specified in the Criminal Code for a new trial. Nor does it furnish any ground for a distinct assignment of error in this case. We have no means of knowing that the evidence, if it were here, would not abundantly sustain and uphold every act of the court leading to the judgment, except the unsupported statement of his counsel. The presumption of law is that the judgment of

the trial court was right until that is overcome by a showing in the record. The remedy of the appellant was an application to this court for an order requiring the circuit court to furnish the transcript at the expense of the county on a proper showing.

Judgment affirmed.

Jordan, J., dissenting:

While I yield due respect to the majority opinion of this court, still I cannot concur therein so far as it sustains the constitutional validity of the provisions of the act of 1897 herein involved, which require the court, without exercising any judicial discretion whatever, to impose an indeterminate sentence on a person convicted of a felony, or which, rather, commands the court, in effect, to turn the convicted person over to the custody of the board of managers of the Indiana Reformatory Prison, there to be confined as provided by the provisions of the act, not beyond the maximum limit of imprisonment fixed by the statute defining the offense. Article 3 of our Constitution distributes the powers of the government into three separate departments,—the legislative, the executive, including the administrative, and the judicial,—and denies the right of any person charged with official duties under any one of these departments to exercise any of the functions of another, except as in the Constitution expressly provided. Any attempt to deprive one department of its rights and powers under the Constitution must be carefully watched and guarded, and no encroachment of one upon the powers of the other can be permitted; otherwise, the constitutional rights of the citizen may be frittered away, and the maintenance of a Republican form of government be impaired. The statute defining the offense of which the prisoner in the case at bar was convicted provides, as a part of the punishment to be inflicted, imprisonment for a term not less than two nor over fourteen years. The law involved recognizes the existence of the provisions of this penal statute, but nevertheless proceeds to divest both the jury and the court of the power of exercising judicial functions in determining, between the minimum and maximum limits, what the term of imprisonment shall be. Not only are the trial, conviction, and sentencing of a person convicted of the commission of a crime a judicial duty, but also, in my opinion, is the right to assess the punishment, and thereby fix the term of imprisonment provided, within the limits of the statute, a judicial function, of which the court wherein the accused is tried cannot be deprived by the legislature. The provisions of the various sections of our Penal Code relating to crimes classed as felonies by the law are expressly recognized by the statute in question as still existing; especially is this true in regard to the limits of imprisonment. Certainly, the right to apply the law as it then exists is the peculiar province of the court or jury in the trial of a criminal cause. Consequently, the right to determine and decide as to the extent to which a convicted person shall be punished by imprisonment under and within the limits of an existing law cannot be wrested from the court and jury and lodged

elsewhere. The provisions of the statute under consideration wholly rob the court of all judicial discretion in regard to the term of imprisonment, and in imperative language require it to sentence the prisoner to the custody of the board of managers of the reformatory for an indefinite term. While the constitutional validity of the statute which simply lodges in the court, where a person accused of crime is tried, the power of assessing the punishment, instead of leaving it with the jury trying the case, may be conceded, but when a law goes beyond this, and deprives both the jury and the court of this power, as does the one in dispute, certainly it must be held to infringe upon the constitutional rights of the accused, which he has, to demand, in the event of his conviction, that his punishment be judicially determined under the existing law, which he had been convicted of violating, and which prescribed the penalties for its violation. The trial cannot be said to have ended until his punishment is determined and adjudged by the court. A statute of the state of Michigan which did not go to the extent of the one here involved, leaving, as it did, the question of an indeterminate sentence to the discretion of the court, was held to be invalid. *People v. Cummings*, 88 Mich. 249, 14 L. R. A. 285. A similar statute in Ohio, which also made the question of imposing an indeterminate sentence one of judicial discretion, was upheld. *State, Atty. Gen., v. Peters*, 43 Ohio St. 629. The decisions of the supreme court of Illinois cited in the majority opinion, whereby the validity of a law similar in some respects to the statute now in controversy was sustained, are, in my opinion, neither satisfactory nor convincing in their reasoning. The effect of these decisions is also impaired from the fact that they were rendered by a divided court.

That the validity of a law providing for the parole, under prescribed rules and regulations, of prisoners who have been sentenced for a definite term of imprisonment, before the expiration of their terms, may be sustained, I think may be conceded; but that is not the vital question presented for decision in the case at bar. The feature in the statute which leads me to condemn it as antagonistic to the Constitution is that which unquestionably divests the judiciary of its rights and powers to a certain extent; and to this extent, and in this respect, the law, in my judgment, is invalid, and cannot be sustained; and this must be true without regard to the question of whether it invests some ministerial board or person with judicial functions. The doctrine is universally affirmed that courts, being a co-ordinate branch of the government, are not, within their sphere, subject to legislative control. *Cooley*, Const. Lim. pp. 114, 116. But, under this statute, the court, in respect to the terms of imprisonment, is wholly controlled by the will of the legislature. It is not permitted to decide what, in its judgment, under the circumstances in the particular case, ought to be the term of imprisonment within the limits provided by law. The man who is convicted of the theft of a pie or a plug of tobacco of the value of 10 cents must be turned over to the prison officials to be restrained of his liberty for the same period as one who has com-

mitted the heinous offense of stealing his neighbor's hogs or sheep, of the value of \$24. The court can exercise no discretion and decide in accordance with the dictates of his own judgment. This is so evident that a mere reading of the statute is sufficient to condemn it in this respect.

It is insisted that the legislature has the power to provide that the term of imprisonment for the crime of burglary shall be fourteen years, and no less, and that the judgment of the court in the case at bar in effect inflicted the maximum term of imprisonment, which was fourteen years. While the power of the legislature to declare that the punishment for the crime of burglary shall be imprisonment for the term of fourteen years in the state's prison and no less, may be conceded, how or in what manner can this concession lend any support to sustain the validity of the statute? As heretofore stated, the law under which appellant was convicted extends the limitation of imprisonment from two to fourteen years, and, if it can in reason be said that the trial court in this case simply inflicted the maximum punishment provided by the law defining the offense of burglary, then it certainly may be asserted that, in doing so, the court responded solely to the command of the statute in controversy, and not, under the circumstances in the particular case, to the dictates of its own judgment as to what the term of imprisonment should be within the limitation provided by an independent statute. The law may be said to be crude and half-baked in its provisions, and possibly open to objections which have been urged against it, that it will in some cases result in great injustice. While these are matters which do not address themselves to a court, still, as the law is to be upheld, they may be mentioned as proper for legislative consideration in the future. As to whether, in the event a minor is convicted, imprisonment for his offense in the county jail may be substituted for imprisonment in the state's prison, as provided by Rev. Stat. 1881, § 1883, Rev. Stat. 1894, § 1902, is a question which, under the act in controversy, is left to judicial construction. Equally so is the question as to whether a fine and disfranchisement shall be adjudged as a part of the punishment by the act, where the same are provided as a part of the punishment by the penal statute which the accused person has been convicted of having violated. This law is certainly more sweeping in its provisions than any other on the same subject enacted by sister states which has come under my observation. It seems to be impressed with the impracticable and sentimental idea of certain theorists who believe that a greater justice will be meted out to the convict, and his condition bettered, by incarcerating him within the walls of a prison for an indeterminate period, without any regard to the circumstances surrounding the offense of which he has been convicted, there to remain until he can secure his liberty by ingratiating himself into the good graces of the board of parole.

I have endeavored somewhat briefly to state the reasons which I consider the cardinal ones for holding the law invalid, and, in my opinion, it should be so adjudged, without regard

to the question of expediency or the results which may follow. These are questions which, as a general proposition, should exert no control over courts in reaching a conclusion in a case involving constitutional rights.

Howard, Ch. J., dissenting:

I am unable to concur in the conclusion that the Indiana reformatory act, as interpreted by the majority of the court, is constitutional. That act, as construed by the court, requires that the appellant, for the crime of burglary, should receive an indeterminate sentence of imprisonment, not to be for less than two years nor more than fourteen years. The best defense that can be made of the legality is that it is, in effect, a sentence of imprisonment for fourteen years. Yet it must be plain that the legislature did not intend this result, else it would have said so, and omitted all reference to the minimum time. The clear meaning of the act, if, indeed, it does provide for an indeterminate sentence, is, rather, that the sentence should be for some time more than two years, and less than fourteen years, such time to be finally determined by the board of managers of the reformatory. That, however, would be to substitute for the judgment of the court trying the case the judgment of the administrative officers appointed to carry out the sentence. Such an interpretation of the act makes it a plain invasion of the constitutional functions of the judiciary. If, on the other hand, it should be conceded that the sentence is, in effect, a sentence of imprisonment for the maximum period of fourteen years, then we have the anomaly that there is no gradation in the crime of burglary; that the ragged boy who lifts a latch and steals a loaf of bread for his suffering mother, brothers, and sisters is to receive his fourteen years, quite the same as the crime-hardened reprobate who breaks into a banking house, and carries off the life earnings of aged and helpless depositors. Such a construction, however, cannot be in harmony with the provision of the Constitution that "all penalties shall be proportioned to the nature of the offense." As I look upon it, the law may be upheld by an obvious construction, and one in harmony with every provision of the Constitution; and, if this can be done, it is, of course, our duty to give to the act such construction. The act provides for confinement in the reformatory "for a term not less than the minimum time prescribed by the statutes of this state as a punishment for such offense, and not more than the maximum time prescribed by such statutes therefor." Is it not a reasonable interpretation of these words to say that their meaning is that the court, after hearing and considering all the facts and circumstances, should fix a definite term of imprisonment, somewhere between the minimum and maximum times provided by the statutes? That would be quite in harmony with the practice under the law as it was formerly understood. The statute in relation to burglary prescribes as a part of the punishment that the convicted person "shall be imprisoned in the state prison not more than fourteen years nor less than two years." No one ever knew a court, under this statute, to say to a defendant: "You have been convicted of burglary,

and you will be imprisoned therefor not more than fourteen nor less than two years." It was, on the contrary, well understood that, while the statute made the punishment indeterminate between certain limits, the court, in its sentence, must name a determinate term of imprisonment within such limits, so that in every case, as required by the Constitution, the penalty "shall be proportioned to the nature of the offense." So interpreted, the act of 1897 would be in harmony with the Constitution, and would also serve to accomplish all

the beneficent designs intended by the legislature. As interpreted by the court, the act seems to me to make a mere figurehead of the trial judge, and transfer the constitutional discretion and judgment of the judiciary to officers of the administrative department of the government; punishing also the culprit, not according to the degree of the offense of which he is convicted, but according to his conduct in the reformatory and the probability of his receiving remunerative employment after he gets out.

IOWA SUPREME COURT.

O. R. SHULTZ

v.

A. P. GRIFFITH, *App't.*

(103 Iowa, 150.)

1. **A traveler going into a yard of a feed and livery barn** which is open to patronage by the public and at which his team is being kept for the night, in order to see that his buggy, which was left in the yard, has been put in the barn, and to get some articles from it, when this is done between 8 and 8½ o'clock in the evening while employees are working at the barn, is not a trespasser or doing an unlawful act within the meaning of Code, § 1485, so as to preclude his recovering from the proprietor for injuries received from a dog which attacks and bites him.
2. **Negligence of a party bitten by a dog is immaterial**, under Code, § 1485, on the question of the liability of the owner of the dog, unless that negligence amounts to an unlawful act.
3. **One who harbors a dog on his premises** as owners usually do with their dogs is to be deemed the owner under a statute respecting the liability of owners for injuries done by dogs.
4. **Future pain and anguish cannot be considered** in assessing damages under a pleading which alleges pain and injury in the past tense only.

(October 12, 1897.)

APPEAL by defendant from a judgment of the District Court for Bremer County in favor of plaintiff in an action brought to recover damages for injuries inflicted by a dog. *Reversed.*

The facts are stated in the opinion.

Mr. G. W. Ruddick, for appellant:

The jury might well find that a reasonable person would not go to the buggy in the dark without first giving information to defendant or his servants of such purpose, and that to do so was negligent.

Rusch v. Davenport, 6 Iowa, 454; *Banning v. Chicago, R. I. & P. Co.* 89 Iowa, 80.

There was no liability on part of defendant unless he was the owner of the dog. The statute does not say that those who harbor

dogs shall be liable to the party injured, but only owners are so liable.

O'Harra v. Miller, 64 Iowa, 462.

It was error to permit the jury to put their fancy on the wing to imagine future agony and allow for it in the verdict.

Meier v. Strunk, 79 Iowa, 17.

Messrs. Gibson & Dawson for appellee.

Given, J., delivered the opinion of the court:

1. The following facts are undisputed: Defendant was the keeper of a feed and livery barn open to patronage by the public. The plaintiff was traveling by team, and on the evening of October 2, 1894, he left his team and buggy in care of the defendant, to be kept in said barn over night, for which he paid 75 cents. When the team was put in the barn, the buggy was left standing near by in the barn yard. Between 8 and 8½ o'clock that evening plaintiff went into the barn yard for the purpose of seeing that his buggy was put under shelter, and of getting some articles belonging to him therefrom. While at the buggy he was attacked and bitten on the leg by a dog, which caused a painful wound. The only dispute as to facts are whether defendant's employees at work at the barn knew of plaintiff's presence before he was bitten, and the identity and ownership of the dog, and the extent of the injury. In the view we take of the case, it is not material to plaintiff's right to recover whether his presence was known to defendant's employees or not. We think the jury was warranted in finding under the instructions that defendant owned the dog that did the biting, and that plaintiff was injured to the extent returned.

2. We have said the jury was warranted in finding as it did under the instructions, but the question remains whether the court erred in giving or refusing instructions in any of the particulars complained of. The court instructed that "under the laws of the state of Iowa the owner of any dog attacking or attempting to bite any person without fault or negligence upon the part of the person injured shall be liable to the person so injured for all damages done by his dog, except when the party injured is doing an unlawful act." Appellant does not complain of this instruction, and, as will be seen hereafter, could not reasonably do so. Following this, the court instructed to the effect that, if the jury found

NOTE.—As to liability of owner of animal for injuries inflicted by it upon person coming on the owner's premises, see note to *Conway v. Grant* (Ga.) 14 L. R. A. 196.

40 L. R. A.

the facts to be as we have stated them above, then "that his going on said premises for said purpose at the time he states he did go there was not unlawful, and you should not so find it to be." Appellant asked an instruction, which was refused, as follows: "The defendant would be bound to keep the property until the next morning, and, if the plaintiff wished to take possession before that time he should ask permission of defendant, and if he went upon the defendant's premises to intermeddle with the property so left, without permission of defendant, he would be doing an unlawful act, and your verdict must be for the defendant." The instruction given is correct, and there was no error in refusing that asked. The barn and yard were places to which the patrons of the business were invited to come at seasonable hours. Plaintiff went there before 8½ o'clock in the evening, and while defendant's son and a hired hand, with a lighted lantern, were at work at the barn. He went there to see that his buggy was put under shelter, and to get some article belonging to him from the buggy. Surely the time was seasonable, the purpose proper, and therefore the act was not unlawful. Though the property was in the care of defendant, plaintiff was not a trespasser in going to it when and for the purpose that he did, without permission, and it is, therefore, immaterial whether defendant's employees knew of his presence or not.

3. The court instructed that "negligence is the failure or omission to do that which an ordinary prudent and cautious man would do under similar or like circumstances." Appellant contends, and correctly so, that this is an incomplete definition, and that the words, "or doing something that a reasonable person would not do," should be added. The question of negligence involved in this case, under the instruction first referred to, was of commission, and not omission. These two instructions taken together, were more favorable to appellant than he was entitled to, and therefore not prejudicial to him. Section 1485 of the Code makes the owner of the dog "liable to the party injured for all damages done by his dog, except when the party is doing an unlawful act." Negligence by the injured party, whether of omission or commission, does not exempt the owner of the dog from liability, unless that negligence amounts to an unlawful act. We think the court erred in giving any instruction on the subject of negligence, as mere negligence, not amounting to an unlawful act, is no defense. These instructions were more favorable to appellant than he was entitled to, and therefore not prejudicial to him.

4. On the question of the ownership of the dog the court gave this instruction: "If you find from the weight of the evidence introduced on the trial that the dog was in the possession of the defendant, and that the defend-

ant was harboring him on his premises, as owners usually do with their dogs, then he will be deemed to be the owner of the dog, within the meaning of the law." It is true that under said § 1485 it is only owners of dogs that are made liable, but possession and harboring, as owners usually do, have been held to be sufficient evidence of ownership. See *O'Harra v. Miller*, 64 Iowa, 462. There is no error in this instruction.

5. On the question of damage the court gave this instruction: "(11) If you find for the plaintiff, then in assessing his damages you may allow him such sum as, under the evidence, you find will compensate him for the wound he received as shown by the evidence, if any: the pain and anguish, mental and physical, if any, which he has suffered, or which the evidence shows it is reasonably certain he will hereafter suffer, if shown by the evidence, and caused by the injuries received." Appellant contends that no claim is made in the petition for future pain and anguish, and that, therefore, the court erred in submitting that as an element of damage. It is alleged in the petition that by reason of the wound "plaintiff became sick, sore, and lame, and suffered great bodily and mental pain and anguish, and continued to suffer for a long time thereafter; that plaintiff has suffered great pain and loss of time, and was put to great expense." These allegations are all in the past tense, and do not even inferentially allege or claim damages for future pain or anguish. Appellee cites *Meier v. Shrunck*, 79 Iowa, 22. In that case the plaintiff alleged that he was not yet recovered from injuries, and we held that was a sufficient allegation to warrant the court in submitting the question as to future damages. Appellee contends that the fair import of this ruling is that, when the petition does not show a recovery, future damages may be submitted to the jury. Its import plainly is that the claim is only to be submitted when the petition alleges that there has not been a recovery. Appellee contends that evidence of future disability was admitted without objection, and therefore the instruction was proper. Whether that would justify the instruction we need not determine, as we do not find that such evidence was introduced. True, plaintiff testified to his condition up to and at the time of the trial, but there is no evidence whatever to show that that condition would continue. Even his attending physician was not asked whether the injuries were such as to cause future pain or anguish. Our conclusion is that the court erred in instructing the jury to consider future pain and anguish in assessing damages, and that appellant was prejudiced thereby.

For this reason the judgment of the District Court is reversed.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

TRUSTEES OF KENTUCKY FEMALE ORPHAN SCHOOL, *Appt.*,

v.

City of LOUISVILLE *et al.*SAME, *Appt.*,

v.

Henry A. BELL, Sheriff, *etc.*

(.....Ky.....)

1. A school for the free education of female orphan children is a charitable institution and an educational institution not used or employed for gain, within the meaning of a constitutional provision exempting such institutions from taxation, although it is under the control of a particular religious denomination and receives day pupils who are required to pay for their tuition if able to do so, the money received being used in carrying on the work of the institution.

2. An exemption of an educational institution from taxation will include property held by it for rent, the income of which is used for the work of the institution, unless there are qualifying words which show, or tend to show, that only property used by the institution or connected with it is to be exempted.

(DuRelle and Guffy, JJ., dissent.)

(May 23, 1898.)

APPEALS by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendants in suits brought to enjoin the collection of taxes on plaintiffs' property. *Reversed.*

The fact are stated in the opinion.

Messrs. Stone & Sudduth, for appellant:

Under the act of March 11, 1862, the property owned by the Kentucky Female Orphan School "shall be exempt from all taxes whatever so long as it exists as a school of charity."

The charters and grants of or to corporations or amendments thereof, and all other statutes, referred to in the first section of the statute of 1856, which the legislature reserved power to amend or repeal, unless a contrary intent be therein plainly expressed, were only such charters and acts of incorporation as were granted thereafter.

There was no reservation of power to repeal an amendment enacted after the statute of 1856, which granted an exemption from taxation to a corporation, whose charter or act of incorporation was enacted prior to that statute.

Franklin County Ct. v. Deposit Bank, 87 Ky. 370; *Johnson v. Com.* 7 Dana, 343; *Farmers' Bank v. Com.* 6 Bush, 127; *Sinking Fund Comrs. v. Green & B. River Nav. Co.* 79 Ky. 73; *Henderson v. Strangers' Rest Lodge No. 13, I. O. of O. F.* 17 Ky. L. Rep. 1041; *Com. v. Railroad Companies*, 95 Ky. 60; *Com., Franklin County, v. Farmers' Bank*, 97 Ky. 590; *At-*

water v. Woodbridge, 6 Conn. 223, 16 Am. Dec. 46; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. ed. 498; *St. Vincent's College v. Schaefer*, 104 Mo. 281; *Northwestern University v. People, Miller*, 99 U. S. 809, 25 L. ed. 387; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 26 L. ed. 1128.

Section 170 of the Constitution was prospective only.

New Orleans v. Poydras Orphan Asylum, 32 La. Ann. 859; *New Orleans Female Orphan Asylum v. Houston*, 37 La. Ann. 68; *State, Dosenbach, v. St. Joseph's Convent of Mercy*, 116 Mo. 575; *Scotland County v. Missouri, I. & N. R. Co.* 65 Mo. 128; *State, Hacussler, v. Greer*, 78 Mo. 182.

It has always been the policy of this state to exempt from taxation charitable and educational institutions.

Ky. Act. Dec. 17, 1825 (2 Morehead & Brown Stat. § 1080); Ky. Rev. Stat. 1852, chap. 58, art. 1, § 1; Gen. Stat. chap. 92, art. 1, § 3, pp. 709, 710, original ed. of 1878; *Com., Franklin County v. Farmers' Bank*, 97 Ky. 590.

Section 170 of the Constitution exempts appellant from taxation.

An exemption from taxation embraced county and municipal taxation.

Johnson v. Com. 7 Dana, 338; *Farmers' Bank v. Com.*, 6 Bush, 127; *Elizabethtown & P. R. Co. v. Elizabethtown*, 12 Bush, 236; *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370; *Louisville v. Com.* 1 Duv. 298, 85 Am. Dec. 624.

While, ordinarily, statutes of exemption are to be construed strictly, where the exemption inures to the benefit only of the person or corporation whose property is exempted from taxation, this rule does not apply, where the state is benefited, or the person or corporation for whom the exemption from taxation is made renders public services, or a fair equivalent to the state in any other manner.

25 Am. & Eng. Enc. Law, pp. 159, 160; *State, Sisters of Charity, v. Chatham Twp.* 52 N. J. L. 373, 9 L. R. A. 198; *State v. Ross*, 24 N. J. L. 497; *State v. Fisk University*, 87 Tenn. 241; *University of the South v. Skidmore*, 87 Tenn. 155; *Methodist Episcopal Church, South v. Hinton*, 92 Tenn. 188, 19 L. R. A. 289.

Under the former Constitution of this state the right to exemption from taxation was not always tested by the power of the legislature to levy a tax to support the institution whose property was claimed to be examined.

Barbour v. Louisville Bd. of Trade, 82 Ky. 655; *Com. v. Masonic Temple Co.* 87 Ky. 353; *Lancaster v. Clayton*, 86 Ky. 376; *Clark v. Louisville Water Co.* 90 Ky. 525; *Henderson v. McCullagh*, 89 Ky. 452; *Higgins v. Prater*, 91 Ky. 6.

"Institution" in a statute exempting property of charitable institutions from taxation, signifies an organization which is permanent in its nature, as contradistinguished from an

NOTE.—As to taxation of schools established as charitable institutions, see also *Philadelphia v. Overseers of Public Schools* (Pa.) 29 L. R. A. 600; 40 L. R. A.

also note to Book Agents of Methodist Episcopal Church, South v. Hinton (Tenn.) 19 L. R. A. 290.

undertaking which is transient or temporary. It designates corporations or other organized bodies created to administer charities, and exempts the property which they own or use for their charitable purposes, and that only.

Humphries v. Little Sisters of the Poor, 29 Ohio St. 201; *Gerke v. Purcell*, 25 Ohio St. 229; *Burd Orphan Asylum v. Upper Darby School Dist.*, 90 Pa. 21; *Donohugh v. Library Co.*, 86 Pa. 806; *Philadelphia v. Women's Christian Asso.*, 125 Pa. 572; *Episcopal Academy v. Philadelphia*, 150 Pa. 565; *Northampton County v. Lafayette College*, 128 Pa. 132; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599.

Farms, the products of which are used for the support of the school, have been held exempt in—

People, Seminary of Our Lady of Angels, v. Barber, 42 Hun. 27; *Monticello Female Seminary v. People*, 106 Ill. 398, 46 Am. Rep. 702; *Willard v. Pike*, 59 Vt. 202; *New Haven v. Sheffield Scientific School*, 59 Conn. 168; *Mount Hermon Boys' School v. Gill*, 145 Mass. 139.

The property of institutions of purely public charity and of education is not confined or limited to that which is actually occupied or used.

Louisville v. Louisville Bd. of Trade, 90 Ky. 409, 9 L. R. A. 629; *Nobles County v. Hamline University*, 46 Minn. 316.

The usual form used in statutes of exemption is to provide that the corporation shall be exempt, without stating its property shall be exempt, which follows as a matter of course.

Elizabethtown & P. R. Co. v. Elizabethtown, 12 Bush, 233; *Com. v. Railroad Companies*, 95 Ky. 60.

In appellant's exemption the language employed is "the property owned."

This language was clearly prospective, and comprehended all property thereafter acquired and owned up to the value limited in subsequent amendments to appellant's charter, first to \$200,000 and afterward to \$400,000.

Washburn College v. Shawnee County Comrs., 8 Kan. 344; *County Comrs. v. Colorado Seminary*, 12 Colo. 497.

Mr. Laf. Joseph for appellees.

Hazelrigg, J., delivered the opinion of the court:

The question involved in this appeal is whether or not certain real estate, situated in the city of Louisville, and belonging to the Kentucky Female Orphan School, located at Midway, in Woodford county, is exempt from state, county, and municipal taxation, under the provisions of the Constitution on that subject. The petitions of the trustees, seeking to enjoin the collection of the taxes, were dismissed on demurrer, and the facts to be considered are therefore undisputed. It appears that the appellant was incorporated by the Kentucky legislature in 1847, and its trustees were given the ordinary powers, rights, and privileges of trustees of any other seminary of learning or academy in the state, with power to acquire by purchase, donation, etc., lands and other property to the extent of not exceeding \$50,000. This limit has been increased

to \$400,000 by subsequent legislative enactment. Section 7 of the charter provides "that the beneficiaries of the institution shall be female orphan children; and the board of trustees shall have power to determine the number that shall at any time be admitted into the institution; and out of any number of applicants, they shall decide which shall be admitted; and shall also prescribe the time for which each beneficiary shall remain in the institution; and shall admit no one under nine years of age; and shall permit no one to remain longer than four years." Section 8 is as follows: "That the board of trustees shall be the guardian of each beneficiary of the institution until she shall arrive at the age of eighteen years; and shall have all such power to control the conduct and actions of each beneficiary, as guardians now have by law to control the conduct and actions of their wards." Section 9: "That pay pupils may be admitted into the institution, the number and terms of admission being decided by a majority of the board of trustees." A charter amendment of March, 1862, provides that the property owned by the Kentucky Female Orphan School, at Midway, Woodford county, shall be exempt from all taxes whatever so long as it exists as a school of charity." And by further amendment (March 3, 1876) it is provided that the trustees shall fill vacancies in their board with "persons who are members in, good standing of some congregation of the Church of Christ in the state of Kentucky." It is alleged in the petition that the real estate sought to be sold for taxes was acquired by devise many years ago, and had been continuously rented out, and the annual income used solely for the purpose of educating female orphans at its institution of learning at Midway; that its property, both real and personal, from which it derives any income, including that in Louisville, constitutes an endowment fund for the purpose of carrying on its school of charity; that the pupils received are boarded and educated, and when they are indigent, and not otherwise provided for, are also clothed, wholly or in part, by the appellant, while attending its institution; and that no part or parcel of its property has ever been used for gain by it or any person, and its income has always been devoted solely to the cause of education. The provisions of the Constitution upon which the claim to exemption is based are as follows: "Sec. 170. There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding $\frac{1}{4}$ acre in cities or towns, and not exceeding 2 acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home and for no other purpose by the minister of any religion, with not exceeding $\frac{1}{4}$ acre of ground in the towns

and cities, and 2 acres of ground in the country appurtenant thereto; household goods, etc.; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The general assembly may authorize the incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years as an inducement to their location."

Upon the admitted facts, and they are attested in the current history of this beneficent institution, we are of opinion that the appellant is an institution of "purely public charity," within the meaning of the foregoing constitutional provision, as well as an institution of education "not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education." The name of the appellant is a significant index to its character, and the provisions of its charter sufficiently indicate its aims and purposes. It is true that "pay pupils may be admitted into the institution," but manifestly this is merely that the "pay" may be devoted to the general and main purpose of educating and supporting those who are unable to provide for their own support and education. It is an exception, as is clearly inferable from the insertion of the provision, and not the rule, that pay pupils are admitted. An instructive definition of a "purely public charity" is found in *Episcopal Academy v. Philadelphia*, 150 Pa. 565, and is thus stated: "(1) Whatever is done or given gratuitously in relief of the public burdens or for the advancement of the public good is a public charity. Where the public is the beneficiary the charity is public; and where no private or pecuniary return is reserved to the giver, or to any particular person, but all the benefit resulting from the gift or act goes to the public, it is a purely public charity, the word 'purely' being equivalent to 'wholly.' (2) A denominational school property, vested in trustees, for the purpose of affording encouragement to the education of youth, is a purely public charity, although the school is not open in the same way to the general public as to persons connected with the religious denomination, but the general public are admitted as vacancies occur, and when admitted, upon the same terms with all other pupils. (3) An institution founded and endowed as a purely public charity does not lose its character as such, under the tax laws, if it receives a revenue from the recipients of its bounty sufficient to keep it in operation." A most satisfactory discussion of this question is found in the case of *Burd Orphan Asylum v. Upper Darby School Dist.* 90 Pa. 21, where a testatrix, by her will, provided for the establishment of an asylum whose object should be the maintenance and education of (1) white female orphan children who shall have been baptized in the Protestant Episcopal Church in the city of Philadelphia, or in the state of Pennsylvania, and (2) all other white female orphan children, without respect to any other qualification, except that the orphan children of clergymen of that church should have the preference. The discussion of the right to tax the property of the asylum takes a wider range than is needed for the purposes of this 40 L. R. A.

case, but it is pertinent particularly to cases being considered in connection with the present one, and we therefore quote liberally from it. The reasoning of the court in that case is as follows: "It is conceded that the devise in question has created a charity which is public in the strict sense of that expression. But it is urged that it is not purely public, and hence that to apply the language of the act to this particular case would be a violation of the constitutional provision. Now, it must be conceded, and it has been decided, here and elsewhere, that the word 'purely' is not to have its largest and broadest significance when used in this connection. In the opposing line of thought it is admitted that the word is to have a limited meaning. It is not contended that a charity, to be purely public, must be open to the whole public, nor to any considerable portion of the public. Without doubt an asylum for the support of fifty blind men or an equal number of paupers would not be obnoxious to the objection that it was not 'purely public.' A charity for the maintenance of disabled seamen, or of aged and infirm stonemasons, resident in the city of Philadelphia, would undoubtedly be a purely public charity. And so, also, would a charity for the education and maintenance of the children of such persons. And if such a charity should be limited to the white female orphan children of such persons between the ages of four and eight years, such limitations, though they would very greatly restrict the class and the number of the beneficiaries, would constitute no valid objection to the purely public character of the charity. But seamen and stonemasons are only designated classes of persons, distinguished by their occupations. A charity for the support of poor widows, or indigent old men, or the insane poor of a city, county, borough, or township would be equally a purely charity, no matter how small would be the number of the beneficiaries or how limited the class. Why, then, would not a charity for the support of poor Episcopalians, Catholics, Jews, or Presbyterians of a state or city be purely public, or a charity for the education and maintenance of the orphan children of such persons? No private gain or profit is subserved; the objects of such a charity are certain and definite, and the persons benefited are indefinite within the specified class. The circumstance that the beneficiaries are to be of a particular religious faith is only of importance as designating the class. It indicates a certain portion of the whole community who are to be recipients of the charity. It has the same effect in this respect as the words seamen, stonemasons, blind persons, poor widows, etc., in the cases already mentioned, for the purpose of defining the class of persons who, as distinguished from all other persons in the community, are to enjoy the benefit of the donor's bounty, the legal effect is the same, whether the words used be seamen, Episcopalians, blind persons, Catholics, poor widows, Jews, stonemasons, or Presbyterians. The argument that to sustain, as purely public, a charity in favor of persons of a particular religious faith, would be to maintain sectarianism is of no weight. It is not discrimination in favor of a sect, for it is treating all sects

alike. It is not even extending a preference to sectarians; it is merely recognizing them as a class of persons. We see no reason why that community which ranges persons into classes, so far as this subject is concerned, may not be a community of religious faith, as well as of occupation, condition in life, sex, color, age, disability, physical or mental, or nationality. As to the meaning of the word 'purely,' when used in this connection, we concur in the construction which was given by the supreme court of Ohio in the case of *Gerke v. Purcell*, 25 Ohio St. 229, that, 'when the charity is public, the exclusion of all idea of private gain or profit is equivalent in effect to the force of "purely," as applied to public charity in the Constitution.' See also *Donohugh's Appeal*, 86 Pa. 306, and *Philadelphia v. Women's Christian Asso.* 125 Pa. 572. In the latter case the court (page 579, 125 Pa.) said: "It will be seen from the foregoing that the object of the association is to improve the temporal, moral, and religious welfare of young females who are obliged to earn their own support, and that, as a means to this end, it furnishes them with food and lodging, not as paupers, but for a compensation which, while it does not compensate, aids in defraying the expenses, and thus preserves the self-respect of the recipients, while to others who are unable to pay, temporary shelter is furnished free, and aid extended to them in the way of procuring employment. All this and much more is done by a band of devoted women, who labor unselfishly, in season and out of season, giving their time and labor freely, and supplying the annual deficit in the treasury by contributions from themselves and their friends. There is no element of gain in the object or operations of this association. It is a public charity, and I regard it as a short-sighted policy in the city of Philadelphia to seek to burden such an institution with taxation." Again the court observes (page 581, 125 Pa.): "In the case in hand the stamp of charity is indelibly fixed upon the association. It appears in its charter and is developed at every stage of its proceedings. Does the mere fact that it charges a small sum to a portion of those who feed at its table and enjoy the shelter of its roof, destroy its character as a purely public charity? . . . This whole subject was carefully considered in *Donohugh's Appeal*, 86 Pa. 306. This was the case of the Philadelphia Library, an institution maintained by the annual contributions of members, from the income derived from such property as has been given to it, and from fees paid for the use of the books. The test in that case was the object of the corporation. That was found to be the general public good, and not private gain."

Regarding as settled that the appellant is such an institution as is entitled to the exemption under the terms of the Constitution, the question remains: What is meant by the word "institution" in the instrument? The chancellor seems to have conceded that appellant was an institution of purely public charity, and an institution of education, such as is contemplated by the Constitution, but argues that, if the different educational or charitable institutions of the state see fit to invest their

endowment funds in real estate in the city, then to grant the appellant's contention might secure substantially the exemption of all the realty in the city. He therefore limited the meaning of the word "institution," and held it to embrace only local property, buildings, grounds, etc., so situated as to constitute part of the institution itself. While the imaginary case put is altogether improbable, and can afford but slight clue to the meaning of the language used, it must be admitted the word "institution" is often used in the sense pointed out by the chancellor. Thus, in *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 845, in discussing the use of this word in the exemption statute, the court said: "The term 'institution' is sometimes used as descriptive of the building, establishment, or place where the business or operations of a society or association are carried on, and at other times it is used to designate the organized body." The words under discussion there were 'hospitals or asylums, charitable or benevolent institutions, so far as used for the benefit of the indigent and afflicted, and the ground which the buildings used as such hospitals, asylums, charitable or benevolent institutions actually cover.' It was held that the language was appropriately descriptive of a building, establishment, or place where the operations of an association or corporation are conducted, but wholly inappropriate as the designation of organized corporate bodies or associations. In the case of *Gerke v. Purcell*, 25 Ohio St. 240, the constitutional provision was: "But burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose . . . may be exempt," etc. It was held that, in a statute providing for the exemption of "all lands connected with public institutions of learning not used with a view to profit," the word "institution" was used as descriptive of the establishment of a place where the business or operations of a society or association is carried on; but, in another section of the statute, where the property referred to is described as belonging to the institution, the word was used to designate the organized body. This case is instructive, also, in considering the feature first discussed, the court saying that the word "charity," in its legal sense, . . . "includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art;" and it was held that schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit, are institutions of purely public charity, within the meaning of the Constitution which authorizes such institutions to be exempt from taxation. The court further said: "The maintenance of a school is a charity. Gifts for the following purposes have been declared to be charities: For schools of learning, free schools, and scholars of universities (2 Story, Eq. Jur. § 1160); to establish new scholarships in a college (*Atty. Gen. v. Andrews*, 3 Ves. Jr. 683); to found and endow a college (*Atty. Gen. v. Bowyer*, 3 Ves. Jr. 714);" etc. In the case of *Nobles County v. Hamline University*, 46 Minn.

316, the act considered provided that all "corporate property belonging to the institution, both real and personal, is and shall be free from taxation;" and to the claim that "only the university itself, and the necessary grounds for its use" was exempt, the court replied as follows: "The third proposition is based upon an untenable attempted distinction between the 'institution' and the 'corporation.'"

The 'institution,' although sometimes used as descriptive of the establishment or place where a business is carried on, properly means an association or society organized or established for promoting some specific purpose.

The institution, as distinguished from the corporation, has no being, and is incapable of owning property. Had it been intended to limit the exemption to property directly used and occupied by the university, different language would have been used." Many other cases are cited by counsel, falling upon the one side or the other in the definition and use of this term, according to the language of the statute to be construed; and upon the whole it would seem that when the statute exempts the "institution" from taxation, and no qualifying words are used showing or tending to show that only the property "used" by the institution or "connected" with the institution, is to be exempt, then the associated entity—the corporate being—with its estate as an entirety, is embraced by the word "institution." The exemption of the institution would thus embrace its endowment fund and property, in whatever form these assets might be found. This is precisely what we find in the section under consideration, so far as reference is made to "institutions of purely public charity." Thus, "there shall be exempt from taxation . . . institutions of purely public charity," and there is to be found no qualifying clause or expression anywhere in the entire section. There is no allusion to "buildings," or "grounds" used by or connected with "institutions of purely public charity," as is the case in many of the authorities referred to by counsel.

Finding no exception to the rule indicated, that where an "institution" of the character named is exempted, the charitable being, including necessarily the whole of its estate, is to be exempted, and having determined the Kentucky Female Orphan School to be an institution of purely public charity, we might rest here with our investigation. But it is proper in this case, and necessary in some of the others connected with it, to consider the succeeding clause of the section: "And institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education." Here it may be said, and with a show of technical accuracy, that whatever is meant by the words "institutions of education," something is meant which may be used or employed by a person or corporation. And this can more fitly be said of the buildings and appurtenant grounds than of the corporate being. For example: We may appropriately say that the buildings, establishment, or place where the business of the corporation is carried on shall not be "used or employed for gain by any person or corporation," while

it would be rather inappropriate to say that the organized corporate body shall not be used or employed by any person or corporation. On the other hand, the clause "and the income of which is devoted," etc., could hardly mean income from the buildings, grounds, etc., but rather the income of the corporate body. Besides, we may notice that the attention of the framers of the section was called directly to the question of exempting the grounds attached to and appurtenant to certain places and houses used for certain purposes, but failed to provide any such limitation with respect to charitable and educational institutions. Perhaps a brief reference to the origin of these provisions in our Constitution may be of assistance here. As originally proposed, the section on the point involved only included the clause "institutions of purely public charity." There was no reference to institutions of education *eo nomine*; and, upon a suggestion that institutions of this character ought to be provided for, it was argued at length by a distinguished delegate that the language already in the proposed section fully covered the question. In support of this position, that "institutions of purely public charity" embraced institutions of education not operated for private gain, a distinguished delegate read on the floor of the convention copious extracts from the Pennsylvania cases cited. While not controverting this position, the particular friends of education argued that the Kentucky courts might not adopt the Pennsylvania construction, and secure the insertion of the clause as it now appears in the section, in order to make it certain that educational institutions not controlled for private gain, and the income of which was devoted to that cause, should be exempt. And while the endowments of some of the more prominent institutions of learning in the state were referred to during the discussion as fit subjects for exemption, if there was any objection raised or difference of opinion suggested as to the propriety of the proposed exemptions, there seems to have been no record of it. We are aware that the weight to be given the declarations of members of the convention is not to be taken as controlling. Mr. Endlich says of these declarations: "They give us no light as to the views of the large majority who did not talk; much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law." Endlich, Interpretation of Statutes, § 510. Yet, confessedly, it must be a source of satisfaction to those who are called on to ascertain the intention of doubtful provisions to find the conclusions arrived at to be in accord with, and not in opposition to, the views of the framers of the law so far as expressed. We think, therefore, a proper construction of the language used in the section requires the exemption of the entire property of this institution, wherever situated, and in whatever form its investments may be found.

This construction of the language of the Constitution is in accord with the long-settled policy of the state. By the Kentucky act of December 17, 1825 (2 Morehead & Brown, Stat. p. 1080), it was provided: "Hereafter the trustees or managers of such schools or sem-

inaries of learning within this commonwealth shall not be bound to list such lands for taxation or to pay any taxes on the same. Nor shall any taxes be demanded by the state for any such land, so long as the same shall absolutely and bona fide belong to a seminary or school of learning." This statute, and the public policy it recognized and enforced, was continued in Rev. Stat. 1852, chap. 58, art. 1, § 1, as follows: "Be it enacted by the general assembly of the commonwealth of Kentucky, that lands held by a school or seminary shall not be subject to taxation, or to forfeiture, for any cause whatsoever." And the same policy, exempting all the property of institutions of learning, was continued in the General Statutes as follows: "The real estates and investment devoted to public schools, seminaries, universities, colleges, court-houses, clerks' offices, jails, public graveyards, lunatic, orphan, and deaf and dumb asylums, hospitals, infirmaries, widows' and orphans' asylums, foundling asylums." Gen. Stat. (original ed. 1872) pp. 709, 710, chap. 92, art. 1, § 3. And the Hewitt revenue law of 1886 provided: "The following property shall be exempt from taxation: Public schools, churches, and all property of seminaries, asylums, hospitals, infirmaries, and colleges and all other funds devoted to charitable purposes, . . . except those owned by joint-stock companies or associations which declare dividends; provided that nothing herein shall be construed as exempting any property which is used or employed for gain of any person, nor any property of which the products, rents, or uses are not devoted solely to the objects of the institution, as distinguished from personal gain of the individuals connected with the institution." Under these statutes we are not aware that endowments of asylums, colleges, etc., not operated for the personal gain of individuals connected with the institution have ever been taxed; and it is inconceivable that an intention to reverse the policy of the state in this respect should have been declared in language so poorly expressive of such intention. As said by the Supreme Court in *United States v. Ryder*, 110 U. S. 729, 28 L. ed. 308: "The revisers would not have proposed, nor would Congress have made, such a fundamental change in the law . . . without employing more appropriate terms for that purpose than those which the section contains. It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." Except for the constitutional enactment, the contention of the appellees that such exemptions would be subversive of the principles announced in the bill of rights might be of some force; but the constitution must be held to be consistent with itself, and the policy adopted must be carried out. But, even before the present Constitution was adopted, this policy was recognized and enforced in the courts. In *Higgins v. Prater*, 91 Ky. 18, in sustaining a tax for the agricultural and mechanical college, this court said: "Other institutions of an educational character and which do not constitute a part of our common-school system have for years been supported by general taxation. . . . The framers of it

[our Constitution] and the people adopting it were not moved by a fear of too much education, but of too little." In *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 91, 13 L. R. A. 668, it is said: "It is the duty of the state to care for its indigent orphans, and, if done by another, he renders what is properly a public service; and the legislature may therefore, without regard to the extent of it, exempt the property devoted to such use from taxation."

We have already considered, perhaps sufficiently, the nature of this institution, but, in view of the appellee's appeal to the bill of rights, it is not improper to note from the yearbook of the institution (1892) the objects it has in view. "The primary object of this institution is to educate such orphan girls as cannot obtain an education in any other way, and to qualify them for teaching. . . . We receive three classes of girls, as follows: (1) Destitute orphans, who have no relatives or friends to aid them; (2) orphans destitute of means and of relatives able to aid them, but whom churches or benevolent societies are willing to sustain at the school; (3) orphans who have some means, but not enough to support them in other schools. Precedence is given to the first class, and as many of them are received as the proceeds of the endowment will justify." If this be not an institution of "purely public charity," and entitled to the aid of the state, one can hardly be found in the state. Other reasons for the exemption are urged by the appellant, but it is deemed unnecessary to consider them.

For the reason given, *the judgments are reversed* for proceedings consistent with this opinion.

Du Relle and Guffy, JJ., dissenting:

We dissent from the opinion of the majority in these cases, and will state briefly the grounds of dissent. The question for decision is whether real estate in the city of Louisville, owned by the appellant, is exempt from state, county, and city taxation, under the provisions of § 170 of the Constitution of Kentucky. The other questions made in argument were not passed on in the opinion of the court, and need not be considered here.

The exemption is claimed under § 170 of the present Constitution, which, so far as applicable to the question in this suit, is as follows: "Sec. 170. Property Exempt—Cities may Exempt Manufactories. There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding $\frac{1}{4}$ acre in cities or towns, and not exceeding 2 acres in the country, places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education, public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the

minister of any religion, with not exceeding $\frac{1}{2}$ acre of ground in towns and cities and 2 acres of ground in the country appurtenant thereto." In connection with this section we must consider certain other sections of the Constitution, in so far as they indicate the purpose of the instrument, and shed light upon the section under consideration. It should be remembered that there is nothing corresponding to this section in the Constitution of 1850. The same may be said of the provisions of § 3, which is as follows: "Sec. 3. All men, when they form a social compact are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation, except as provided in this Constitution; and every grant of a franchise, privilege, or exemption shall remain subject to revocation, alteration, or amendment." Section 5 contains this provision: "No preference shall ever be given by law to any religious sect, society, or denomination; nor to any particular creed, mode of worship, or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." In this connection we quote the corresponding provision of the old Constitution (§ 5, art. 13, of the Bill of Rights of the Constitution of 1850), as follows: "Sec. 5. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority ought, in any case whatever, to control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship." Section 171 of the present Constitution provides: " . . . Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation, within the territorial limits of the authority levying the tax." And § 174 contains the following: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by the Constitution."

It is evident from the provisions quoted that the policy of the new instrument was intended to be different from that of the old in the matter of exemptions from taxation. The change is significant, when, in connection with § 5, we consider the provision in § 3 that "no property shall be exempt from taxation except as provided in this Constitution," the provision in § 171 that taxes shall be levied and collected for public purposes only and shall be uniform upon all property subject to taxation, and the provision of § 174 as to uniformity of taxation of corporate property with that of individuals. The policy of the new Constitution was to do away with exemptions. Out of deference to the supposed views of the religious element of the community, certain specific exemptions

were made, and, while we do not contend that these should necessarily be strictly construed, they should certainly not be extended by implication to any property not fairly within the meaning of the Constitution. Except in so far as the Constitution provides, nothing can be exempted from taxation which might not be supported by taxation. Undoubtedly the exemption of any property works an increase of the burden on property which is not exempted, and the placing of a burden upon property, by taxing it to a greater extent in order to exempt other property, is to that extent a taking of property without just compensation. With these principles in mind, the construction of § 170 is simple. First, public property is exempted; next, places actually used for religious worship, with the ground attached, with a limitation upon the extent of the ground; next, places of burial not held for private or corporate profit; next, institutions of purely public charity; and then, in the same clause, institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the support of education. The case in which the main opinion of the majority was rendered turned upon the construction of this phrase, "institutions of purely public charity and institutions of education not used or employed for gain." And the first question is, What is meant by "institutions?" Undoubtedly, in the latter part of the clause, the word "institution" is used to denote the physical, corporal property employed for the purpose of education; and it is a cardinal canon of construction that where, in one part of a clause of a statute, a word having two meanings is undoubtedly used in one sense, it will be construed to be used in the same sense in the other parts of the section, unless such construction is forbidden by the context. It is practically admitted in the opinion that the words "used or employed for gain" apply, and can apply, only to the tangible property employed for the purpose of education. We can conceive of no reason for attributing to the phrase a different meaning when used as to institutions of purely public charity. If it had been intended to exempt the endowment of institutions of public charity and institutions of education, it may fairly be argued that the same phrase would have been used which is used in the succeeding clause as to public libraries, whose endowments are exempted, together with the income of such property as is used exclusively for their maintenance, and this is done as to libraries in express terms. So, in the next succeeding clause, as to any parsonage or residence owned by a religious society, and occupied as a home, and for no other purpose, by the minister of any religion. Further, the lands attached to places used for religious worship, and the lands appurtenant to parsonages, are limited in extent. But, in this case, institutions of purely public charity are construed to mean the corporations which conduct such institutions, and all property belonging to such corporations is exempted from taxation. We cannot assent to such a construction. Such a conclusion would lead, not only to manifest injustice in the matter of placing burdens upon the other

property in a community, but would lead corporations conducting such institutions to select, for the purpose of investment, those cities and towns which had the highest tax rate, in order to benefit by the advantage thereby given in competition for tenants. For, just in proportion as the surrounding property is subjected to a greater tax, is a greater bonus given to the corporation which owns the exempted property, a part of which bonus it can afford to give in the shape of a reduction of rent whereby to entice tenants away from the owners of the surrounding property. Just in proportion to the increase of exempted property held by such corporations in a city or town, must the tax rate become higher, and the inducement greater to such corporations to invest their surplus there. And this leads to further injustice. The tenants of such a corporation, induced to become such by a reduction of rent, are thereby enabled to undersell their neighbors, who are compelled to contribute their just proportion towards bearing the burden of taxation placed upon the property they occupy. Is it conceivable that the Constitution was intended to work such injustice?

It is matter of state history, which this court can and ought to take knowledge of, that the present Constitution was proclaimed to the people as putting a limit upon exemptions. Legislatures no longer were to work their will by exemptions in favor of the particular sect which the majority happened to favor, or to pool their issues in favor of a number of sects, whose adherents might constitute a majority. Specific exemptions were made in favor of property devoted to certain uses, which were supposed to furnish an excuse, if not a reason, for relief from the common burden. With great ingenuity, limitations more apparent than real were placed upon these exemptions, and the finished instrument was spread before the people as an enduring check upon the power of future legislatures to tax one man's property for the purpose of exempting another's. Moved by these and similar representations, the people voted by a majority of some 140,000 that this instrument should be their fundamental law. And with what result? To fasten upon their necks a burden of constitutional exemptions which can only be removed by a new constitutional convention or a constitutional amendment; to place limitations, not upon the legislative power to grant exemptions, but upon their own power to refuse, control, or repeal them. It is to no purpose to cite the language of the debates. Endlich says, of the declarations of members of a convention: "They give us no light as to the views of the large majority who did not talk, much less of the mass of our fellow citizens whose vote at the poles gave that instrument the force of fundamental law." Endlich, Interpretation of Statutes, § 510. And everyone who knows anything of conventions and legislatures knows that the declarations of the speakers not only do not represent the convictions of those who do not speak, but frequently do not give the real views of the speakers themselves. Speeches in such bodies are not even supposed to be made for the mere purpose of declaring the views of the

speakers, but for the purpose of influencing the votes of the listener. Hence, another than the real reason for the advocacy of a provision is often given, and another than the true interpretation of the language of a section is too often suggested in argument. Members who are in the minority strive for the substitution of less definite language than that proposed by the majority, with the purpose of taking their chances in the courts. But it is not by the declarations, more or less sincere, of the individual members of the convention, nor the understanding of the majority, that the instrument obtains validity or its meaning is to be ascertained. It is the votes of the plain people which give it force and effect, and from this fact flows the wise rule of constitutional construction, universally acknowledged by the courts since the foundation of the government, though too often disregarded in practice, that the language of such an instrument is to be construed according to its ordinary and common meaning, and that sense is to be given its provisions which was understood by the people whose ballots made it organic law.

Applying this test to the provision in question, we find a sectarian charity school, operated by a corporation created by special act which provided "that the institution shall be located in the town of Midway, in the county of Woodford." It comes to this court claiming exemption from taxation upon property situated in Louisville which is leased to tenants for various purposes, and the rents from which are applied to carrying on the institution at Midway. Waiving the question whether the charity thus provided for is purely public, about which there is grave doubt, the question arises, How many Kentucky voters had an idea that they were authorizing the exemption of houses in Louisville, the rents of which were used to carry on an institution at Midway? That the word "institution," in this section, was understood by the people to denote the physical property used for the charitable or educational object, there can be little doubt. Not one voter in a thousand would imagine that, in speaking of an institution not used or employed for gain by a person or corporation, the word "institution" was used to mean a corporation. It would instantly occur to the average man that the words used could not have been intended to provide for the case of a corporation not used for gain by a corporation, and that the thing meant by "institution" was the land and house and appurtenances used for the conduct of the charity, or for the educational purpose. If it was not so meant by the framers of the instrument, it must have been intended to deceive the people. So, the income of an institution of education must be limited to the income which is derived from the tuition fees. Authority is abundant in favor of the construction here stated. "Property from which a revenue is derived is not exempt. Property used exclusively as a general dispensary is exempted; but lots and buildings thereon, when an investment, the income of which is to be applied to the purposes of the dispensary, and stocks and public securities held by it, are subjects of taxation. The fact that the rents and revenues of a prop-

erty owned by a charitable corporation are devoted to the charitable purposes for which the corporation was organized, will not exempt such property from taxation. It is only when the property itself is actually and directly used for charitable purposes that the law exempts it from taxation." 1 Desty, Taxn. 119. And again: "A building of a benevolent society is liable to taxation to the extent of the value of the rental received. The building of a benevolent society leased for pecuniary profit is taxable, although built with funds that were exempt, and into which the rents are paid. Where the property of a benevolent society was leased for business purposes, and an income derived therefrom, its status as taxable property is thereby fixed." 1 Desty, Taxn. 120. "Where a statute exempts from taxation property devoted to religious, educational, or other purposes, or exempts the property of a corporation, the exemption will be confined in the former case to property used exclusively for such purposes; in the latter, to property necessary to the objects of the company's incorporation." 25 Am. & Eng. Enc. Law, p. 162. "Unless the terms of the statute are explicit to the contrary, a general exemption of the property of educational institutions will be confined to property actually and exclusively used by the institution for its legitimate purposes. If the property is used for other purposes, the fact that the proceeds of such use are devoted to carry out objects of the institution is immaterial." Id. pp. 165-167. And see *Washburn College v. Shawnee County Comrs.* 8 Kan. 350, and *County Comrs. v. Colorado Seminary*, 12 Colo. 497. An exemption to one is a tax upon others, and the language of the Constitution should not be strained to authorize such an act of injustice. This court has said: "As a general rule, the test of the right to exempt property is the existence of the right to levy a tax to foster such property. The levy of a direct tax upon the whole people of the state, to be paid to this corporation to forward the objects stated in their charter, would be declared at first blush unconstitutional, and yet that is what is indirectly done by the exemption. If the same power exercised by this corporation

had been conferred upon a designated individual, it would strike anyone as palpably beyond legislative authority. But there is no difference in principle between the corporation and an individual. If there is the power to exempt the one, there is unquestionably the power to exempt the other." *Barbour v. Louisville Bd. of Trade*, 83 Ky. 654.

It would be unprofitable to discuss the many collateral questions which have been urged or suggested. The claim of contract exemption seems to us to have little merit, and is not relied on in the opinion of the majority. The question whether a corporation would be exempt, under § 170, which was created for the purpose of education, to be imparted by the corporators, with a provision devoting the surplus revenue to charity, after providing a liberal salary for the corporators, does not properly arise in this case. It may be mentioned that the reasoning of the opinion in *Burd Orphan Asylum v. Upper Darby School Dist.* 90 Pa. 21, much relied on in support of the opinion of the majority upon the question of what is a purely public charity, has been questioned by the same court in *Philadelphia v. Masonic Home*, 160 Pa. 572, 23 L. R. A. 545; the reasoning of the latter case being in direct conflict with that of the former. The importance of the main question in this case can scarcely be overestimated. It is not a mere question of the taxes sought to be collected upon Louisville property belonging to the female orphan school, as the most casual glance at the statistics given in the census reports will show. Behind the little Midway school stalk great sectarian corporations, "rich beyond the dreams of avarice," directed, no doubt, by honest and devoted men, but, as corporations, demanding, as of right, from the state and the municipality privileges which no good citizen ought to ask for himself. The result is to be deplored, not only as it works an increase of the burden of taxation, already sufficiently onerous, upon the masses of the people, but in the inevitable reaction against corporations, formed for worthy objects, but which seek to profit by injustice.

Rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Anna S. LORING *et al.*

v.

Loring HILDRETH *et al.*

(.....Mass.)

1. Persons yet unascertained and unborn are not deprived of their rights without due process of law by making them defendants in a bill to remove a cloud upon title, and having

them represented by a guardian *ad litem* as provided by Stat. 1897, chap. 522.

2. A deed of trust which was never delivered does not amount to a declaration of trust merely because it was recorded by the grantor, when there is nothing to show that he intended to create any trust, except as the deed provided.

3. A cloud on title may be removed in equity although the defendants have not done

NOTE.—As to judicial proceedings affecting the rights of unborn children, see also *Nelson v. Galveston, H. & S. A. R. Co.* (Tex.) 11 L. R. A. 391; and 40 L. R. A.

Kent v. Church of St. Michael (N. Y.) 18 L. R. A. 381.

or threatened to do anything in opposition to the title of the plaintiff.

(February 25, 1898.)

REPORT by the Supreme Judicial Court of Essex County for the opinion of the full bench of a suit brought to remove cloud from title to certain real estate. *Decree for plaintiffs.*

The facts are stated in the opinion.

Messrs. Huntington & Fitz, for plaintiffs:

The plaintiffs are in possession of the premises, taking the rents and profits, and have no complete and adequate remedy at law.

Clouston v. Shearer, 99 Mass. 209; *Martin v. Graves*, 5 Allen, 601; *Russell v. Deahon*, 124 Mass. 342.

The trusts set out in the trust deed were never perfectly created in the way the settler intended to create them, *viz.* by a transfer of the legal title to a trustee; and the incomplete voluntary conveyance cannot be sustained as a declaration of trust.

The trust deed was not delivered.

Loring v. Whitney, 167 Mass. 550; *Barnes v. Barnes*, 161 Mass. 381.

It was retained by George B. Loring, who remained in possession of the premises as before, until he conveyed them some time later to his wife and daughter through the medium of his brother.

Equity will not help a volunteer to enforce an intention to create a bounty, manifested by an imperfect gift or conveyance.

Ellison v. Ellison, 6 Ves. J. 656; 1 White & Tudor's Lead. Cas. in Eq. p. 382 [923], and notes.

In order to render a voluntary settlement valid and effectual, the settlement must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.

Milroy v. Lord, 4 DeG. F. & J. 264; *War-ringer v. Rogers*, L. R. 16 Eq. 340; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Moore v. Moore*, L. R. 18 Eq. 474; *Re Breton*, L. R. 17 Ch. Div. 416; *Re Shields*, 53 L. T. N. S. 5; *Hayes v. Alliance British F. Life & F. Assur. Co. Ir. L. R. 8 C. L. 149*; *Hartley v. Nicholson*, 44 L. J. Ch. N. S. 277.

In some of the English cases there seems to have been an inclination to relax the rule and hold that an assignment which was ineffectual to pass the legal title might yet take effect as a declaration of trust, and the donor declared a trustee for the party designed to be benefited.

Richardson v. Richardson, L. R. 8 Eq. 686; *Morgan v. Malleson*, L. R. 10 Eq. 475; *Baddeley v. Baddeley*, L. R. 9 Ch. Div. 113; *Kor v. Hawks*, L. R. 13 Ch. Div. 822.

But these decisions have all been overruled or questioned in the cases above cited.

In this country the latest decisions of our courts have followed and sustained *Milroy v. Lord*.

Dickerson's Appeal, 115 Pa. 198; *Smith's Estate*, 144 Pa. 428; *Young v. Young*, 80 N. Y. 422, 38 Am. Rep. 634; *Govin v. De Miranda*, 83 Hun, 414; *Beaver v. Beaver*, 117 N. Y. 421, 6 L. R. A. 403; *Wadd v. Hazleton*, 137 N. Y. 215, 21 L. R. A. 693; *Flanders v. Blandy*, 45 Ohio St. 108; *Pope v. Burlington Sav. Bank*, 40 L. R. A.

56 Vt. 284, 48 Am. Rep. 781; *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557; *Lloyd v. Brooks*, 34 Md. 237; *Lane v. Ewing*, 81 Mo. 75, 77 Am. Dec. 632; *Landon v. Hutton*, 50 N. J. Eq. 500; *Stone v. Hackett*, 12 Gray, 227; *Cummings v. Bramhall*, 120 Mass. 552.

But if the imperfect instrument of conveyance can be construed to be a declaration of trust in order to effectuate the supposed intention of the settler, the intention must be evinced by acts which admit of no other interpretation than that the settler had ceased to be and others had become the beneficial owners of the property.

Landon v. Hutton, 50 N. J. Eq. 200; *Heartley v. Nicholson*, 44 L. J. Ch. N. S. 279; *Antrobus v. Smith*, 12 Ves. Jr. 39.

A voluntary covenant or agreement will not be enforced or effect given to an imperfect gift because of the existence of a meritorious consideration.

Notes on *Ellison v. Ellison*. 1 White & Tudor, Cas. in Eq. 382 [923]; *Phillips v. Frye*, 14 Allen, 36; *Buford v. McKee*, 1 Dana, 107; *Hayes v. Kershaw*, 1 Sandf. Ch. 258; *Badgley v. Votrain*, 68 Ill. 25, 18 Am. Rep. 541; 1 Lewin, Tr. Flint's notes, 8th ed. 83; Acts 1897, chap. 522.

The law only operates on real estate within the commonwealth.

United States v. Fox, 94 U. S. 315, 24 L. ed. 192.

As to persons within the jurisdiction of the court and within reach of process, but on whom actual service had not been made, service by publication in a proceeding *in rem* is clearly sufficient.

As to the constitutionality of the act with respect to nonresidents, see—

Arndt v. Griggs, 134 U. S. 816, 33 L. ed. 918; *Jackson, Hart, v. Lamphire*, 3 Pet. 280, 7 L. ed. 679; *Parker v. Overman*, 18 How. 187, 15 L. ed. 318; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Hart v. Sanson*, 110 U. S. 151, 28 L. ed. 101; *Langdon v. Sherwood*, 124 U. S. 74, 31 L. ed. 344; *Gormley v. Clark*, 134 U. S. 388, 33 L. ed. 909; *Eberling v. Dreyer*, 149 N. Y. 460; *Dillon v. Heller*, 39 Kan. 599.

The right of the state to authorize proceedings *in rem* by which persons unborn shall be bound has been so often recognized by the legislature without any question being raised as to the constitutionality of the proceeding, that it seems too late to raise any such question now.

Pub. Stat. chap. 178, §§ 9, 35, 62, 63, 70; Stat. 1892, chap. 6; Pub. Stat. chap. 120, § 20; Pub. Stat. chap. 141, § 21; *Crippen v. Dexter*, 13 Gray, 330; Pub. Stat. chap. 144, §§ 13, 14; Stat. 1889, chap. 466, §§ 1, 2; Stat. 1885, chap. 288; *Morse v. Hill*, 136 Mass. 60; Stat. 1888, chap. 420; Stat. 1839, chap. 442; Pub. Stat. chap. 142, §§ 18-17.

Mr. R. D. Weston-Smith, for defendants:

In the absence of statute, courts of equity have no authority to make any decrees except such as operate strictly *in personam*.

Any statute authorizing a court to render such a decree against a defendant who had not been actually served with process, or who had not appeared in the cause, would be clearly unconstitutional.

Rand v. Hanson, 154 Mass. 87, 12 L. R. A. 574; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Eliot v. McCormick*, 144 Mass. 10; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896.

The proceeding contemplated by the Statute of 1897, chap. 522, so far at least as it looks to an adjudication on the claims of persons who are unascertained, not in being, unknown, or out of the commonwealth, is substantially a proceeding *in rem*; and it is well settled that as against nonresidents or unknown persons it is within the constitutional power of the legislature to authorize the making of a decree *in rem* establishing the title after notice by publication, such notice being deemed constructive service.

Constructive service is held to be sufficient because the *res*, the title to which is in controversy, is within the jurisdiction of the court, and because the notice given enables parties whose rights may be affected by the proceeding to come in and defend. The constitutionality of such constructive service is sustained on the express ground that it enables persons who are interested to come in and defend if they see fit.

Arndt v. Griggs, 184 U. S. 316, 38 L. ed. 918; *Langdon v. Sherwood*, 124 U. S. 74, 31 L. ed. 344; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896; *Dick v. Foraker*, 155 U. S. 404, 39 L. ed. 201; *Lynch v. Murphy*, 161 U. S. 247, 40 L. ed. 688; *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691.

There are various probate proceedings in which the rights of persons unascertained or not in being are determined after the appointment of a guardian *ad litem*.

Morse v. Hill, 136 Mass. 60.

The proceedings of probate courts, however, in dealing with the estates of deceased persons, are in many respects peculiar and furnish no safe analogy.

Cases which constitute exceptions to the general rule, and in which it has been held that persons not actually before the court can be bound by the decree, may apparently be divided into four classes:

1. Cases in which the parties are extremely numerous, and where "sufficient persons are before the court honestly, fairly, and fully to try the general right."

Story, Eq. Pl. 10th ed. §§ 94-135; *Hills v. Barnard*, 152 Mass. 67, 9 L. R. A. 211; *Hills v. Putnam*, 152 Mass. 124; *Smith v. Williams*, 116 Mass. 510.

2. Cases in which the parties whose interests are to be concluded are represented by an executor or administrator.

Story, Eq. Pl. 10th ed. §§ 140, 141, 148, 203.

3. Cases in which absent persons are represented by a trustee.

Story, Eq. Pl. 10th ed. §§ 143, 149, 150, 207, 217.

4. Cases in which it has been held that a first tenant in tail *in esse* represents subsequent estates and interests.

Story, Eq. Pl. 10th ed. §§ 144, 147, 198, 202.

All these exceptions rest on the theory of representation.

All persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it either as

plaintiffs or defendants, so that there may be a complete decree which shall bind them all.

Story, Eq. Pl. 10th ed. § 72; *Crease v. Babcock*, 10 Met. 525; *Jewett v. Tucker*, 189 Mass. 566.

The trusts declared in George B. Loring's trust deed were effectually created.

We insist on the importance of carrying out the declared intention of the settlor to affect the property with a trust, as distinguished from his intention to make himself or any other person a trustee. That the trust shall be established is in most cases the settlor's one paramount object. That the trust shall be administered by any particular person is a matter of very trifling consequence. The intention, therefore, to affect the property with a trust should, if possible, be carried out, even though the intended settlement be voluntary.

Ex parte Pye, 18 Ves. Jr. 140; *Airey v. Hall*, 3 Smale & G. 315; *Parnell v. Hingston*, 3 Smale & G. 337; *Arthur v. Clarkson*, 35 Beav. 458; *Kekewich v. Manning*, 1 DeG. M. & G. 176; *Richardson v. Richardson*, L. R. 3 Eq. 686; *Morgan v. Malleon*, L. R. 10 Eq. 475; *Baddeley v. Baddeley*, L. R. 9 Ch. Div. 118; *Jones v. Jones*, 23 Week. Rep. 1; *Fox v. Hawke*, L. R. 13 Ch. Div. 822; *Adams v. Adams*, 88 U. S. 21 Wall. 185, 22 L. ed. 504; *Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908; *Moore v. Page*, 111 U. S. 117, 28 L. ed. 873; *Sanford v. Finkle*, 112 Ill. 146; *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631; *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. 9; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Crooks v. Crooks*, 34 Ohio St. 610; *Brookbank v. Kennard*, 41 Ind. 339; *Majors v. Everton*, 89 Ill. 56, 31 Am. Rep. 65; *O'Neil v. Greenwood*, 106 Mich. 572.

Notice to Anna S. Loring, one of the beneficiaries, was sufficient to establish the trust in favor of all, in analogy to the doctrine that delivery of a deed to one of several grantees is a sufficient delivery to the use of all.

Perry v. Holden, 22 Pick. 269; *Hubby v. Hubby*, 5 Cush. 516, 52 Am. Dec. 742.

Allen, J., delivered the opinion of the court:

This is a bill in equity to remove a cloud upon the title to land in the possession of the plaintiffs, who claim to be the owners thereof. The cloud consists in the record of a deed of trust from the late George B. Loring to the late John A. Loring, in trust "during the life of Anna S. Loring, wife of said George B. Loring, and of Sally P. Loring, the daughter of said George B. Loring, to pay over to them one half part to each of the net rents and profits thereof, and at the death of either of them the said Anna S. or Sally P. Loring to convey her one-half share in the said estate to her heirs at law, or to make such disposal of it as she shall direct by will." There were further provisions, not now material. This deed was signed and put on record by said George B. Loring, and it was also signed by said Anna S. Loring to release dower and homestead, but it was never accepted by the grantee, and, upon the facts found at the hearing, it was never delivered. *Barnes v. Barnes*, 161 Mass. 381. It was held by us in *Loring v. Whitney*, 167 Mass. 550, that the existence of

this deed and record constituted such a cloud that a purchaser ought not to be compelled to accept a title. The present bill accordingly is brought to remove that cloud.

The first question to be considered is whether the requisite parties are properly before the court, and the only doubt is whether parties unascertained and now unborn, who are contingently interested, can be so represented before the court that a decree affecting their rights can be entered. Stat. 1897, chap. 522, provides that in cases like the present a guardian *ad litem* may be appointed to represent such parties, and that the suit shall be deemed to be a proceeding *in rem* against the land, and that a decree establishing or declaring the validity, nature, or extent of the plaintiff's title may be entered, which decree shall operate directly on the land. There is no doubt that the statute is sufficient in its terms to cover the present case, and all requisite steps under the statute have been duly taken. The question, then, remains whether the statute is constitutional, under the 12th article of the Declaration of Rights, which provides that no subject shall be deprived of his property "but by the law of the land;" and the 14th Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property "without due process of law." It is contended for the defendants that no constructive service of process can reach these persons yet unascertained and unborn. It is conceded that there may be a good constructive service upon nonresidents and unknown persons, because such service enables them to come in and defend; but it is contended that this rule does not extend so far as to include persons unascertained and unborn, and that no sufficient service can be made upon them, and that, therefore, the provisions of Stat. 1897, chap. 522, do not fulfil the constitutional requirement of due process of law. If this argument were to prevail, it would often happen that the settlement of a title to land would have to remain in abeyance for an indefinite period of time, in cases where possible contingent interests were shown to exist. If a deed purporting to create such interests were inadvertently or fraudulently put on record, if such a deed were stolen, or even forged, and put on record by the thief or forger; nay, even if a forgery were committed in the registry of deeds by making what appeared to be a record of such a deed, when in fact no such deed or form of deed existed,—the courts would be powerless to inquire into and determine the facts, because parties purporting to have possible contingent interests could not be brought in or represented. In this way a title might be tied up for an indefinite period, by an unauthorized or criminal act, with no power in the courts to afford a remedy. Such a result should not be reached, except upon most stringent reasons of necessity. In *Clarke v. Cordis*, 4 Allen, 466, the constitutionality of Stat. 1861, chap. 174, § 1, authorizing compromises of controversies respecting estates in the hands of executors, administrators, guardians, and trustees was expressly declared. The court said: "Such contingent rights and interests are duly protected by the provision which requires the 40 L. R. A.

court to appoint some suitable person, whose duty it shall be to represent them in all proceedings under the statute, and by the requirement that the court shall adjudge, on due examination and inquiry, that the proposed award or compromise is just and reasonable in its effect on all contingent interests in the estate in controversy." This decision has stood unchallenged for thirty-five years, and we are satisfied that it rests on sound reasoning. The only difference in principle between that case and this, which has been suggested, is that the present proceeding is not in any sense one for the benefit of the defendants who are unascertained or not in being, but is strictly adversary to them. But this distinction does not vary the principle. The necessity which has been found to exist for acting upon the view that such statutes are constitutional, is illustrated by various other statutes which have been cited to us by counsel on both sides, relating to various proceedings in the probate court, to partition of lands, to the sale of property subject to contingent remainders, and to the determination of ancient conditions and restrictions. These have the effect to show that it has long been assumed and understood that the legislature has power to pass statutes under which such interests may be affected.

It is also contended by the defendants that, although the deed of trust was never delivered, still the execution and recording of it by Mr. Loring amounted to a sufficient declaration of trust. It is conceded that under the late English cases there was no sufficient declaration of trust to be enforced against Mr. Loring, or persons deriving title from him. *Milroy v. Lord*, 4 De G. F. & J. 264; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Moore v. Moore*, L. R. 18 Eq. 474; *Re Breton*, L. R. 17 Ch. Div. 416; *Re Shield*, 53 L. T. N. S. 5; *Bottle v. Knockner*, 46 L. J. Ch. N. S. 161; *Ex parte Todd*, L. R. 19 Q. B. Div. 186.

But it is contended that these decisions proceed upon too narrow a ground, and that, although the trust deed of Mr. Loring shows no intention to make himself a trustee, and although there was no valuable consideration, yet that he intended to affect the property with a trust, and that this intention ought to be carried out. The answer to this view is that the deed shows no intention to create a trust, except in the manner provided. If his intention could not be carried out *modo et forma*, then, so far as appears, there was no intention. The trust fails because there was no intention to create one which can be carried out. It often happens that charitable trusts fail because they cannot be carried out in the mode intended, if there was no intention that they should be carried out in any other mode. See *Teale v. Bishop of Derry*, 168 Mass. 341, 38 L. R. A. 629, and cases there cited. So here. The deed shows no intention outside of the mode and form adopted by the deed, and this fails because the deed itself was never delivered. In *Adams v. Adams*, 21 Wall. 185, 22 L. ed. 504, the court resorted to testimony outside of the deed itself to ascertain the grantor's intention, and there found an intention to create a trust. If resort were had in the present case to outside circumstances, no support is found for the view that the grantor intended

to create a trust independently of the deed. Numerous decisions from other states are cited for the plaintiffs, which confirm us in the view that we should not undertake to complete and carry out the trust, which the donor himself clearly abandoned.

We have no doubt of the jurisdiction of the court to enter a decree removing the cloud upon the title, there being no adequate remedy

at law. *Barnes v. Barnes*, 161 Mass. 381; *Russell v. Barstow*, 144 Mass. 130; *Clouston v. Shearer*, 99 Mass. 209; *Burns v. Lynde*, 6 Allen, 305, 312. The fact that these defendants have not done or threatened to do anything in opposition to the title of the plaintiffs does not prevent the giving of the relief prayed for.

Decree for the plaintiffs.

MICHIGAN SUPREME COURT.

Thomas KINGSTON, *Plff. in Err.*,
v.

FORT WAYNE & ELMWOOD RAIL-
WAY COMPANY.

(.....Mich.....)

1. In defense of a claim for loss of wages and future earnings in an action for personal injuries, defendant may show any facts

concerning plaintiff's habits and conduct which may throw light upon the probability of his securing employment, and the character and continuity of the same.

2. The intoxication of a passenger standing on the running board of a street car will not absolve the company from exercising care toward him, nor prevent his recovering damages in case he is injured by its negligence.

(March 10, 1897.)

NOTE.—Intoxication as affecting negligence.

I. Intoxication no excuse.

II. When it amounts to contributory negligence.

a. Generally.

b. With relation to trespassers.

c. With relation to persons injured at crossings.

d. With relation to passengers.

e. With relation to persons injured on highways, streets, etc.

f. With relation to miscellaneous matters.

III. Effect when there is negligence on both sides.

IV. Question for the jury.

V. Presumption and burden of proof.

VI. Intoxication as evidence of negligence.

a. Admissibility.

b. Weight and sufficiency.

VII. Employment of persons having habits of intoxication.

I. Intoxication no excuse.

Intoxication does not excuse the omission to use the same care and prudence which are required of a sober man under the same circumstances to protect himself against injury. *Louisville & N. R. Co. v. Johnson*, 82 Ala. 204, 104 Ala. 241, 108 Ala. 62, 31 L. R. A. 372; *Fisher v. West Virginia & P. R. Co.* 42 W. Va. 183, 33 L. R. A. 69; *Welty v. Indianapolis & V. R. Co.* 106 Ind. 55; *Missouri P. R. Co. v. Evans*, 71 Tex. 361, 1 L. R. A. 476; *Price v. Philadelphia, W. & B. R. Co.* 84 Md. 506, 36 L. R. A. 218.

Self-imposed disability by intoxication affords no more excuse in the law of negligence than it does in the criminal law. *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 287.

A man cannot voluntarily place himself in a condition whereby he loses such control of his brain or muscles as a man of ordinary prudence and caution in the full possession of his faculties would exercise, and by such loss of control contribute to an injury to himself, and then require of one ignorant of his condition recompense therefor. *Strand v. Chicago & W. M. R. Co.* 67 Mich. 380; *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 366, 23 L. R. A. 758.

If his intoxication contributes to his injury as a proximate cause it is a complete bar to an action for any damages sustained in consequence thereof. *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 366, 23 L. R. A. 758.

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The question in an action for personal injury alleged to have been caused by negligence is whether or not the injury was caused by the negligence of the defendant or the contributory negligence of the plaintiff, and not whether the plaintiff was at the time intoxicated, drunkenness on his part not relieving the defendant from liability if guilty of negligence, and the question whether he was drunk or sober not affecting the question of his liability if his want of ordinary care contributed to the injury. *Denver Tramway Co. v. Reid*, 4 Colo. App. 58.

Thus, the fact that a person injured by being run over by a street car was intoxicated at the time, and that he was negligent because of such intoxication, affords no excuse for such negligence, and does not prevent it from being a bar to a recovery of damages for the injuries received. *Weeks v. New Orleans & C. R. Co.* 32 La. Ann. 615.

And the intoxication of a person killed while driving along the railroad track does not excuse his negligence in failing to get off of the track, though his getting on the track in the first instance was due to the negligence of the railroad company. *McDonald v. Chicago, M. & St. P. R. Co.* 75 Wis. 121.

So, the fact that a person walking upon a railroad track not at a public crossing but at a place which was no part of the public highway, was drunk, does not relieve him from his duty to use every care and precaution, and all diligence, against any injury which might be done him. *St. Louis, I. M. & S. R. Co. v. Wilkerson*, 46 Ark. 513.

And the intoxication of a trespasser on a railway track who is killed by a train at a curve in a cut does not exempt him from the consequences of his contributory negligence where it was unknown to the persons in charge of the train, and they had no reason to anticipate that he was on the track in such a condition. *Memphis & C. R. Co. v. Womack*, 84 Ala. 149.

So, refusal to instruct the jury in an action against a city for damages sustained by reason of a defective highway, that a city is not bound to keep its streets safe and convenient for intoxicated persons, or that, if the person injured was intoxicated at the time, he will be presumed to have been negligent, is not error, where the court had charged that the person injured could not recover if anything else than the negligence of the city contributed to cause the accident, or if it occurred

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by its negligence. *Reversed.*

In any part through his own negligence; and that if he was intoxicated it was a circumstance to be considered as bearing upon the question of due care on his part. *Alger v. Lowell*, 3 Allen, 402.

And the fact that a minor who had arrived at years of discretion was grossly intoxicated at the time of the sale of chloroform to him by a druggist, which he drank, and then died, does not render the sale the proximate cause of his death. *Meyer v. King*, 72 Miss. 1, 35 L. R. A. 474.

II. When it amounts to contributory negligence.

a. Generally.

No greater degree of care is required to be exercised by an intoxicated man for his own protection than by a sober man, however, and if one's conduct is characterized by a proper degree of care and prudence it is immaterial whether he was drunk or sober. *Chicago & N. W. R. Co. v. Drake*, 33 Ill. App. 114.

The mere fact of intoxication of a person injured is not evidence of negligence *per se* which will prevent a recovery for the injury. *Newton v. Central Vermont R. Co.* 80 Hun, 491; *Tompkins v. Oswego*, 40 N. Y. S. R. 4; *Lynch v. New York*, 47 Hun, 524; *Holmes v. Oregon & C. R. Co.* 5 Sawy. 290; *Northern P. R. Co. v. Craft*, 29 U. S. App. 687, 69 Fed. Rep. 124, 16 C. C. A. 175. And see principal case.

It is immaterial whether a person suffering a personal injury from the negligent act of another was drunk or sober at the time, where no want of common care and prudence can be imputed to him. *Ward v. Chicago, St. P. M. & O. R. Co.* 85 Wis. 601.

The condition of the plaintiff in an action for a personal injury, with reference to intoxication, is of no importance where his own negligence did not contribute to the injury complained of. *Houston & T. C. R. Co. v. Reason*, 61 Tex. 618; *Alger v. Lowell*, 3 Allen, 402; *Central R. & Bkg. Co. v. Phinazee*, 93 Ga. 488; *Maguire v. Middlesex R. Co.* 115 Mass. 229; *Meyer v. Pacific R. Co.* 40 Mo. 151. And see *Baltimore & O. R. Co. v. State, Chambers*, 81 Md. 371, set forth *infra*, II., 3.

And the intoxication of a person injured will not affect his right to recover for the injury where it was not the proximate cause thereof. *Meyer v. Pacific R. Co.* 40 Mo. 151; *Davis v. Oregon & C. R. Co.* 8 Or. 172.

The mere fact of the intoxication of a person injured does not establish want of ordinary care upon his part. The jury must determine whether the intoxication contributed to the injury, and if it did not it is of no importance. *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 5 Hun, 165, *Reversed* on other grounds, 67 N. Y. 425; *Newton v. Central Vermont R. Co.* 80 Hun, 491.

But no recovery can be had in an action for a personal injury where the person injured was intoxicated and the intoxication contributed to bring about the injury. *Lynch v. New York*, 47 Hun, 524; *Bradley v. Second Ave. R. Co.* 8 Daly, 289; *Strand v. Chicago & W. M. R. Co.* 67 Mich. 380.

Or where it was the proximate cause of the injury. *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 266, 23 L. R. A. 758.

And one who voluntarily uses intoxicating drinks until he becomes helpless, or his powers are so far impaired that he is unable to exert the necessary efforts to avoid danger, is guilty of negligence when he places himself in a position of danger. *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242; *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.

And the same rule applies where he stupefies and 40 L. R. A.

The facts are stated in the opinion.

Messrs. Moore & Moore for plaintiff in error.

Messrs. Conely & Taylor for defendant in error.

deadens his intellectual powers so that he is unable to foresee and guard against danger. *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.

And refusal to instruct the jury in an action for a personal injury, that if they believe from the evidence that the plaintiff was guilty of negligence and improvidence at the time of the occurrence, and that they contributed to the injury, she was not entitled to recover, is error where there was evidence that the plaintiff was intoxicated at the time. *Brand v. Schenectady & T. R. Co.* 8 Barb. 368.

Drunkenness is not a defense in an action for negligence by way of contributory negligence, unless it was the substantial cause of the injury; but if a person drinks under such circumstances that a reasonably prudent man can foresee that he is putting himself in such a condition that the injury may probably happen, his drunkenness will be no defense. *Davis v. Oregon & C. R. Co.* 8 Or. 172.

And an instruction in an action for damages for a personal injury, that the fact of the intoxication of the person injured alone would not prove contributory negligence unless it amounted to imbecility, is erroneous as liable to mislead the jury. *Fitzgerald v. Weston*, 52 Wis. 354.

It is not necessary that a person should be so drunk as to be imbecile before his conduct will be affected by his intoxication, and before it can be taken into account by a jury in determining the question of his contributory negligence. *Fitzgerald v. Weston*, 52 Wis. 354. But see *Seymer v. Lake*, 66 Wis. 661, set forth *infra*, V.

So, after the intoxication of a person bringing an action for an injury alleged to have been caused by the negligence of another has been established, it is not necessary that the jury should further find that as a result thereof he became careless and reckless in regard to his safety, to defeat his recovery, as an intoxicated person might become neither reckless nor careless, and at the same time might so far lose control of his muscular action as to be unable to avoid injury. *Cramer v. Burlington*, 42 Iowa, 315.

And an instruction in an action for damages for personal injuries, that ordinary care is that care which might be reasonably expected of one in the situation of the person injured at the time of the accident, is erroneous where there is evidence from which the jury might infer that he was not sober when the accident occurred. *Buesching v. St. Louis Gaslight Co.* 6 Mo. App. 85.

b. With relation to trespassers.

A trespasser upon a railroad track, who was killed by a passing train at a place where he could not be seen in time to stop the train to prevent striking him, is not exempt from the consequences of his contributory negligence in being upon the track by the fact of his intoxication, where it was unknown to the persons in charge of the train, and they had no reason to anticipate that he was in such a condition. *Memphis & C. R. Co. v. Womack*, 84 Ala. 149.

And one who voluntarily becomes drunk, and falls down or lays down in a state of insensibility on a railroad track, so that he is injured by a passing train, cannot recover for injuries so received, though there may have been contributory negligence on the part of the employees of the road. *Southwestern R. Co. v. Hankerson*, 61 Ga. 114; *Illinois C. R. Co. v. Hutchinson*, 47 Ill. 408; *Denman v. St. Paul & D. R. Co.* 26 Minn. 367; *O'Keefe v. Chicago, R. I. & P. R. Co.* 32 Iowa, 467; *Price v.*

Long, Ch. J., delivered the opinion of the court:

The defendant, on October 10, 1891, owned and operated a horse railway in the city of Detroit. The plaintiff went upon one of its

cars on that date, for the purpose of being transported as a passenger. It was what was called a "summer car," open on both sides, with a step or running board, consisting of one board, extending the length of the car. The

Philadelphia, W. & B. R. Co. 84 Md. 506, 36 L. R. A. 213.

Unless its servants wilfully caused his death, or were guilty of such gross neglect as amounted in law to a wilful neglect of duty. Illinois C. R. Co. v. Hutchinson, 47 Ill. 408; Houston & T. C. R. Co. v. Symphkins, 54 Tex. 615, 38 Am. Rep. 632.

And he cannot recover for injuries because of being run over while so lying on the track, though the company was negligent in using an engine without a headlight, and though in the absence of such negligence he might have been seen and his injury avoided. O'Keefe v. Chicago, R. I. & P. R. Co. 32 Iowa, 467.

So, one who while intoxicated goes upon a railroad track at the usual and ordinary time of the running of trains thereon, and is injured by a passing train, is guilty of contributory negligence. Whalen v. St. Louis, K. C. & N. R. Co. 60 Mo. 323.

And a railroad company is not liable for the killing of a person who goes upon its tracks in a state of intoxication for the purpose of walking home thereon, and lies or falls down upon the track, and is run over, unless the company or its servants in charge of the engine running over him had knowledge that he was on the track in time to prevent the accident. Yarnall v. St. Louis, K. C. & N. R. Co. 75 Mo. 575.

And no recovery can be had for the killing of a person found lying on a plank between the rails of a railroad track by a track walker who notified him that a train was coming on presently, which notice he acknowledged but remained where he was, and was afterwards killed, where there was no evidence to justify the inference that he was sick, and his conduct in lying on the track appeared to be either the result of intoxication or mere recklessness. Virginia Midland R. Co. v. Boswell, 82 Va. 932.

So, evidence that a person injured by being struck by a railway train walked upon the railroad track 300 yards, although there was a street or road upon the side of the same which he could have used, and that he was not paying attention to anything and had been drinking and might have been intoxicated, and that the alarm whistle sounded for a distance varying, according to the different witnesses, from 200 yards to 20 feet from the place where the injury was inflicted, does not warrant the court in assuming that the negligence of such person was slight only. Houston & T. C. R. Co. v. Smith, 52 Tex. 178.

And a person who was killed by being run over by an engine and tender upon a railroad track while in a state of semi-intoxication, who turned from a path of safety and descended a bank several feet high and crossed a ditch on a plank across the main track just ahead of an engine, turning and walking slowly and heedlessly up the track, was guilty of such contributory negligence as will bar a recovery, where he could not, in the exercise of ordinary care, have failed to see the engine and tender back up to a point near the crossing a little east of where he was, and stand there waiting for a train to clear the switch so that it could pass through, and he lived near by and was familiar with the surroundings. Norfolk & W. R. Co. v. Harman, 83 Va. 553.

And one who, while incapable of protecting himself from the voluntary use of intoxicants, enters upon a train of cars from which he is forbidden, and without the knowledge or consent of the conductor, cannot hold the railroad company to any duty beyond ordinary care to protect him from in-

jury while upon the train, and to leave him in a reasonably safe condition. Missouri P. R. Co. v. Evans, 71 Tex. 361, 1 L. R. A. 478.

And one who while in a state of intoxication goes upon a street-car track and falls or tumbles, unable to support himself, from intoxication, and is injured by being run over by a car, is guilty of contributory negligence which will prevent a recovery therefor. Button v. Hudson River R. Co. 18 N. Y. 248.

And one who while intoxicated walks out on a railroad trestle to a position of great peril, and is there killed by a train, cannot be held free from contributory negligence. Anderson v. Chicago, St. P. M. & O. R. Co. 87 Wis. 195, 23 L. R. A. 203.

Reasonable care and diligence are all that are required to be exercised by a railroad company toward one who goes upon its tracks at a place other than at a crossing in such a condition from intoxication as not to be able to take care of himself or to heed the warnings of an approaching train. Price v. Philadelphia, W. & B. R. Co. 84 Md. 506, 36 L. R. A. 213; Columbus & W. R. Co. v. Wood, 86 Ala. 164.

And it is not the duty of a railroad company by whose train a trespasser has been injured while intoxicated to give any account in an action for such injury of the manner in which the injury occurred. Price v. Philadelphia, W. & B. R. Co. 84 Md. 506, 36 L. R. A. 213.

The mere fact that a person is guilty of negligence in going on a railway track while so intoxicated that a warning whistle would not arouse him and enable him to escape injury, however, will not relieve the railroad company from liability for his death caused by being run over by a railway train if the engineer saw him or could by due diligence have seen him in time to stop the train. Fulp v. Roanoke & S. R. Co. 120 N. C. 525.

But, except at public crossings and within the limits of cities or towns, a railroad company is under no obligation to keep a special lookout for intruders or trespassers on its tracks, and is only bound to use reasonable diligence after they are or ought to have been discovered; and the intoxication of the trespasser imposes no increase of diligence, unless the officers in charge of the company's train has knowledge of it,—the same rule applying, in the absence of such knowledge, to an intoxicated man as to a sober one. Columbus & W. R. Co. v. Wood, 86 Ala. 164.

An instruction in an action against a railroad company for killing a person upon a railroad bridge, that if the deceased went thereon in an intoxicated condition about schedule time for the train to pass, this would constitute gross negligence, is calculated to mislead the jury, and is erroneous, where it appears that the train causing the death was a special running out of schedule time, and faster than the regular train usually ran. East Tennessee & W. N. C. R. Co. v. Winters, 85 Tenn. 240.

c. With relation to persons injured at crossings.

One who places himself, in a state of intoxication, upon a railroad track, and is struck by a train having a headlight and giving the required warning, cannot recover therefor. Indianapolis & St. L. R. Co. v. Galbreath, 63 Ill. 436.

And a person injured while attempting to cross a railroad track cannot recover for such injury where from partial stupor from drink, or from reckless temerity, he undertakes to cross with the

plaintiff, being unable to secure a seat, stood on the running board, and claims that the conductor in charge of the car negligently pushed him off, causing the injury complained of,

The defendant claims that the plaintiff was intoxicated, and either jumped or fell off. On the trial, before a jury, the defendant had verdict in its favor. Plaintiff claims that he was

train in full view, if he had before looked along the track. *Toledo, P. & W. R. Co. v. Riley*, 47 Ill. 514.

And no recovery can be had against a railroad company for running over and killing a man who recklessly ventured upon a crossing in front of an advancing train being fully apprised of the approach of the train, or, if not so, it was for the want of the simple precaution of looking and listening, the deceased being addicted to hard drink, and being probably under the influence of liquor at the time, where it appears that the night was still though dark, and that the train was lighted up, and there was a bright headlight with nothing to obstruct the view for some distance. *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill. 102.

So, no recovery can be had against a railroad company for the killing of a person who was stupefied and confused by liquor, and, knowing that the trains passed irregularly, stood upon the track after dark and was struck by a slowly moving locomotive having a lighted headlight. *Marquette, H. & O. R. Co. v. Hanford*, 38 Mich. 537.

The intoxication of a person who was struck and injured by a detached car at a railway crossing, however, is not material in an action for such injury, where the car was detached for the purpose of making a running switch, and he watched and waited until the train passed, after which he drove on not supposing or having reason to expect or think that the detached car was following the train. *Ward v. Chicago, St. P. M. & O. R. Co.* 85 Wis. 601.

But where a three-horse team, the management of which was intrusted by the owner, who was riding in the wagon and was drunk, to a person riding one of the horses, who was also drunk and incapable of managing them, to the owner's knowledge, became frightened at a train of cars while passing along a highway running parallel with the railroad, and was struck by the train at a crossing upon which they ran and the owner and team were injured thereby, the proximate cause of the injury was the fright of the horses, and not the failure of the person in charge of the train to give the statutory signals at the crossing where the injury occurred. *Butcher v. West Virginia & P. R. Co.* 37 W. Va. 180, 18 L. R. A. 519.

And a person who is stupefied with liquor, who, seeing a locomotive slowly backing up, and misjudging as to the rapidity of its approach, attempts, with utter recklessness of consequences, to pass before it, and in doing so is knocked down and crushed under the wheels, cannot recover for the injury. *Brand v. Schenectady & T. R. Co.* 8 Barb. 388.

But an instruction in an action for the death of a person by being run over while crossing a railroad track, that evidence that he had been slightly intoxicated, but that he was not drunk at the time of the accident, raises no inference of want of ordinary care and prudence, is not error, though the court might have gone further and submitted the circumstances of the drinking and the degree of intoxication, which the jury would have had a right to consider upon the question of due care. *Baltimore & O. R. Co. v. State, Chambers*, 81 Md. 371.

So, no recovery can be had against a street-railway company for running over and killing a man whose faculties were blunted with intoxication, and who did not exercise proper care and prudence in crossing the track, where the driver used all the care, diligence, and exertion in his power to prevent the accident, and knowledge of the inebriated

condition of the person killed was not brought home to him. *Weeks v. New Orleans & C. R. Co.* 32 La. Ann. 615.

And the intoxication of a person injured, while attempting to cross a railroad track, which was the cause of his going upon it, may be considered in an action for the injury on the question of contributory negligence. *Hankinson v. Charlotte, C. & A. R. Co.* 41 S. C. 1.

d. With relation to passengers.

An intoxicated man has the right to ride upon railway trains so long as he keeps quiet and does not interfere with others, and the fact of his intoxication does not absolve the company from its duty to observe due care for his safety, or relieve it from liability for an injury to him caused by the sudden jerking of the car at a station where the train had stopped and the station had been announced, while he was in the act of getting off. *Millman v. New York C. & H. R. R. Co.* 66 N. Y. 642.

And the intoxication of a passenger on a railroad train, who is injured upon alighting, though proper to be considered by the jury upon the question of contributory negligence, does not exonerate the company from liability, the question depending upon his ability to act with proper care and judgment in and upon the train, and in getting on and off. *Millman v. New York C. & H. R. R. Co.* 4 Hun, 409, 6 Thomp. & C. 585, Affirmed in 66 N. Y. 642.

So, the intoxication of a passenger on a railway train who was injured by the company's negligence should not count against him as disqualifying him to avoid the consequences thereof if the circumstances were such that a prudent man could not have avoided them by the exercise of ordinary diligence. *Central R. & Bkg. Co. v. Phinazee*, 93 Ga. 488.

And the intoxication of a person injured by being put off of a train while in motion will not prevent a recovery therefor unless it directly contributed to cause the injury, and in consequence thereof he did not exercise ordinary care and prudence. *Meyer v. Pacific R. Co.* 40 Mo. 151.

So, intoxication is not necessarily evidence of contributory negligence where the intoxicated party, who was a passenger upon a boat landing at a pontoon upon a dark night, there being no light upon the boat except one lantern in the hands of a deck hand, fell into the river through a space between the pontoon and the boat, which was from 18 inches to 2 feet wide, and was drowned, the space being due to the fact that the boat had not landed in its usual position. *Holmes v. Oregon & C. R. Co.* 5 Fed. Rep. 523.

And the intoxication of a person injured by being thrown from the platform of a horse-car will not prevent his recovery against the company on account of the negligence of the driver, unless his intoxication contributed to the injury. *Maguire v. Middlesex R. Co.* 115 Mass. 239.

But a passenger on a railway train, who sustains injuries in leaving the train while in motion because sufficient time has not been given for that purpose, cannot recover where he drank intoxicating liquor before taking passage, and such drinking had contributed at all to such injury. *Strand v. Chicago & W. M. R. Co.* 67 Mich. 380.

And where a passenger upon a railroad train arrives at his destination, and leaves the train and returns and lies down in such proximity to the railway track as to endanger his life from moving

not intoxicated at the time of the injury, and, even if he were, he had a right to ride standing on the running board, and that if he was guilty of no neglect, and was pushed off the

car by the negligent conduct of the conductor, he was entitled to recover. Complaint is made of the admission of certain evidence, and of the refusal of the court to give certain re-

trains, and is injured or killed, he cannot claim immunity from the rule of contributory negligence, because he was then drunk, unless the facts show such negligence or want of care upon the part of the servants of the railroad company as would render it liable notwithstanding his own negligence. *Rozwadowskie v. International & G. N. R. Co.* 1 Tex. Civ. App. 487.

And one who drinks beer immediately before taking passage upon a railway train, and subsequently drinks whisky at a station at which the train stops, and voluntarily sits in a light, loose chair in a caboose which has seats for half a dozen passengers where they would be safe from falling out of the open side door, who is thrown from such open side door and injured while the train is running down grade, along short curves at the rate of 35 miles an hour, the chair standing within 3 inches of such open door, is guilty of contributory negligence but for which the injury would not have occurred, and is not entitled to recover therefor. *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241.

It is the duty of a railroad company after it has, through its conductor, notice that a passenger is riding on the platform of a car in such a state of intoxication as to be heedless of the danger to which he is exposed, however, to use the ordinary precautions for his safety, such as calling his attention to the danger and the rules of the company forbidding such exposure, and inviting him to go inside the car, and it is his duty to comply with such invitation. *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 363, 23 L. R. A. 758.

And a railroad company is responsible for the death of a passenger caused by his falling off the rear steps of a car while in motion where he was in a state of unconsciousness, and the servants of the company knowingly and negligently permitted him to remain on the rear steps of the car in a place of danger, though he exercised no care for himself. *St. Louis, A. & T. H. R. Co. v. Carr*, 47 Ill. App. 353.

But if a passenger voluntarily becomes intoxicated the law does not impose the duty upon the carrier to place a guard over him and prevent him from injuring himself or placing himself in a position of danger, and where he places himself in such a position, before the carrier can be held liable for a resulting injury it must be proved that the agents or servants operating the train actually knew of his condition and perilous position. *St. Louis, A. & T. H. R. Co. v. Carr*, 47 Ill. App. 353.

And knowledge on the part of a newsboy, engaged in a private enterprise, of the intoxication and perilous position of a passenger sitting upon the steps of a moving car, from which he fell and was killed, is not notice to the company which will render it liable for such killing. *St. Louis, A. & T. H. R. Co. v. Carr*, 47 Ill. App. 353.

Evidence in an action against a railroad company for the death of a person from falling from the steps of a car while in motion, that the conductor surmised that he was intoxicated from a remark made by him, and that a station agent saw him on the rear platform of a car as the train passed his station, and that he was supporting his head in his hands with his elbows resting on his knees, does not show knowledge on the part of the agents and servants of the railway company of his condition and perilous position which would require them to stop the train or remove him in order to relieve the company from liability for his death. *St. Louis, A. & T. H. R. Co. v. Carr*, 47 Ill. App. 353. 40 L. R. A.

So, there is no such privity between a railroad company and a disorderly passenger as to make the company liable on the principle of *respondeat superior* for the breaking of the arm of another passenger caused by drunken and quarrelsome men intruding in a car in great numbers at a station and engaging in a general fight therein. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224.

And it is not the duty of a railroad company to furnish its trains with a police force adequate to protect passengers against an excited and drunken crowd which assembles at a station and rushes upon its cars and engages in a fight thereon, where the numbers are such as to defy the resisting power of the conductor and trainmen under his command. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224.

Nor is a street-car company liable for the death of a passenger caused by an assault by another passenger who was drunk when he came on the car and who insulted ladies accompanying the person killed, where he became quiet upon being told to do so by the conductor, and remained so while on the car, but rushed out and struck the other with the car-hook upon his leaving the car. *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 108.

But a conductor of a railway train into which a drunken mob intrudes at a station, which begins fighting therein, does not perform his whole duty so as to relieve the railroad company from liability to a person whose arm is broken in consequence of such fighting until he has put forth all the force at his disposal to expel the persons creating the disturbance; and to keep his train in motion, and busy himself with collecting fares in forward cars while the fight is raging in the rearmost one where lady passengers have been placed, is not a performance of his duty, and it is not sufficient that he exhorts the passengers to throw the fighters out. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224.

And a railroad company which is a common carrier of passengers for hire is responsible for damages for the death of a passenger caused by being shot by another passenger who was laboring under a fit of delirium tremens, and was excited, nervous, and delirious, and labored under the delusion of pursuit of enemies on the train, where the conductor apprehended, or, as a man of understanding, knowledge, and experience should have apprehended, the danger that he might mistake some passenger for his supposed pursuer, and shoot him in imaginary self-defense. *King v. Ohio & M. R. Co.* 22 Fed. Rep. 413.

So, a peaceable passenger on a railway train whose eye is put out by a piece of glass from a bottle, broken in a drunken row between other passengers on board the train who should not have been permitted aboard, may recover from the railroad company therefor. *Pittsburgh & C. R. Co. v. Pillow*, 76 Pa. 510.

And a guard on an elevated railway train who quarrels with an intoxicated passenger upon a crowded platform, by which the crowd is caused to jostle another passenger on the platform so as to lead him to seize the railing, whereby his arm is caught between the railings of two of the cars and injured, is guilty of negligence for which the company is liable. *Graham v. Manhattan R. Co.* 149 N. Y. 336.

A passenger on an elevated railway car does not assume the risk of an unusual disturbance caused by a quarrel between the guard and an intoxicated

quests, and also to some portions of the charge as given.

It appeared upon the trial that the plaintiff had worked for the Union Elevator Company

in Detroit for seven years continuously, and that he had severed his connection with that company between two and three years before the injury. The foreman of the elevator com-

passenger by riding on the crowded platform of the car. *Grabam v. Manhattan R. Co.* 149 N. Y. 336.

And one who has entered a railway car for the purpose of becoming a passenger is entitled to protection against unlawful assaults by the trainmen, though he has not purchased a ticket, and though he entered the car in a violent and ungentlemanly manner, and though he was intoxicated at the time, where he entered with the intent to become a passenger and pay his fare, and was behaving properly at the time of the assault. *Illinois C. R. Co. v. Sheehan*, 29 Ill. App. 90.

As to effect of intoxication on the rights of a passenger ejected from a railway train, see *Roseman v. Carolina C. R. Co.* (N. C.) 19 L. R. A. 327, and the note appended thereto. And the following cases also relate to the same subject.

A carrier of passengers has the power, and is under the duty, of refusing to receive as a passenger anyone who is drunk, disorderly, or riotous, or who so conducts himself as to endanger or interfere with the comfort and convenience of the passengers, and may exert all necessary power and means at the proper time and place to eject anyone so imperiling the safety or annoying others, and in case of the neglect of such duty, and a passenger receives an injury which might have been reasonably anticipated from one so improperly received or permitted to continue as a passenger, the carrier is responsible. *Edgerly v. Union Street R. Co.* (N. H.) 36 Atl. 558.

A conductor in charge of a public vehicle may exclude therefrom any person whose conduct or condition is such from intoxication or otherwise as to render acts of impropriety, rudeness, indecency, or disturbance either inevitable or probable, and he is not bound to wait until some overt act of violence, profanity, or other misconduct has been committed. *Vinton v. Middlesex R. Co.* 11 Allen, 304, 87 Am. Dec. 714; *Murphy v. Union R. Co.* 118 Mass. 228.

A carrier is not bound to wait until some act of violence, profanity, or other misconduct is actually committed before exercising his authority to expel an intoxicated offender. It is sufficient if the offender, through intoxication or otherwise, is in such a condition as to make it reasonably certain that he will become offensive or annoying to other passengers, although he has not committed any act of offense or annoyance. *Edgerly v. Union Street R. Co.* (N. H.) 36 Atl. 558.

• And one who enters a railroad car as a passenger, in an intoxicated condition, and persistently refuses to pay his fare, and becomes boisterous, and uses profane and obscene language, is to be regarded as a trespasser and not as a passenger, and it is the right and duty of the conductor to eject him from the car, having due regard to circumstances of time, place, and condition of the person ejected, and using no unnecessary force. *Johnson v. Louisville & N. R. Co.* 104 Ala. 242.

So, a street-railway company has the power to refuse to receive as a passenger, or to accept, anyone who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of other passengers, and may exert all necessary power and means to eject anyone so imperiling the safety of or annoying others. *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190; *Murphy v. Union R. Co.* 118 Mass. 228.

And in cases of failure to do so, if a passenger receives an injury which might have been reasonably anticipated, the company will be held lia-

ble. *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190.

And a passenger honestly supposed by the conductor of a street car to be drunk, and who repeatedly disobeys the request of the conductor to behave himself, and whose conduct is offensive and annoying to the other passengers, may be ejected from the car without rendering the company liable therefor, though such conduct was caused by sickness and not intoxication,—especially when he made no explanation or complaint of sickness, and the conductor did not know and had no reason to know that he was sick. *Lemont v. Washington & G. R. Co.* 1 Mackey, 180.

And to charge the jury, in an action for damages for the ejection of a sick person from a street car, that vomiting from intoxication is the only form of that evil which would authorize the conductor to expel a passenger from a car, is error as tending to withdraw their minds from all other forms of the evil which might excuse the conduct of the conductor in the proper management of the car, and as withdrawing the question of the contributory negligence of the passenger in failing to make his sickness known from their consideration. *Lemont v. Washington & G. R. Co.* 1 Mackey, 180.

So, when a drunken person got upon a passenger train, and used profane and obscene language to the conductor, and behaved in a disorderly manner, and drew his pistol when the conductor attempted to put him off the train, thus inducing the conductor to arm himself in order to expel him, after which he continued his profanity and vituperation, using foul and insulting language, upon which shots were exchanged and the drunken person was injured by being struck in the shoulder, the railroad company is not liable therefor, though the conductor was not fully excusable for shooting, his excitement and consequent failure in the performance of his duty being due to the acts of the person injured. *Peavy v. Georgia R. & Bkg. Co.* 81 Ga. 485.

And the agents and servants of a railroad company in charge of one of its trains have the right to remove a passenger who is drunk and disorderly and using indecent language to the annoyance of the other passengers, from the passenger car in which he is riding, and place him in the baggage car, and carry him to his destination therein, only using reasonable force, when he does not attempt or express a desire to leave the train; and the company is not liable therefor though such servants and agents are police officers, and though they do not arrest such passenger. *Sullivan v. Old Colony R. Co.* 148 Mass. 119, 1 L. R. A. 513.

The fact that an individual may have drunk to excess, however, will not in every case justify his expulsion from a public conveyance. It is rather the degree of the intoxication and its effect upon the individual, and the fact that by reason thereof he is dangerous or annoying to other passengers, that give the right and impose the duty of expulsion. *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190.

A person cannot be refused permission to ride merely because he is slightly intoxicated, where there are no indications that he will not conduct himself properly. *Pittsburgh, C. & St. L. R. Co. v. Vandyne*. 57 Ind. 576, 26 Am. Rep. 68.

And it does not follow, and cannot be presumed, that because a man is drunk and offensive to others as well by his demeanor as in his appearance that he is a dangerous man, and that his presence in a

pany was called as a witness by the defendant, and was asked why the plaintiff was discharged by that company, and, under objection, was permitted to testify that it was be-

cause of his intemperance. The superintendent of the elevator company was called as a witness by the defendant, and was permitted to testify, under objection, that the reputation

street car imperils the safety of others, and that because he is drunk he may violently assault or murder others without provocation. *Putnam v. Broadway & S. Ave. R. Co.* 55 N. E. 108, 14 Am. Rep. 190.

So, the intoxication and misbehavior of a passenger which will authorize his expulsion from a train will not justify expulsion without the exercise of due care for his safety, having reference to time, place, and surroundings. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 372.

And where a person ejected from a railway train is incapacitated to take care of himself, and so continues until he perishes, his ejection from the train must be regarded as the proximate cause of his death, whether he was incapacitated by intoxication or by being stunned by the fall from the car. *Gill v. Rochester & P. R. Co.* 37 Hun, 100.

Where a passenger upon a railway train is intoxicated to a degree rendering him unconscious of danger and unable to comprehend his position, surroundings, and perils, and his duty to avoid them, or where he does not possess the power of locomotion and is put off of the train by the conductor on account of his misconduct, and the place where he is left is dangerous to one in his condition, and these facts are known to the conductor, he is guilty of reckless and wanton negligence rendering the company liable for damages resulting therefrom, although the person ejected might have been legally ejected in a proper manner and at a proper place. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 372, 104 Ala. 242.

And the ejection from a train at night of a passenger known to be drunk and irresponsible, at a place from which he can escape only by following the roughly ballasted railroad track and crossing cattle guards on one side and a bridge over a creek on the other, renders the railroad company liable where he is soon after killed by another train. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 372.

In *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 372, *supra*, it was said by the court that if the case decided in 92 Ala. set forth in *note* to *Roseman v. Carolina C. R. Co.* (N. C.) 19 L. R. A. 327, contains expressions or lays down principles contrary to the later utterances of the court in *Johnson v. Louisville & N. R. Co.* 104 Ala. 241, to which it still adheres, it must be modified conformably to what it now holds, and if such decisions may be found to be contrary it declines to follow them.

Mere intoxication upon the part of a person ejected from a railway train, which did not take away consciousness and the power to consider and understand the danger to which he was exposed or deprive him of physical capacity to take care of himself and avoid danger, however, does not relieve him from the responsibility of exercising due care after being put off; and if he is killed in consequence of such neglect of duty on his part no recovery can be had for such killing or injury. *Johnson v. Louisville & N. R. Co.* 104 Ala. 242.

And the death of a person struck and killed by a car on a street railway cannot be assumed to be the natural and proximate cause of the expulsion of such person from another car, where he was intoxicated at the time of such expulsion but not so drunk as to be deprived of intelligence or unable to walk, and there was no reason to suppose that he was not able to care for himself, and he was left but a short time after sunset near dwellings and upon a public highway, and there was no evidence tending to show that the place was a dangerous

one. *Edgerly v. Union Street R. Co.* (N. H.) 80 Atl. 558.

And when a trespasser was ejected from a train, who became unconscious and unable to realize his condition and his duty, from the effects of liquor drunk either before or after his ejection, but was not so at the time of such ejection, the railroad company was not liable for any injury that occurred to him as the result of such subsequent intoxication. *Johnson v. Louisville & N. R. Co.* 104 Ala. 242.

So, was a trespasser on a railway train, who is put off at a place from which he could by ordinary prudence have discovered and gone upon a traveled road instead of upon the railway track, is not excused so as to render the company liable for his death by being run over by a railway train, by a condition of partial intoxication, or by the influence of a companion which prompted him to remain upon the track. *Ham v. Delaware & H. Canal Co.* 142 Pa. 617.

And where a passenger in a railway train was carried beyond his destination because he was drunk and in a stupefied condition, and he refused to pay fare beyond that point, and was put off and sat down on the grass some feet to one side of the road, and left sitting there, and afterwards went upon the track of the road and lay down upon it and was run over by another train and killed, the company is not chargeable with notice that he went upon the track, and is not liable for his death. *McClelland v. Louisville, N. A. & C. R. Co.* 94 Ind. 276.

And an instruction in an action by a passenger for being put off a railroad train that the company was liable in damages if it wilfully, negligently, or carelessly carried him beyond his destination without his fault, is error where he was carried beyond his destination because he was so intoxicated as to render it unsafe to put him off there, and he was put off the next day when he had boarded another train to return to his destination because of his refusal to pay fare, no claim having been made for damages for being carried beyond his destination, and there being no evidence authorizing any recovery therefor. *Louisville & N. R. Co. v. Lewis*, 14 Ky. L. Rep. 771.

So, no liability upon the part of a railroad company arises from the ejection of a trespasser from one of its cars by a conductor who did not know or was not informed of the intoxication of the party and the consequent peril attending his ejection. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 372.

But evidence in an action against a railway company for the death of a person, alleged to have been caused by his ejection from its train in an intoxicated condition, that he refused to pay his fare in a very nonsensical way, and used rude, obscene language to the conductor, such as no one but a crazy or drunken man would employ, at which the latter did not become angry, and evinced a want of rationality, tends to show that the conductor had knowledge of his intoxicated condition. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 372.

So, an instruction in an action for the death of a person who was ejected from a railroad train and was afterwards found dead, that if the intoxication of the deceased contributed in any degree to his inability to get out of the situation in which he was found, such intoxication is to be attributed to him as contributory negligence, and if, being under the influence of liquor, he fell in the place

of the plaintiff among the people in and about the elevator was that he was a drinking man. The defendant was also permitted to show that the plaintiff was under the influence of liquor

at different times a year prior to the accident. One of the police officers was called, and permitted to testify that he knew the plaintiff when he kept a saloon; that at one time there

where he was found, and the influence of liquor contributed to or aided in producing his inability to get out of that position, and his death was caused by suffocation or drowning coupled with such inability, no recovery can be had,—should not be given; and refusal to give it is not ground for reversal where that view of the matter was not suggested at the trial, and the court had charged that if the incapacity of the deceased was the result of intoxication the intoxication must have been known by the conductor when he ejected the deceased in order to warrant a recovery. *Gill v. Rochester & P. R. Co.* 37 Hun, 109.

And an instruction in an action for a personal injury alleged to have been received by being forcibly ejected from the station house of a railroad, that if the falling of the plaintiff was attributable wholly or in part to defective steps at the door, or was caused in part by his intoxication and not by necessary force used in ejecting him, there could be no recovery, need not be given under a system of practice requiring instructions to be in writing, where the instructions given distinctly inform the jury that to find for the plaintiff it must appear from the evidence that the agent used more force than was reasonably necessary, and that by reason of the excessive force the plaintiff was injured. *Johnson v. Chicago, R. I. & P. R. Co.* 58 Iowa, 348.

e. With relation to persons injured on highways, streets, etc.

Being abroad in a street of a city at night in a state of intoxication is not negligence as a matter of law, but is a circumstance from which the jury may find the existence of negligence as a fact. *Cramer v. Burlington*, 42 Iowa, 315.

The intoxication of a person injured by reason of a defective highway will not affect his recovery therefor where it had nothing to do with the accident. *Alger v. Lowell*, 3 Allen, 402.

Over-indulgence in spirituous liquors is not to be imputed to a person falling into an excavation in a public street as negligence, unless he was disqualified thereby from the exercise of ordinary care and prudence. *O'Hagan v. Dillon*, 10 Jones & S. 458.

It does not, as matter of law, constitute such a want of ordinary care as would preclude a recovery, the question as to what constitutes ordinary care being one for the determination of the jury. *Stuart v. Machias Port*, 48 Me. 477.

But one who receives an injury on a highway while so intoxicated as to be unable to manage and conduct himself and his team with ordinary care and prudence cannot be said to be in the use of ordinary care, and if this want of ordinary care contributed in the least degree to produce the injury, he is not entitled to recover. *Cassedy v. Stockbridge*, 21 Vt. 391.

And one who is injured while intoxicated, while attempting to drive over a washout or chasm extending across the roadway, cannot recover of the county where, if he had been sober, he could and would have seen it and escaped injury, as in such case voluntary intoxication is in itself negligence. *Woods v. Tipton County Comrs.* 128 Ind. 280.

But the court in an action against a city for damages sustained by reason of a defective highway in which the intoxication of the plaintiff is interposed as a defense is not required to instruct the jury that a city is not bound to keep its streets safe and convenient for intoxicated persons, or that if the plaintiff was intoxicated at the time of the accident they are to presume that he

was negligent, where it had charged that the plaintiff could not recover if the accident occurred through his own negligence, and that if he was intoxicated that was a circumstance to be considered by them as bearing upon the question of due care on his part. *Alger v. Lowell*, 3 Allen, 402.

So, the intoxication of a person driving across a dangerous bridge does not of itself relieve the town of liability for maintaining it in that condition, the question being whether or not he exercised reasonable care to avoid the danger, but is evidence to go to the jury upon that question. *Thorp v. Brookfield*, 38 Conn. 320.

Negligence upon the part of a person in leaving an uncovered hole in the sidewalk of a public street, however, is not excused by the fact that a person falling into it was drunk. *Robinson v. Ploche*, 5 Cal. 461.

But where the drunkenness of a person injured in consequence of defects existing in a sidewalk in any way contributed to his injury, he cannot recover, and whether it did or not is a question of fact for the jury to determine. *Healy v. New York*, 3 Hun, 708.

So, one who travels by night along a country road in a wagon driven by a man known to him to be drunk and unfit to drive is guilty of contributory negligence, and cannot recover damages from the township for injuries sustained by the overturning of the wagon and his precipitation down an unfenced bank 5 or 6 feet high, at the side of the road. *Hershey v. Mill Creek Twp. Road Comrs. (Pa.)* 8 Cent. Rep. 252.

And a city will not be held liable for an injury caused to a woman by being thrown from a wagon driven over a defective crosswalk where the husband, who was driving, was in a drunken condition and drove too fast over the crossing, which was not so out of repair as to render it unsafe had he driven over it as a careful, sober man would have done. *Rock Island v. Vanlandschoot*, 78 Ill. 485.

But negligence will not be imputed to an injured party voluntarily riding in a private conveyance so as to defeat a recovery on his part in an action for personal injury against a toll-road company where he was without personal fault and had no control over the driver who was a fit person to manage the horses, by reason of the sudden closing of the passage by the toll-gate keeper on account of a wrongful attempt on the part of the driver, who was considerably intoxicated, to pass the toll-gate without paying toll. *Brannen v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115.

1. With relation to miscellaneous matters.

The owner of a wagon left standing in a roadway is not exempted from liability to a person who drives against it in the night and suffers injury thereby, by the fact that he was drunk at the time of the accident. *Kidley v. Lamb*, 10 U. C. Q. B. 354.

And a railroad company will not be held liable for damages for goods destroyed by fire in its warehouse upon the ground of negligence, upon evidence that a night operator, who had charge of the telegraph office in the warehouse, was addicted to drinking and was drunk at the time of the fire. *Young v. Wilmington & W. R. Co.* 116 N. C. 362.

And where a mother sends her two sons to a depot to meet their father, who is expected to return on a train in an intoxicated condition, and the sons are driven away from the depot by the person in charge, and the father arrives and leaves the train and subsequently returns and goes to sleep

was trouble at the saloon, and he went in and found the plaintiff and others pretty well intoxicated. Another police officer was called, and testified that in 1891 he had seen the

plaintiff under the influence of liquor. He was then asked, "Did you know what sort of a place he had?" and answered that he considered it rather tough. This testimony was ob-

upon the railroad track and is killed by another train, the driving of the boys from the depot and preventing them from meeting their father to conduct him home are not the immediate and proximate cause of his death so as to render the railroad company liable therefor, his contributory negligence being the proximate cause thereof. *Rozwadowskie v. International & G. N. R. Co.* 1 Tex. Civ. App. 487.

So, the condition of a driver as to being drunk or sober at the time of an accident is a proper subject of investigation in a suit for damages for injuries claimed to have been received by reason of the careless and reckless driving of the defendant's servant as a part of the *res gestæ*. *Williams v. Edmunds*, 75 Mich. 92.

And where a person driving for another at his request and solicitation and upon his business is intoxicated, and drives so heedlessly and carelessly that the other, in the exercise of ordinary care, can perceive it, and fails to do so, and remonstrate with him, and is injured by reason of such careless driving, he is chargeable with contributory negligence, and the question does not depend upon whether he is negligent in not remonstrating with the driver, or upon the fact that it is apparent to him, or occurs to his mind, that the driver is driving in a heedless and careless manner, or upon whether he assents to it or not. *Smith v. New York C. & H. R. R. Co.* 38 Hun, 33.

So, one who falls by accident against a stove in a public bar-room, striking against a vessel of hot water, which upsets and scalds another, is responsible for the injury thereby caused where the fall was the effect of intoxication. *Sullivan v. Murphy*, 2 Miles (Pa.) 296.

And a guest in a hotel cannot recover of the proprietor for an alleged robbery where the guest was intoxicated and his intoxication contributed to the loss. *Walsh v. Porterfield*, 87 Pa. 376.

But the fact that a guest in a hotel is intoxicated, or that his door is unlocked, will not destroy the landlord's liability for the acts of his servants in the theft of property belonging to such guest. *Cunningham v. Bucky*, 42 W. Va. 371, 35 L. R. A. 850.

And an innkeeper's liability for the baggage of a guest is increased rather than diminished by the fact that the guest got too drunk at his bar to take care of himself. *Rubenstein v. Cruikshanks*, 54 Mich. 199, 52 Am. Rep. 806.

And where one enters a saloon or tavern open for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ, as of drunken and vicious men whom he may choose to harbor. *Rommel v. Schambacher*, 120 Pa. 579.

And a saloon or tavern keeper is liable for damages for injury to a customer to whose clothes an intoxicated companion attaches a piece of paper, and sets fire to it within view of the proprietor, whereby he is seriously burned. *Rommel v. Schambacher*, 120 Pa. 579.

So, a licensed liquor seller who furnished another with intoxicating liquor in violation of the statutes, upon which he became intoxicated and unconscious, when the liquor dealer put him into his vehicle drawn by a gentle horse which the intoxicated man had borrowed, which ran away and was killed by reason of the driver's intoxication, is liable to the owner of the horse for its value. *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42.

It is no defense to an action for a wilful injury to 40 L. R. A.

person or property, however, that the person causing the injury was intoxicated, and the person injured was a licensed liquor seller and had sold him the liquors that intoxicated him, and was thereby guilty of contributory negligence. *Cassady v. Magher*, 85 Ind. 228.

And an answer in an action brought by a liquor seller to recover for injuries to his property on account of the wilful negligence and careless conduct of the defendant which admits the injuries and alleges that the defendant was intoxicated at the time by liquors sold to him by the plaintiff who was a licensed liquor dealer, is insufficient to constitute a defense. *Cassady v. Magher*, 85 Ind. 228.

So, contributory negligence is chargeable to a minor who takes chloroform when so intoxicated as to be incapable of exercising any reasonable degree of caution or prudence, where he is old enough to earn as a clerk in a grocery store a reasonable and substantial compensation. *Meyer v. King*, 72 Miss. 1, 35 L. R. A. 474.

And a person is not liable on the ground of injuring one in danger, for death following his selling chloroform to an intoxicated person who is not shown to be absolutely without mind to the knowledge of the vendor. *Meyer v. King*, 72 Miss. 1, 35 L. R. A. 474.

Nor will a sale of chloroform to a minor in violation of law, where he was intoxicated, render the seller liable for the minor's death from drinking it, if the sale was not the proximate cause of his death. *Meyer v. King*, 72 Miss. 1, 35 L. R. A. 474.

III. Effect when there is negligence on both sides.

As to concurring negligence generally, see *Jacksonville, T. & K. W. R. Co. v. Peninsular Land Transp. & Mfg. Co.* 27 Fla. 1, 17 L. R. A. 33, and note.

There seems to be some disagreement in the authorities as to whose act shall be deemed the proximate cause of an injury where the negligence of both parties concurred in bringing it about. Thus, on the one hand, it is held that though there was negligence on the part of a railroad company in running an engine backwards in the night and not having a light upon the tender and a lookout, yet no recovery can be had on behalf of one who was killed while voluntarily on the track and from intoxication unable to get out of the way of the train, as his own negligence was the proximate cause of his death. *Little Rock & Ft. S. R. Co. v. Pankhurst*, 36 Ark. 371.

So, the contributory negligence of a man who becomes drunk or unconscious upon a railway track will bar a recovery for injuries sustained by being struck by a locomotive, though the engineer was also negligent in failing to discover him in time to avert injury, as his negligence was concurrent with, if not subsequent to, that of the engineer, operating as it did up to the very moment of the collision. *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 237.

And though the company was also negligent in failing to use a headlight, by using which he might have been seen and the injury avoided. *O'Keefe v. Chicago, R. I. & P. R. Co.* 32 Iowa, 467.

And, though an engineer in charge of a railroad train was negligent in failing to blow his whistle at a crossing, the subsequent refusal or failure of a person upon the track in a drunken condition to get off is nevertheless the proximate cause of the injury sustained by being struck, unless it can be reasonably inferred that the engineer saw, or could by ordinary care have seen, not simply that he was on the track, but that he had placed

jected to by counsel for the plaintiff. Counsel for the defendant insists that this testimony was competent when the plaintiff's story and demand are taken into consideration; that his

story was that the conductor treated him in a negligent manner, whereby he was caused to fall from the running board of the car; that he did not do anything in whole or in part to

himself in a perilous condition and appeared to be drunk or insensible in the way of the engine, and that after he could by proper watchfulness have had reasonable ground to believe that such was his condition it was within the power of the engineer by the use of the appliances at his command and without peril to his passengers to stop the train in time to avoid injury. *Norwood v. Raleigh & G. R. Co.* 111 N. C. 236.

So, the proximate cause of the injury to a person whose foot is crushed by being run over by a railway train is his negligence in voluntarily walking upon the track and his inability to get out of the way in consequence of intoxication or an attack of vertigo, where he was drunk at the time and had started out to walk down the railway track, and was overtaken, according to his own account, by a blind spell and knew no more until he was run over, the track being straight at the place where the accident happened, the engineer having discovered a small object on the rail which he took for a block of wood, and having made every effort to stop the train after discovering that it was a man's leg, without being able to do so in season, the railway company not being responsible unless its trainmen had clear opportunity after discovering his peril to avoid striking him. *Little Rock, M. R. & T. R. Co. v. Haynes*, 47 Ark. 497.

And no recovery can be had for a personal injury to one who goes upon a railroad track in a helpless state of drunkenness and falls asleep or unconsciously sits upon the railroad track at a perilous place after having been warned of the danger of passing trains, and there waits until struck by an engine though he could be seen for a distance of 3 or 4 miles, where there is no evidence tending to show that he was seen by any of the train men, or that they could by the exercise of reasonable care have avoided the injury. *Price v. Philadelphia, W. & B. R. Co.* 84 Md. 506, 36 L. R. A. 213.

And one who is injured by being struck by a railroad train when in such a condition of intoxication as not to be able to take care of himself or pay any heed to the warnings of the approaching train, whose situation was not known to those in charge of the train, who did not discover it in time by the use of reasonable diligence to save him from injury, cannot recover therefor, though there was negligence on the part of the employees of the railroad in detaching cars and allowing them to run down the switch by their own momentum. *Kean v. Baltimore & O. R. Co.* 61 Md. 154.

So, the engineer of a railway train who sees men upon the track ahead is justified in supposing that they will get out of the way before his train reaches them, and may continue under that impression until he gets near enough to see that they are either drunk or asleep, which he is not bound to foresee; and the company is not liable for injury to them where he is unable after discovering their condition to stop and save them because of his nearness to them. *Herring v. Wilmington & R. R. Co.* 38 N. C. (10 Ired. L.) 402, 51 Am. Dec. 395.

And the negligence of a person killed while driving along a railroad track in failing to get off of the track is not excused by the fact that he was intoxicated, though his getting onto the track in the first instance was due to the negligence of the railroad company. *McDonald v. Chicago, M. & St. P. R. Co.* 75 Wis. 121.

If the employees of a railroad company in charge of a train see a man upon its track at a distance ahead sufficient to enable him to get out of the way they have a right to presume that he will do so, and 40 L. R. A.

go on without checking the speed of the train until they see he is not likely to do so, when it becomes their duty to give extra alarm, and as a last resort to check its speed and stop the train if possible in time to avoid disaster; but where the man seen is known to be, or from his appearance gives good reason to believe that he is, grossly intoxicated or otherwise insensible to danger or unable to avoid it, they have no right to presume that he will get out of the way, but should act upon the hypothesis that he may not or will not, and use proper care to avoid injuring him; and failing in this the company will be responsible in damages if, by the use of such care after they become aware of his negligence, they can avoid injuring him. *St. Louis, I. M. & S. R. Co. v. Wilkerson*, 48 Ark. 513.

And it is incumbent upon the plaintiff, in an action for the death of a man who was killed while lying unconscious from intoxication upon a railroad track, to avoid the effect of such negligent act, to show that when the engineer could first have seen him he was not only on the track, but in such a condition that he could not probably escape if the train continued on, and that he neglected to use the means available and safe to stop it. *Norwood v. Raleigh & G. R. Co.* 111 N. C. 236.

Upon the other hand, the rule is laid down that where the negligence of a defendant, in an action for a personal injury which contributed directly to cause the injury, occurred after the danger in which the injured party had placed himself by his own negligence was, or by the exercise of reasonable care might have been, discovered in time to have averted the injury, the defendant is liable, however gross the negligence of the injured party may have been in placing him in such a position of danger. *Werner v. Citizens' R. Co.* 81 Mo. 383.

He who has the last clear chance notwithstanding the negligence of the adverse party is deemed solely responsible for the injuries resulting from his failure to exercise reasonable care, and the failure of an engineer to perform his duty to maintain a reasonably vigilant lookout along the track in front of his train renders the railroad company liable for killing a human being lying upon the track apparently helpless from intoxication or other causes, where the engineer could have seen him by the exercise of ordinary care. *Pickett v. Wilmington & W. R. Co.* 117 N. C. 618, 30 L. R. A. 257.

And if a person crossing a railroad track, and while upon the track, is in fact drunk and fails to observe reasonable precautions to avoid danger, though improperly there and under circumstances constituting negligence on his part, yet, if the servants of the railroad company in charge of its train, after discovering his perilous situation, could, by the exercise of reasonable care and diligence, have avoided injury to him, they were bound to do so, and the company is liable for the injury if they fail to make proper and reasonable exertions whereby the injury could have been prevented. *Kean v. Baltimore & O. R. Co.* 61 Md. 154.

So, notwithstanding the fact that a person who is lying insensible upon a railroad track is drunk, his negligence is not deemed concurrent where the railroad company's servants by the exercise of ordinary care could have seen him in time to have prevented the injury by the proper use of the appliances at their command. *Lloyd v. Albemarle & R. R. Co.* 118 N. C. 1010. And see *Yarnall v. St. Louis, K. C. & N. R. Co.* 75 Mo. 575, and *Fulp v. Roanoke & S. R. Co.* 120 N. C. 525, *supra*, II. b.

And a railroad engineer operating a train, who

cause the accident; and that he was entitled to recover from the defendant, not only for the direct physical injury he received, but also for the pain and suffering, loss of time, and

for loss of work which he would have received had he not been injured; that the plaintiff was called as a witness on his own behalf, and therefore put himself in the way

sees upon the track a person whose appearance gives him reason to believe that he is grossly intoxicated or otherwise insensible of danger or unable to avoid it, has no right to presume that he will get out of the way, but should act upon the belief that he may not or will not, and take means to stop his train in time to prevent a collision. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, *dictum*.

And where a railroad engineer in charge of a train by reasonable watchfulness might discover a person lying upon the track asleep or drunk, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means short of imperiling the lives of passengers to stop the train. *Deans v. Wilmington & W. R. Co.* 107 N. C. 686.

In *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, *supra*, *Herring v. Wilmington & R. R. Co.* 32 N. C. (40 Ired. L.) 402, 51 Am. Dec. 365, *supra*, was directly and expressly overruled.

And in *Lloyd v. Albemarle & R. R. Co.* 118 N. C. 1010, *supra*, *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 287, *supra*, is spoken of as having been overruled.

So, a railroad company may be held liable for injuries caused by running over a man with a train which did not display any headlight, or sound a whistle, or ring a bell, as required by law, though he had been drinking freely, where he was not so much under the influence of ardent spirits as to be incapable of self-control, his negligence in walking upon the track being but slight as compared with the negligence of the company in running a dark train at a high rate of speed through a village without signaling its approach. *Indianapolis & St. L. R. Co. v. Galbreath*, 63 Ill. 436.

And where an engine running backwards with the tender in front runs over a man lying drunk upon the track, if a headlight would have enabled the railroad company by due diligence upon the part of its servants to have seen the man in time to have stopped the train before reaching him, the failure to provide one was a continuing negligent omission of duty the performance of which would have given the company the last chance to prevent the injury, and therefore its negligence in omitting it is the proximate cause of the injury. *Lloyd v. Albemarle & R. R. Co.* 118 N. C. 1010.

So, where a passenger riding on the platform of a car is in such a state of intoxication as to be careless and heedless of the danger to which he is exposed, it is the duty of the railroad company, after the conductor has notice of his condition and exposure to danger, to use the ordinary precautions for his safety, such as calling his attention to the danger and the rules of the company, forbidding such exposure, and to invite him to go inside the car. *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 366, 23 L. R. A. 758.

And a city railway company is liable for the death of a person run over by one of its cars in the night-time who had laid down or fallen upon the track in a state of intoxication and remained there, where the driver of the car, by the exercise of ordinary care and prudence, might have ascertained that the object which he saw lying on the track was a human being before he ran over it, and might have stopped the car before reaching it. *Werner v. Citizens' R. Co.* 81 Mo. 368.

And the failure of the driver of a street car to stop the car in the night-time where he could see an object on the track as large as a sack of oats

and which he thought resembled one or a bundle of hay, is such negligence on his part as will render the street-car company liable for running over the object, which proved to be a man who had laid or fallen upon the track in a state of intoxication and remained there until struck. *Werner v. Citizens' R. Co.* 81 Mo. 368.

So, the intoxication of a passenger upon a ferry boat is not evidence of contributory negligence which will defeat a recovery for his death by drowning where his death was caused by the fact that the boat did not land in a proper place and left a space of from 18 inches to 2 feet wide between the pontoon and the boat, which was poorly lighted, and he fell through the space from stumbling against the pontoon instead of stepping upon it. *Holmes v. Oregon & C. R. Co.* 5 Fed. Rep. 528.

But the drunkenness of a driver with whom one travels by night along a country road, which is known to the passenger, is the proximate cause of injuries sustained by him from the overturning of the wagon and his precipitation down an unfenced bank at the side of the road, though the accident would not have happened if the bank had been fenced. *Hershey v. Mill Creek Twp. Road Comrs.* (Pa.) 8 Cent. Rep. 252.

So, an innkeeper in whose inn a customer becomes drunk and unconscious, who expels such customer at a late hour of the night, by reason of which he dies from exposure and cold, cannot escape liability for such wrongful and negligent act on account of the customer's prior negligence in getting drunk. *Weymire v. Wolfe*, 52 Iowa, 538. See also *McHugh v. Schlosser*, 159 Pa. 480, 23 L. R. A. 574.

And a person who induces another whose faculties have been impaired by habitual drunkenness, to continue drinking on a wager to a manifestly dangerous excess, which causes his death, is liable for the wrongful act under articles 2899, 2900, Texas Rev. Stat., providing that an action for actual damages on account of injuries causing the death of any person may be brought where such death is caused by the wrongful act, negligence, unskillfulness, or default of another. *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260. See also *supra*, II., 2.

IV. Question for the jury.

Whether the intoxication of a person injured was such as to have contributed to the injury is a question of fact for the jury. *Houston & T. C. R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632; *Healey v. New York*, 6 Thomp. & C. 92; *Newton v. Central Vermont R. Co.* 80 Hun, 481.

Where there is evidence on the one hand, in an action for personal injury resulting in death, that the deceased was intoxicated at the time of the accident, and on the other hand, tending to show an absence of contributory negligence, the question whether the intoxication caused or contributed to the injury is one properly for the jury. *Tompkins v. Oswego*, 40 N. Y. S. R. 4.

And the verdict of a jury in an action for damages for negligence upon the question of contributory negligence and drunkenness of the plaintiff is conclusive upon appeal where the evidence was conflicting and the question was properly submitted to the jury under proper instructions. *Salina v. Trospers*, 27 Kan. 545.

And a judgment in favor of the plaintiff in an action against a railroad company for an injury received by a passenger while stepping on the train after a stoppage for dinner will not be reversed on

of an attack, not only upon his honesty as a party claimant, but also upon his credibility as a witness, both generally and in respect of his version of the occurrence resulting in his

injury. Counsel contends, further, that the plaintiff's own counsel put his sobriety in issue, and that defendant's counsel went into the matter on cross-examination.

appeal where the evidence as to whether the passenger was intoxicated or not then and upon other occasions was conflicting, though in the opinion of the appellate court the verdict of the jury should have been set aside by the trial court and a new trial granted. *Union P. R. Co. v. Diehl*, 33 Kan. 422.

And an instruction in an action for a personal injury caused by a defect in a highway, that if the jury find that at the time of the accident the plaintiff was intoxicated, this of itself would constitute such a want of ordinary care as would prevent a recovery by him, should not be given, as the question, What constitutes ordinary care? is one for the jury. *Stuart v. Machias Port*, 48 Me. 477.

So, it is within the province of the jury, and not the court, to determine whether the engineer of a railroad train had reason to believe that a man who was drunk upon the track was so situated that he could not without peril get off the track in time to escape the train, or was so intoxicated that he could not or would not attempt to escape, and whether after he could have discovered the situation the engineer might by using ordinary care have avoided injuring him. *Clark v. Wilmington & W. R. Co.*, 109 N. C. 430, 14 L. R. A. 749.

And where it appears in an action for a personal injury against a township that by reason of neglect to repair a road a gutter or channel had formed and been allowed to remain across such road, and that the plaintiff while passing along such road in a wagon was thrown therefrom into such channel, but that he was intoxicated at the time and was aware of the existence of the defect in the road, and that with reasonable care the accident could have been avoided, the question of his contributory negligence is one for the jury. *Maw v. King & Albion Twps.*, 8 Ont. App. Rep. 248.

And it is a question for the jury to say whether the failure of a brakeman who is injured in a collision alleged to have been caused by the habitual intemperance and incompetency of an engineer to refuse to work with such engineer in view of such knowledge on his part as to such incompetency was, under all the attending circumstance, contributory negligence. *Williams v. Missouri P. R. Co.*, 109 Mo. 485. And see *Laning v. New York C. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417, set forth *infra*, VI.

So, the question whether the removal of a passenger from one car to another by the officers of the train while the train was moving at the rate of 25 miles per hour is negligent or wrongful or not, where the passenger had been drinking previous to his going in the car, and he and those in company with him had behaved in a boisterous manner and made remarks which were improper in the presence of ladies, is one of fact under all the circumstances of the case, as is also the question whether unnecessary force was used in making the removal. *Marquette v. Chicago & N. W. R. Co.*, 33 Iowa, 563.

And the extent of the intoxication of a passenger, and the conductor's knowledge of his condition and the safety of the place at which he was ejected from the train, are questions for the jury. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 372, 104 Ala. 241.

And where a person who was very much intoxicated was removed from a railway train, and he had no money with which to pay his fare, and could not produce a ticket, notwithstanding the fact that a companion tendered fare which the conductor refused to receive, demanding a ticket, the expulsion is wrongful; and where his intoxication

was such as to render him helpless in the situation in which he was placed, and he was killed shortly after his removal by another train, after proceeding on his way to his destination, falling or laying down upon the track, the question whether his death was traceable directly to the removal from the train under all the circumstances is for the jury. *Guy v. New York, O. & W. R. Co.*, 30 Hun, 399.

So, the finding of a jury in an action for a personal injury will not be disturbed on appeal where the question was whether the plaintiff was voluntarily drunk and in that condition placed himself on defendant's railroad, or whether he had a sudden attack of vertigo by reason of which he fell thereon and was injured by the negligence of defendant's agents in running its trains, which was fairly submitted to the jury and there was evidence to uphold their finding. *Southwestern R. Co. v. Hankerson*, 72 Ga. 182.

But refusal to instruct the jury in an action for a personal injury on the submission of the question whether the plaintiff was so intoxicated when injured as to be incapable of exercising ordinary care to avoid injury, for a special verdict, as to the legal effect of such intoxication, is not error, as it is for the court to say what is the legal effect, though the jury answers the question affirmatively. *Schuenke v. Pine River*, 84 Wis. 669.

And the question whether a railway engineer in the exercise of due diligence might have discovered a person lying drunk and helpless across a rail in front of his train, and whether by prompt and strenuous efforts he could have saved his life without putting his passengers in jeopardy, is one for the jury. *Deans v. Wilmington & W. R. Co.*, 107 N. C. 688.

So, whether it was due care and a proper exercise of power to expel a drunken and disorderly passenger from a horse car while in motion is a question of fact to be determined by the jury in view of the rate of speed at which the car was moving and all the other circumstances of the case. *Murphy v. Union R. Co.*, 118 Mass. 228. See also *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 342, and *Guy v. New York, O. & W. R. Co.*, 30 Hun, 399, *supra*, II., d, and *Healey v. New York*, 3 Hun, 708, *supra*, II., e.

V. Presumption and burden of proof.

Where it is negligence to be in a particular place in a state of intoxication, and some evidence is introduced tending to show that a person receiving an injury at such place was intoxicated, the burden of proof is cast upon him to show by a preponderance of evidence that he was not intoxicated in order to recover in an action for such injury. *Cramer v. Burlington*, 42 Iowa, 815; *Hubbard v. Mason City*, 60 Iowa, 400.

And an instruction in an action for damages for alleged negligence that the burden of proof rests with the defendant to show that the plaintiff's injury resulted from his own intoxication and negligence, means negligence superinduced by intoxication, and is not therefore misleading. *Loewer v. Sedalia*, 77 Mo. 431.

And refusal to instruct the jury in an action for damages for an injury received upon a public highway, that if the person injured was so intoxicated as to be incapable of properly conducting himself and his team no recovery can be had, is not error where the jury were told that if he was so intoxicated at the time of the injury that of itself would throw the burden of proof upon the plaintiff to

We think it was proper examination to make inquiry as to the plaintiff's condition at the time of the injury complained of, and that the question was open to defendant's inquiry as

to whether the plaintiff was or was not intoxicated at the time of the injury, and that the defendant had a right to call witnesses to show that the plaintiff was intoxicated at that time.

show that he exercised ordinary care and prudence and that his intoxication was *prima facie* evidence of want of ordinary care. *Burns v. Elba*, 82 Wis. 605.

So, where it appears that the conductor running a train which causes a personal injury was a man of intemperate habits, the burden is cast upon the railroad company of proving that he was not intoxicated at the time and had used proper care. *Pennsylvania R. Co. v. Books*, 57 Pa. 333, 98 Am. Dec. 229.

And the fact of intoxication of a person injured by being thrown from a railroad car by a sudden jerk while the person was attempting to alight does not establish negligence *per se* unless it contributed to the injury, and the question is properly submitted to the jury whether or not it did so contribute. *Newton v. Central Vermont R. Co.* 80 Hun, 491.

Sobriety is the normal condition, and is presumed to exist, and the presumption stands in favor of the party injured by the alleged negligence of another in the place of proof; but when evidence of intoxication is introduced, it must appear from a preponderance of the whole testimony that the person injured was not intoxicated at the time of the injury, the burden of proof being shifted to the plaintiff, and the presumption of sobriety being overcome. *Cramer v. Burlington*, 42 Iowa, 315.

So, the burden of proving that a railroad company has not bestowed ordinary diligence with reference to a trespasser upon its tracks who is injured rests with the plaintiff in an action for such injury. *Columbus & W. R. Co. v. Wood*, 86 Ala. 164.

But while the intoxication of a person injured at the time of the injury is a circumstance to go to the jury on the ground of contributory negligence, it is not conclusive, and does not change the burden of proof unless the intoxication was of such a degree as to render him imbecile. *Seymer v. Lake*, 66 Wis. 651. And see *Ford v. Umatilla County*, 15 Or. 315, *infra* VI., a. But see *Cramer v. Burlington*, 42 Iowa, 315, *supra*, and *Fitzgerald v. Weston*, 52 Wis. 354, *supra*, II., a.

So, a habit of intoxication upon the part of a person injured, once proved to exist, is presumed to continue, and raises a presumption of negligence in case of accident to him which stands until rebutted. *Lane v. Missouri P. R. Co.* 132 Mo. 4. See also *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 87; *Chapman v. Erie R. Co.* 55 N. Y. 579.

VI. Intoxication as evidence of negligence.

a. Admissibility.

The intoxication in any degree of a person injured is proper to be considered in an action for damages for the injury in determining the question of his contributory negligence. *Alger v. Lowell*, 3 Allen, 402; *Hankinson v. Charlotte, C. & A. R. Co.* 41 S. C. 1; *Houston & T. C. R. Co. v. Waller*, 56 Tex. 331; *Northern P. R. Co. v. Craft*, 29 U. S. App. 687, 69 Fed. Rep. 124, 16 C. C. A. 175. And see *Cramer v. Burlington*, 42 Iowa, 315, *supra*, II., e.

While drunkenness is not negligence *per se*, it is evidence of negligence more or less cogent according to the circumstances. *Holmes v. Oregon & C. R. Co.* 6 Sawy. 290, 5 Fed. Rep. 523.

Thus, the intoxication of the plaintiff in an action for an injury received while crossing a railroad bridge and trestle, and the fact that he was admonished of the danger of crossing, are proper to be considered by the jury, in connection with all the other facts in the case, in passing upon the question of negligence, and it is not proper to sep-

arate such facts from their connection with others and make them the basis of an instruction, as such a course would tend to mislead the jury. *Baltimore & O. R. Co. v. Boteler*, 38 Md. 568.

And an instruction in an action for damages for causing a party's death in which the question of mutual negligence is involved and it appears that the deceased was intoxicated at the time, that the love of life and the natural instinct of self-preservation possessed by all persons may be considered in determining whether the deceased used ordinary care, is improper and erroneous; it should be qualified to the effect that if the deceased was drunk the jury should consider that fact and determine whether or not it rebutted such presumption. *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.

But intoxication is not of itself evidence of contributory negligence, and only becomes so by the fact that the intoxication contributed to the injury. *Lynch v. New York*, 47 Hun, 524; *Northern P. & Co. v. Craft*, 29 U. S. App. 687, 69 Fed. Rep. 124, 16 C. C. A. 175. And see *Holmes v. Oregon & C. R. Co.* 5 Fed. Rep. 523, *supra*, II., d.

Though evidence tending to show that the person injured was intoxicated at the time is competent. *Alexander v. Humber*, 86 Ky. 565.

Intoxication of a person injured in any degree, at the time of the injury, is a circumstance to go to the jury in an action therefor on the question of negligence; but it is not conclusive as to the fact of negligence, and does not change the burden of proof unless it may be seen that the intoxication is of such a degree as to render the party imbecile. *Seymer v. Lake*, 66 Wis. 651.

And evidence of intoxication in an action for a personal injury caused by the falling of a bridge furnishes a circumstance tending to corroborate proof of carelessness, but, standing alone, is not such proof, and does not shift the burden of proof to the plaintiff to show that he exercised due care. *Ford v. Umatilla County*, 15 Or. 313.

So, evidence tending to show that a person was drunk at the time of an accident causing his death is properly admissible in an action by his administrator against a railroad company by whose train he was killed, to recover damages therefor, as tending to show negligence on his part. *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.

And the condition of a driver as being drunk or sober at the time of an accident caused by careless driving is a proper subject for investigation, being part of the *res gestæ*. *Williams v. Edmunds*, 75 Mich. 22.

And evidence that a driver was more or less intoxicated at the time of the injury is competent in an action against him for driving a wagon against and over a person injured in a public road upon an issue as to whether or not he was guilty of neglect. *Alexander v. Humber*, 86 Ky. 565.

And evidence of the intoxication of an engineer who run an engine which killed a man is admissible in an action against the railroad company for such killing as a circumstance to be considered with the other evidence tending to prove the charge of negligence, though the complaint contained no allegation of such intoxication and did not allege the same as a specific act of negligence. *Northern P. R. Co. v. Craft*, 29 U. S. App. 687, 69 Fed. Rep. 124, 16 C. C. A. 175.

And refusal to exclude evidence of negligence on the part of the servants of a railroad company from the jury which may have caused the person injured to be upon the railroad track in a dazed and intoxicated condition is not error in an action

The defendant's conductor denied that he pushed the plaintiff off, or was in any way instrumental in his falling off the car. The defendant claimed that the plaintiff fell off by

reason of his intoxication, and this was a proper subject of inquiry.

But the court was in error in permitting the defendant to introduce testimony showing that

for damages for his death caused by being struck by a train while on such track in such condition. *Cincinnati, I. St. L. & C. R. Co. v. Cooper*, 120 Ind. 469, 6 L. R. A. 241.

So, evidence that a ship captain whose ship had gone on shore and who had sold her to a party who succeeded in getting her off was addicted to drunkenness within a short time before the vessel sailed is admissible on an issue between the owner and the insurer whether she had been totally lost. *Alcock v. Royal Exch. Assur. Corp.*, 13 Q. B. 292, 18 L. J. Q. B. N. S. 121, 13 Jur. 445.

And the intoxication of the plaintiff in an action against a city to recover damages caused by a fall due to defects in a sidewalk is a material question as tending to show want of ordinary care on his part. *Aurora v. Hillman*, 90 Ill. 61.

So, the intoxication of a person injured while attempting to cross a dangerous bridge should be taken into consideration by the jury with other facts of the case in determining whether or not he exercised reasonable care to avoid danger. *Thorp v. Brookfield*, 38 Conn. 320.

And evidence of repeated drunkenness of the plaintiff in an action against a city for injuries caused by falling into an excavation in one of its streets, for some years before that time and afterwards, is admissible for the purpose of throwing light on the issue whether or not he was drunk at that time. *Enright v. Atlanta*, 78 Ga. 288.

And the intoxication of the defendant may be proved in an action of trespass against him for an injury caused by driving his horse and sleigh against the plaintiff. *Wynn v. Allard*, 5 Watts & S. 525.

So, the condition of a physician as to being intoxicated, and his appearance at the time the services were performed by him, is admissible in evidence in an action against him for malpractice as a part of the *res gestæ*. *Merrill v. Pepperdine*, 9 Ind. App. 416.

But intoxication at the time of an injury cannot be inferred from proof of mere intemperate habits. *Hampson v. Taylor*, 15 R. I. 83.

And evidence of such a habit previously indulged in is not competent to prove intoxication at the time of the injury. *Hubbard v. Mason City*, 60 Iowa, 400. And see principal case.

And evidence that the plaintiff in an action for damages sustained by being run over by a horse-car was in the habit of becoming intoxicated is not admissible. *Barker v. Savage*, 1 Sweeny, 288.

And evidence of the habit of intoxication on the part of a person killed by a train at a railroad crossing is not admissible to prove contributory negligence on his part in an action against a railroad company for his death. *Lane v. Missouri P. R. Co.*, 182 Mo. 4.

Nor is evidence, in an action for injuries claimed to have been received by reason of reckless driving, as to the general character for sobriety of the driver. *Williams v. Edmunds*, 75 Mich. 92.

And evidence of intemperate habits on the part of the person injured is properly excluded in an action for an injury to a traveler on a highway resulting from a combination of two causes both proximate, one of which was a defect in the highway and the other a natural cause or a pure accident. *Hampson v. Taylor*, 15 R. I. 83.

Nor is evidence in an action for a personal injury by being struck by a moving car at a street crossing, that the plaintiff shortly before the accident was in a saloon and called for a drink of liquor, and that the barkeeper told him that he had

had enough, admissible, such fact not being proved by the declarations of a third person. *Lake Erie & W. R. Co. v. Zoffinger*, 107 Ill. 199.

But the plaintiff in an action for a personal injury, who had testified that he was not drunk at the time and had not been drinking to his recollection, may be asked on cross-examination if he was not in the habit of getting drunk. *McCracken v. Markesan*, 76 Wis. 499.

And the plaintiff in an action against a street-railway company for a personal injury sustained by the alleged negligence of the defendant in its management of its cars in his transportation may show that he was not intoxicated at the time, and prove his general character for sobriety, where the defendant had introduced evidence of his intoxication at the time, and inquired with reference to his habits for years. *Denver-Tramway Co. v. Reid*, 4 Colo. App. 53.

And the fact that an engineer was in the habit of drinking intoxicating liquor and visiting a particular saloon is proper to be considered by the jury in an action for an injury caused by an accident to his train in connection with other evidence, as tending to sustain the charge of intoxication on the part of the persons in charge, where there was evidence tending to prove that he had drunk intoxicating liquor at the last station passed by the train before the injury, and about thirty minutes before the accident. *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401.

So, the general reputation of a flagman of a railroad company as being intemperate is admissible in evidence in an action for an injury caused by his negligence, not for the purpose of showing his intemperance, but to show that the company, if it had used due care, must have known that he was habitually intemperate, and therefore an unsuitable servant to be employed by it. *Gilman v. Eastern R. Co.*, 13 Allen, 433, 90 Am. Dec. 210.

And evidence of the general reputation of an engineer for drunkenness is admissible in evidence for the purpose of showing his incompetency as such, and the negligence of the railroad company in retaining him in its employ. *Baltimore & O. R. Co. v. Henthorne*, 43 U. S. App. 113, 73 Fed. Rep. 634, 19 C. C. A. 623.

See also *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293; *Huntington & B. T. Mountain R. & Coal Co. v. Decker*, 82 Pa. 119; and *Cleghorn v. New York C. & H. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375, *infra*, VII.

But evidence in an action for a personal injury caused by a collision with a railroad train, that the witness had seen the engineer occasionally drink a glass of beer, and that he thought he had seen him drink one the night of the accident, does not tend to show that the engineer was intoxicated at that time. *Northern P. R. Co. v. Craft*, 29 U. S. App. 687, 69 Fed. Rep. 124, 16 C. C. A. 175.

And evidence that the plaintiff in an action to recover damages sustained by reason of a defective sidewalk was endeavoring at the time of the injury to secure impecunious parties upon a bond of \$300 for his appearance at court, to show his intoxication and consequent contributory negligence, bears so remotely and slightly upon the question of his intoxication that a judgment would not be reversed on account of the exclusion thereof. *Hubbard v. Mason City*, 60 Iowa, 400.

So, a physician cannot testify as to the effect of alcoholic drunkenness upon a person or individual in an action against a railroad company for damages for the alleged negligent killing of a person shown to have been intoxicated when ejected from

two or three or more years prior to that time the plaintiff was in the habit of becoming intoxicated. This evidence was undoubtedly prejudicial to the plaintiff's case. It was proper

one of the railroad company's trains. *Johnson v. Louisville & N. R. Co.* 104 Ala. 242.

And a witness in an action for causing death by the ejection of an intoxicated person from a railway train who testifies that he saw the deceased in conversation with others but could not hear what he said, and that he had no conversation with him, and that he occupied a seat in one end of the car and the deceased occupied one in the other end on a different side, cannot testify whether or not he was stupidly drunk. *Johnson v. Louisville & N. R. Co.* 104 Ala. 242.

b. Weight and sufficiency.

Where the evidence of negligence is nearly balanced the fact of drunkenness of one of the parties might turn the scale, as a man partially bereft of his faculties would be less observant than if he were sober. *Wynn v. Allard*, 5 Watts & S. 525.

And the testimony of the driver of a car which ran over and killed a man, that the deceased came staggering over to catch the horses by the heads and seemed to be very drunk, is sufficient to entitle the defendant in an action for such killing to a specific charge on the subject of the intoxication of the deceased. *Bradley v. Second Ave. R. Co.* 8 Daly, 289.

So, evidence that a person run over by a railroad train while attempting to cross the tracks was intoxicated entitles the defendant in an action for the injury to an instruction that if the jury believed from the evidence that the person injured was guilty of negligence and imprudence at the time of the occurrence, and that such negligence and imprudence contributed to the injury, she was not entitled to recover. *Brand v. Schenectady & T. R. Co.* 8 Barb. 368.

And the defendant in an action for an injury caused by a collision between a locomotive and the person injured at a crossing has a right to have the jury pass upon the facts under suitable instructions as to the law, where the theory is warranted that the person injured, upon arriving at the crossing and seeing the locomotive slowly backing up, and being herself stupefied by liquor, misjudged as to the rapidity of its approach and attempted to pass before it. *Brand v. Schenectady & T. R. Co.* 8 Barb. 368.

And evidence that a railroad engineer was an habitual drunkard, often drunk when off, and sometimes when on, duty, and was seldom free from the influence of liquor, is sufficient to warrant the jury in an action for an injury to a brakeman alleged to have been caused by the incompetency of the engineer in drawing the inference that he was an unfit person to be intrusted with the duties of a locomotive engineer, even in his sober intervals, notwithstanding the fact that there was evidence tending to show sobriety. *Williams v. Missouri P. R. Co.* 109 Mo. 485.

Nor does the evidence of a railway engineer whose train ran over and killed a man lying upon the track in an alleged drunken condition that he could not have seen him in time to stop the train before reaching him, authorize the court in an action for such killing to take from the jury the question as to whether he was negligent or not in not stopping the train. *Fulp v. Roanoke & S. R. Co.* 120 N. C. 525.

So, a nonsuit will be granted in an action against a railroad company for causing death, where it appears that the deceased returned to his home with a number of companions in a somewhat intoxicated condition about 11 o'clock at night, and

matter of cross-examination of plaintiff to inquire what his past life had been, and what company he had kept in the past, as he was before the jury as a witness; and it was proper

on leaving the car got off on the wrong side where there was no platform, and fell off the bridge on which the car stopped and was killed, the other passengers having gone off on the platform. *Deseims v. Baltimore & O. R. Co.* 149 Pa. 432.

And evidence tending to show that a collision between a railroad train and a detached car by which a brakeman was injured was caused by gross negligence on the part of the engineer in failing to pay attention to signals which it was his duty to obey, and that he was unfit and incompetent to perform the duties assigned him by reason of habits of intoxication, warrant the jury in concluding that his incompetency was the direct cause of the accident. *Williams v. Missouri P. R. Co.* 109 Mo. 485.

And a verdict will be directed for the defendant in an action against a city railroad company for an injury to a passenger caused by his being thrown from the car, where it appears that he was drunk and had no recollection of taking the car or of any facts connected with the accident, and that he was standing on the front platform his body swaying backward and forward, and that the rate of the speed was moderate, and there was no evidence of any defect in the road or that there was anything extraordinary in the motion of the car. *Holland v. West End Street R. Co.* 155 Mass. 387.

And an allegation that a minor who had arrived at years of discretion was intoxicated from an excessive use of liquor to such an extent that he was wholly incapable of exercising any reasonable degree of caution or prudence, in an action against a druggist for causing his death by selling him chloroform, shows contributory negligence upon its face which is sufficient to defeat the action. *Meyer v. King*, 72 Miss. 1, 35 L. R. A. 474.

So, the court is not warranted in assuming that the negligence of a person injured on a railroad track was slight only where the evidence shows that he walked upon the track 300 yards although there was a road upon one side of it which he could have used, and was not paying attention to anything, and had been drinking and might have been intoxicated, and that the alarm whistle was sounded from 200 yards to within 20 feet of the place where the injury was inflicted. *Houston & T. C. R. Co. v. Smith*, 52 Tex. 178.

And one who while very much intoxicated crosses a stream upon a foot bridge which is defective and is injured by falling from the bridge, will be denied a recovery upon the ground of contributory negligence, where it appears that he was very much intoxicated and was warned that the bridge was not safe, and there was another bridge which was safe within a few feet of that from which the accident happened. *Wood v. Andes*, 11 Hun, 543.

And the omission upon the part of village authorities to erect a railing or fence at the top of a bank descending from the exterior line of the sidewalk beside a street will not render the village liable to a person who was injured by falling down the bank, where he was greatly intoxicated and had been directed to his destination by a person who had guided him half of the way and told him to follow the car track in the street, and objects could be seen plainly for 200 feet, and no reasonable excuse seemed to exist for his leaving the roadway and walking off the bank except his intoxication. *Monk v. New Utrecht*, 104 N. Y. 552.

So, where a sidewalk is found, in an action for an injury happening upon it, to have been in such a condition that a person using ordinary care and prudence could walk over it without danger of falling, evidence that the person injured was in-

to inquire into his antecedents, as it had a direct bearing upon his credibility as a witness. The defendant, however, would be bound by his answers, as there is no rule

which would permit the defendant to introduce direct testimony bearing upon those questions, thus raising a collateral issue. The general reputation of the plaintiff for truth and

toxicated at the time is sufficient to warrant a finding that his negligence and intoxication contributed to his injury. *McCracken v. Markesan*, 76 Wis. 490.

But intoxication of one killed in a railroad yard while in the discharge of his duties, though evidence of contributory negligence, is not conclusive thereof unless it was the proximate cause of the injury. *Northern P. R. Co. v. Craft*, 29 U. S. App. 687, 69 Fed. Rep. 124, 16 C. C. A. 175.

And the fact that the plaintiff in an action for damages for falling into an excavation had indulged in intoxicating liquors sufficiently to make the fact perceptible from his breath does not show intoxication to such a degree as to disqualify him for the exercise of ordinary care, which would constitute contributory negligence upon his part. *O'Hagan v. Dillon*, 10 Jones & S. 458.

And the fact that a person injured from a defective sidewalk was just returning from a saloon where he got his dinner bucket filled with ale for his sick wife, and himself drank one glass of beer with a fellow workman who had drank several, does not constitute contributory negligence which will bar a recovery for the injury. *Aurora v. Hillman*, 90 Ill. 61.

So, contributory negligence which will justify the court in taking the case from the jury is not established in an action for the killing of an employee of a railroad company by an engine in charge of another employee by evidence that the person killed had been drinking that night and was intoxicated, where the testimony upon this point was conflicting and there was evidence of the intoxication of the person in charge of the engine, and evidence tending to sustain the theory that the deceased was walking on the track at the time he was struck and could have been seen by the person in charge of the engine, rather than that he was lying upon it in an intoxicated condition. *Northern P. R. Co. v. Craft*, 29 U. S. App. 687, 69 Fed. Rep. 124, 16 C. C. A. 175.

And evidence that a person contracting for the transportation of supplies to his landing smelled whisky on the captain of the ship on the morning preceding an injury thereto, and that of two witnesses that on one occasion he was drunk on a visit to a plantation but not when on duty, is not sufficient to show that the disaster occurred with the knowledge of the owner within the meaning of U. S. Rev. Stat. § 4283, providing for the limitation of liability of the owner to the value of his interest in the vessel and her freight if the loss was occasioned or occurred without his privity or knowledge, where all the other witnesses spoke as to the captain's general sobriety, and the owner distinctly avers that he never knew him to be drunk, and that liquor was forbidden on his boats except possibly a small flask in bad weather. *The Anna*, 47 Fed. Rep. 525.

Nor is a verdict for the plaintiff in an action for personal injury against a railroad company based upon the defendant's negligence justified by evidence of a witness who lived near the railroad track, that the accident occurred about 10 o'clock at night, and that he was in his room in the second story of the house and heard the train passing, and heard the scream of a man and the wheels jumping on the rails, and that he got out within five minutes of the time of the accident and found the person run over seriously injured, and that he did not hear the ringing of any bell when the train went by, and that when he reached the body of the man he saw the locomotive headed south with one or

two cars ahead of it and three or four cars behind it, where there was evidence from which it could be readily inferred that the deceased was intoxicated and brought the injury and subsequent death upon himself. *Church v. Northern P. R. Co.* 81 Fed. Rep. 529.

So, evidence in an action for an injury to a child caused by driving over it with a carriage, that the driver was intoxicated and driving at a reckless speed, and that with proper care he might have avoided the accident, is sufficient to sustain a recovery in the absence of evidence of contributory negligence upon the part of the child or his parents. *Daly v. Hinz*, 113 Cal. 366.

VII. *Employment of persons having habits of intoxication.*

The question of the liability of a master for injuries caused to one servant by the incompetency of a fellow servant, including incompetency through use of liquor, is fully treated in *Norfolk & W. R. Co. v. Hoover* (Md.) 25 L. R. A. 710, and *note* thereto. The question there considered, however, relates to injuries to fellow servants only, and the following cases will be found to bear generally upon the question of liability for the employment or retention of persons indulging in habitual intoxication.

Thus, the acts of a superintendent who exercised the executive duties of master in the employment and selection of servants are executive acts and those of the master, rendering the master liable for injury caused by the negligence of drunken servants employed by him. *Brickner v. New York C. R. Co.* 2 Lans. 506, Affirmed 49 N. Y. 672; *Laning v. New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

And the duty of a master to a servant to employ skilful and competent fellow servants is not performed so as to relieve him from liability by the selection of one or more general agents of approved skill and fitness, conferring upon them the power of selecting, and if the general agent selects servants incompetent by reason of intoxication or otherwise, from which incompetency damage to another results, the master is liable, and it is immaterial whether the incompetency of the fellow servant existed at the time of the hiring or has been since acquired, where he is continued in the service with notice or knowledge or the means of knowledge upon the part of the master, of the incompetency. *Laning v. New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Baltimore & O. R. Co. v. Henthorne*, 43 U. S. App. 113, 73 Fed. Rep. 634, 19 C. C. A. 623.

So, when a railroad company employs a conductor, who, on account of his drunkenness, is unfit for the business, knowing his unfitness, it is chargeable with the consequences of his negligence, even to one employed in the same general service. *Huntingdon & B. T. Road & Coal Co. v. Decker*, 84 Pa. 419, 82 Pa. 119.

And a railroad company is responsible in damages for an injury to a person employed by it to repair its cars, caused by the failure properly to adjust a switch by a flagman employed by the company who was usually intrusted with the management of the switch and who was an habitual drunkard, to the knowledge of the company or which by the use of due care would have been known, though due care was used in the original selection of the flagman, and a local agent was employed with authority to hire and superintend such servants, and by the rules of the company it was the duty of another person to manage the switch. *Gil-*

veracity was open to inquiry, but the attack upon his credibility, which would raise a collateral issue, was not open to the defense. In *Williams v. Edmunds*, 75 Mich. 92, it was

held that it was proper to show whether the servant who was alleged to have committed the injury was or was not sober at the time the injury was committed, it being a part of

man v. Eastern R. Co. 13 Allen, 433, 90 Am. Dec. 210.

And a railroad company employing a freight conductor which is advised through its managing agents of the fact that the conductor was an intemperate and improper person, or which by the exercise of proper care and caution could have ascertained the fact of his intemperate habits, which fails to discharge him, is guilty of negligence in retaining him. *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 87.

So, it is negligence for a large manufacturing institution to place men who are accustomed to the habitual use to excess of intoxicating liquor in charge of business requiring the control and directions of persons operating dangerous machinery which will render it liable for any injury happening to an employee under the charge of an intoxicated foreman arising from such cause, where the company had knowledge of his intemperate habits. *Kean v. Detroit Copper & B. Rolling Mills*, 68 Mich. 284.

And the employer of a skilled agent having authority to employ men for a particular department of service, who hired a foreman who was competent at the time but subsequently became incompetent from subsequently acquired habits of intoxication, which was known to the agent, which foreman while intoxicated directed unskilled and incompetent workmen to erect a scaffold upon which another was directed to work, which was so defectively built that it fell, injuring such workman, is chargeable with the negligence of the agent in retaining a drunken superintendent in the employment after he had knowledge of his incompetency. *Laning v. New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

And where a drunken superintendent employed by a master chargeable with knowledge of his intemperate habits allows dangerous machinery to be operated by an intoxicated workman, whom he orders to do an act which must necessarily cause danger to another workman who is thereby injured, a breach of duty is established toward the latter, both at common law and under the employer's liability act, which will support an action either at common law or under such act. *McPhee v. Scully*, 163 Mass. 216.

And exemplary damages may be given in a case of gross negligence upon the part of a stage proprietor in the employment of a drunken driver where a passenger has been injured in consequence thereof. *Frink v. Coe*, 4 G. Greene, 555, 61 Am. Dec. 141.

So, the knowledge of the superintendent of a railroad, entrusted with the management of the road and the power of employing and discharging, of the drunken character of a conductor employed by him, is notice to the company. *Huntingdon & B. T. Road & Coal Co. v. Decker*, 84 Pa. 419, 82 Pa. 119.

Power to suspend an employee for drunkenness or incompetency carries with it authority to receive notice of such incompetency. *Baltimore & O. R. Co. v. Henthorne*, 43 U. S. App. 113, 73 Fed. Rep. 634, 19 C. C. A. 623.

And where by the use of due diligence to inform themselves of the competency of their employees the officers and managers of a railroad company ought to be informed of the incompetency of an engineer who had acquired habits of intoxication they are chargeable with the consequences of his negligent acts caused by drinking. *Hilts v. Chicago & G. T. R. Co.* 55 Mich. 437.

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And where an accident occurred through the negligence of a servant of a railroad company who was intoxicated, and it appears that he was in the habit of drinking to excess, and such habit had extended for a period of nine months while in the employment of the company, and no actual knowledge or notice ever reached any superior officer, the jury would be justified in concluding that the company was negligent in failing to learn of such habit and retaining the employee in their employment. *Hilts v. Chicago & G. T. R. Co.* 55 Mich. 437.

And proof of drunkenness on the part of a servant, so habitual as to be generally known in the community, is sufficient to raise a presumption of knowledge thereof on the part of his master, which will render him responsible for injuries thereby caused. *Sawyer v. Sauer*, 10 Kan. 466.

And habits of intemperance on the part of a railroad conductor, which were so noticed among the men and so long continued that they must have been known to the division superintendent and to the railroad company which retained him in its employ, are sufficient to render it liable for injury resulting therefrom. *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 288. See also *supra*, VI., a.

So, evidence that the foreman of a roundhouse, whose duty it was to look after the engines of a railroad company and the men and make reports to his superior, had heard that an engineer was drinking too much, is sufficient to warrant the jury, in an action against the company for an injury to a brakeman alleged to have been caused by the incompetency of the engineer, in concluding that the railroad company knew or ought to have been aware of the engineer's intemperate habits. *Williams v. Missouri P. R. Co.* 109 Mo. 485.

And knowledge on the part of a general agent authorized to hire and discharge servants, of the incompetency of a servant from subsequently acquired habits of intoxication, may be proved by declarations of the agent that if such servant did not do better he would have to discharge him. *Laning v. New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

And declarations of the superintendent of a railroad company having power to hire and discharge conductors, to the effect that he had several times discharged a conductor for getting drunk and disobeying orders, are admissible in evidence in an action for an injury caused by the conductor's negligence for the purpose of showing negligence on the part of the company in retaining him in its employ. *Huntingdon & B. T. Mountain R. & Coal Co. v. Decker*, 82 Pa. 119.

And evidence of declarations upon the part of a superintendent in an action for an injury caused by the negligence of an employee who was competent when hired but had become incompetent by habits of intoxication, that he must quit drinking, and that he had told him that he had heard that he had been off on a spree, which the employee did not deny and for which the superintendent reprimanded him, is admissible, not as evidence of the fact of the habit of drinking, but to prove notice to the superintendent. *Chapman v. Erie R. Co.* 55 N. Y. 579.

So, evidence of the accustomed disobedience of orders on the part of a railroad conductor, and of his habitual drunkenness, is admissible in an action against the company for an injury caused by the conductor's negligence upon proof that the facts were known to the superintendent, who had the entire control and management of the road,

the *res geste*, but that it was not proper to show his intoxication at other times, as it was raising a collateral issue. In *Fohey v. Crotty*, 63 Mich. 383, it was held that in a civil action the reputation of the plaintiff was not in issue. See also *Pokriefka v. Mackurat*, 91 Mich. 399; *Klein v. Bryer*, 81 Mich. 234; *Cully v. Walkeen*, 80 Mich. 443.

It is apparent, therefore, that the court was in error in permitting the testimony showing the reputation of plaintiff as a drinking man prior to the time of the injury, as well as in permitting the defendant to show by witnesses called by it the character of the hotel which he kept. As we have said, these were matters proper for cross examination, as bearing upon the plaintiff's character and credibility as a witness, but they were not open to other proofs, as such issues are collateral and entirely foreign to the subjects of inquiry in the suit.

The court charged the jury: "If you find that the time he was upon this place he was intoxicated, then he could not recover in this case, because in the case of an intoxicated man the company was not expected and the law would not require of this company that it should guard an intoxicated man against injury, standing in the place he was standing." This charge was erroneous. It was asserted by the plaintiff that he was pushed off or

thrown off by defendant's conductor, and the fact that he was intoxicated would not give the conductor the right to push him off. The question of his intoxication was a matter to be taken into consideration by the jury in determining whether or not the plaintiff was in the exercise of due care in standing upon the running board while he was in that intoxicated condition; but his condition would be no excuse to the company if its conductor negligently and wrongfully pushed him off. In 2 Thomp. Neg. p. 1174, it is said: "Intoxication on the part of the plaintiff at the time of the accident does not constitute negligence in law, warranting a nonsuit or a peremptory instruction for the defendant, but is a circumstance to go to the jury on the question of contributory negligence." This seems to be the general rule. *Stuart v. Machias Port*, 48 Me. 477; *Alger v. Lovell*, 3 Allen, 402. Defendant's conductor testified that the plaintiff was intoxicated while standing on the running board. It was therefore his duty, and he was required, to exercise care in passing him upon that running board. 4 Am. & Eng. Enc. Law, p. 79, note 5, and cases there cited.

Some question is raised in reference to the charge of the court as to the preponderance of evidence; but, upon an examination of the whole charge, we are satisfied that that question was fairly submitted to the jury, or, at

including the right to employ and discharge conductors. *Huntingdon & B. T. Mountain R. & Coal Co. v. Decker*, 82 Pa. 119.

And evidence in an action by an employee against a railroad company for personal injuries arising from the negligence of a switchman, tending to show that the defendant knowingly or in ignorance, caused by its own negligence, employed an habitual drunkard as a switchman, thereby occasioning the accident, is competent, the question of its force being one for the jury. *Gilman v. Eastern R. Co.* 10 Allen, 233, 37 Am. Dec. 635.

And evidence in an action against a railroad company for damages for injuries resulting from negligence of an employee, after proof of negligence, that the employee was intoxicated at the time and was a man of intemperate habits, which was known to the agent of the company having power to employ and discharge such employees, is proper with the view of claiming exemplary damages upon the ground of gross negligence. *Clegborn v. New York C. & H. R. R. Co.* 56 N. Y. 44, 15 Am. Rep. 375.

So, evidence in an action for damages to an employee of a railroad company alleged to have been caused by the intoxication of a coemployee, as to his having been seen in the yard in an intoxicated condition on the day of the accident and at other times, is not rendered inadmissible by the fact that there was no allegation in the complaint with reference to the condition or habits of such employees, but only as to their skill and experience. *Lyons v. New York C. & H. R. R. Co.* 39 Hun, 386.

In *Warner v. New York C. R. Co.* 44 N. Y. 465, however, it was held that evidence in an action for damages for an injury from a collision with a railway train that the flagman employed by the railway company had been intoxicated on several occasions previous to the happening of the injury, and that his intemperate habits were known to the officers of the company, is inadmissible, as his previous habits had nothing to do with the case.

And an employee cannot recover of his employer for a personal injury upon the ground of 40 L. R. A.

the wrongful employment and retention of another employee addicted to the intemperate use of intoxicating liquor by whose act the injury was caused, in the absence of proof that such employee was intoxicated at the time of the accident, or was rendered incompetent or unfit for his position by such habits of intoxication. *Harrington v. New York C. & H. R. R. Co.* 19 N. Y. 8, R. 20.

Nor can a railroad company be held liable for negligence in retaining an employee having habits of intoxication, where it exercised due care and diligence in ascertaining as to his competency, but failed to learn as to such habits. *Hilts v. Chicago & G. T. R. Co.* 55 Mich. 437.

And evidence that a flagman was careful, attentive, and temperate is admissible in an action for a personal injury alleged to have been caused by his negligence, in which it is attempted to be proved that he was a careless and intemperate person, and the fact may be proved by witnesses who had seen his conduct and could testify to the facts which they had observed, though they are not experts. *Gahagan v. Boston & L. R. Co.* 1 Allen, 189, 79 Am. Dec. 724.

So, the mere employment or retention by a railroad company of a conductor of intemperate habits does not render it responsible for an accident happening from his acts; it is incumbent upon the plaintiff in an action therefor to show by a preponderance of testimony that the accident was caused in whole or in part by the negligence of such incompetent and unfit conductor. *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 87.

And a ship master cannot be held chargeable with negligence rather than a mere error of judgment upon evidence that not long before the accident the pilot twice requested the master to take charge of the helm until his return and steer for a certain light ahead, and the master being under apprehension because the ship was run too close to shore each time put the ship's head farther out, and the pilot on his first return brought the ship back again, and the ship struck while being brought back upon his second return, though it might be assumed that the master had by this time

least, that the plaintiff's rights were not prejudiced by the charge.

For the reasons stated *the judgment will be reversed*, and a new trial ordered.

The other Justices concur.

A petition for rehearing having been granted, the following opinion was handed down on February 16, 1898:

Per Curiam:

This cause was in this court at the January term, 1897, and an opinion filed March 10 following, reported in 70 N. W. R. 315 (3 Det. L. N. 842). On the trial in the court below the defendant had judgment, which was reversed and a new trial granted. The defendant afterward moved for rehearing which was granted.

While we are satisfied that the case was properly reversed and a new trial granted, we think there are some matters in the former opinion which should be corrected. It was there held that certain evidence should not have been admitted showing that the plaintiff for two or three years prior to that time was in the habit of becoming intoxicated, and also showing the character of the house or hotel

perceived that the pilot was under the influence of liquor, and feared to trust him. *Earnmoor S. S. Co. v. Union Ins. Co.* 44 Fed. Rep. 374.

A railroad company is presumed to have discharged its duty in exercising due care and diligence in seeing that its employees are competent and sober, and the burden of proof rests with those who assert negligence in the discharge of such duty. *Hilts v. Chicago & G. T. R. Co.* 55 Mich. 437.

So, where proper persons are employed, who afterwards become incompetent or unfit for the duties of the employment from habits of intoxication subsequently acquired, and this is brought to the knowledge or notice of the employer or his or its managing officers who have power to act in the premises, the failure or neglect promptly to discharge such employees will render the principal liable for any injury caused thereby. *Chapman v. Erie R. Co.* 55 N. Y. 579.

And where the attention of the officers of a railroad company is called to the fact that a yard master had at times used beer if not stronger drinks, in view of the great danger likely to result from the use by one in his position of intoxicating liquor, it becomes their duty to make careful and frequent investigation upon the subject, the weight of the evidence of their knowledge thereof being for the consideration of the jury. *Michigan C. R. Co. v. Gilbert*, 46 Mich. 176.

But while in employing subordinates a principal must exercise great care, and is required to institute affirmative inquiries to ascertain their character and qualifications, negligence in this respect creating a liability for injuries thereby caused, after suitable persons have been employed there is not the same reason for exacting such a high degree of diligence, and good character and proper qualifications once possessed will be presumed to continue, and the employer may rely upon the presumption until he has knowledge or notice of the habits of intoxication or other bad habits of the employees, or at least such knowledge as would put a reasonable man upon inquiry, and without such knowledge or notice the employer is not liable to another servant for injuries sustained from his negligent acts. *Chapman v. Erie R. Co.* 55 N. Y. 579.

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he kept. From a further examination of the case we are convinced that the court below was not in error in admitting it. The plaintiff claimed damages on account of:

1. The direct physical injury to himself, its natural incidents, pain, suffering, etc.

2. Loss of wages which he would probably have received during the period which intervened between the date of the accident and the date of the verdict.

3. Loss of probable future earnings.

It appears that when the plaintiff was injured he was not employed at any work, and the testimony tends to show that his habits were very dissolute; that he kept a house of doubtful character, and had before that been discharged from his employment at other places. Counsel contends that "It is not in the usual course of things that a man of dissolute habits, of more or less evil association, of bad record, and of ill repute should obtain employment as readily or to the same extent as if he were sober, industrious, of good fame and record; and that defendant had the right to lay before the jury by appropriate testimony any facts concerning the plaintiff's habits, character, or repute which might throw light on the probability of his securing employment, and the character and continuity of the same."

And where a servant knows of the habits of intoxication of another servant as fully as the master, and they are the producing cause of the injury to him, and he continues in the employment of the master without promises of correction or change of his own accord, remaining exposed to the effects thereof when they shall come, it may constitute contributory negligence on his part which will bar his right to a recovery. *Laning v. New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

But an instruction in an action against a railroad company for an injury to a brakeman alleged to have been caused by the habitual drunkenness and incompetency of the engineer, that if the plaintiff had equal means of knowledge with the defendant in ascertaining the alleged incompetency of the engineer he could not recover, should not be given where the plaintiff had been in the defendant's employ but a short time and had made but one trip with such engineer, and was but slightly acquainted with him, while the engineer had been in the employ of the defendant for five or six years. *Williams v. Missouri P. R. Co.* 109 Mo. 485.

And evidence in an action for an injury to a brakeman alleged to have been caused by intemperate habits of the engineer, that the brakeman knew nothing about the engineer's habits, and that he went into the employ of the company about the middle of October and the injury occurred early in December of the same year, and that he had previously made but one trip with such engineer and was but slightly acquainted with him and did not see him very often, is sufficient to support a finding that he had no knowledge of such engineer's intemperate habits. *Williams v. Missouri P. R. Co.* 109 Mo. 485.

It is a question of fact for the jury in an action for a personal injury caused by the negligence of a drunken coemployee whom the master had promised to discharge upon receiving notice of his incompetency, whether the remaining in the master's employ on the part of the person injured, with knowledge of the incompetency of the other, was contributory negligence upon his part. *Laning v. New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

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We think the doctrine cannot be carried to the extent claimed by counsel. The defendant undoubtedly had the right to lay before the jury any facts concerning the plaintiff's habits or conduct which might throw light on the probability of his securing employment and the character and continuity of the same; but we know of no rule which would permit the defendant to go into proof of the plaintiff's character or repute. In this view of the case we think the court below was not in error in admitting the testimony, or in the charge to the jury upon that question.

Metropolitan Street R. Co. v. Kennedy, 51 U. S. App. 503, 82 Fed. Rep. 158.

A new trial being had, we have made this correction of the former opinion.

Anna A. HARLEY, *Piff. in Err.*,

Desmus PROCUNIER.

(.....Mich.....)

A married man may, without his wife's consent, select the cows which he will claim as exempt in giving a chattel mortgage on other cows, under 2 How. Ann. Stat. § 7686, providing that two cows shall be exempt to each householder from any final process, and that any chattel mortgage created on any part of such exempt property shall be void unless the mortgage is signed by the wife of the mortgagor.

(November 17, 1897.)

ERROR to the Circuit Court for Alcona County to review a judgment in favor of defendant in a replevin suit to recover possession of certain cows which had been taken by defendant under a chattel mortgage. *Affirmed.*

The facts are stated in the opinion.

Mr. Osmond H. Smith, for plaintiff in error:

The consent must be as prescribed by the statute in writing, or it is of no force or effect. The legislature in enacting § 7686 saw fit to make mortgages, bills of sale, and other liens upon certain articles of exempt property void without the wife's signature.

Singer Mfg. Co. v. Cullaton, 90 Mich. 642; *Ingersoll v. Gage*, 47 Mich. 122.

The other three cows were virtually mortgaged, which of itself ought to be enough, as a matter of law, to settle this whole question of exemption. The other three cows were liable to be taken away any day on the mortgages. Where there are two cows exempt the exemption ought to be applied to the two unencumbered.

Herman, Executions, p. 114; *Greenleaf v. Sanborn*, 44 N. H. 16; *Tryon v. Mansir*, 2 Allen, 219; *Hill v. Loomis*, 6 N. H. 263.

It is not a mere partial interest or right of redemption only in the animal which is intended by the statute to be secured to the debtor and his family.

NOTE.—This case decides what seems to be a new question as to the person who may select cows or other property claimed to be exempt for the use of a family.

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Tryon v. Mansir, 2 Allen, 219; *Greenleaf v. Sanborn*, 44 N. H. 16.

The manifest intent of the legislature was not to regard the family as simply a voluntary association of two persons, legally independent of each other, but of a unification of interests.

Snyder v. People, 26 Mich. 109, 12 Am. Rep. 302.

The exemption is intended for the benefit of the family, and the remedy is given to the wife that the family may be protected in the benefit, even when the husband is indifferent or hostile.

Ingersoll v. Gage, 47 Mich. 123; *Shepard v. Cross*, 33 Mich. 98.

Mr. M. J. Connine, for defendant in error:

This law was not created so as to exempt all the cows a man has, where more than two, but only two.

2 How. Ann. Stat. § 7687.

Nor was it intended that mortgages on a husband's cattle, as a class or quantity, should be void unless signed by the wife; but only mortgages on the two exempt cows.

The property is the husband's; the right of exemption from sale is his; the right of selection after levy is also his, under the statute; neither the right of exemption nor the privilege of selection are ever in the wife.

Charpentier v. Bresnahan, 62 Mich. 360.

The restriction upon the right to encumber must have expressly and necessarily applied to these two cows. This restriction is more of a limitation in her hands than an exemption; it is in derogation of his common-law right to encumber, and should be strictly construed.

Singer Mfg. Co. v. Cullaton, 90 Mich. 639.

An exemption under this statute may be waived by conduct of the one entitled to it.

Fuller v. Byrne, 102 Mich. 461; *Dann v. Cudney*, 13 Mich. 239, 87 Am. Dec. 755; *Davis v. Zimmerman*, 40 Mich. 24.

Long, Ch. J., delivered the opinion of the court:

Plaintiff is a married woman having a family of children. September 10, 1894, her husband gave a chattel mortgage in the sum of \$30 upon two cows, without the plaintiff's signature, and, as she claims, without her consent. At that time the husband owned five cows. Proceedings were being taken to foreclose this mortgage, when the plaintiff brought replevin, and took the cows into possession. The replevin cause was tried in justice court, and removed to the circuit, where, upon a trial before a jury, the defendant had verdict and judgment. The claim of the plaintiff on the trial was that these two cows were exempt, and that, therefore, the mortgage was void, under the provisions of § 7686, 2 How. Ann. Stat. That section provides that "the following property shall be exempt from levy and sale under any execution or upon any final process of a court: . . . To each householder, . . . two cows," etc. Subdivision 9 of that section provides: "And any chattel mortgage, bill of sale, or other lien created on any part of property above described, . . . shall be void unless such

mortgage, bill of sale, or lien be signed by the wife of the party making such mortgage or lien," etc. It appears upon the trial that this mortgage was given for a bona fide indebtedness of the husband; and the defendant introduced evidence tending to show that these cows had been mortgaged prior to that to one Wood. The defendant had an agreement with the husband of plaintiff that, if Mr. Wood would release his mortgage, he would give a mortgage to the defendant upon them. The defendant made the arrangement with Mr. Wood for the release, and went to plaintiff's house. Her husband was not there; but the plaintiff was told by defendant that he had arranged for the discharge of the Wood mortgage, and that her husband promised to give him a mortgage on the same cows. The plaintiff then told him that anything her husband did about the matter was all right. The husband came home shortly after that, and defendant took a description of the two cows in plaintiff's presence. She knew which two her husband was to mortgage. At that time she made no claim that these two cows were exempt. The five cows were there at that time, and all were owned by the husband. The next morning the mortgage was executed. Plaintiff made no objection to the giving of the mortgage, and made no claim then that these two cows were exempt. The plaintiff was called as a witness, and denied that she ever had any such talk with defendant, or that she was present when the description of the cows was taken by him to put into the chattel mortgage. The court submitted the question to the jury to find whether or not, under these circumstances, these two cows were exempt. The verdict was in favor of defendant for the amount of his lien under the mortgage.

Some questions are raised upon the ruling of the court in the admission and rejection of evidence upon the trial. We find no error in that. It is claimed by plaintiff that under these circumstances the court should have directed the verdict in her favor. We think not. The court charged the jury as to the exemption as follows: "Mr. Harley was a householder, and had a family, and was entitled to have two cows the law could not reach. It seems from the evidence he had five cows. Now, three of these cows could not be exempt, only two; and he is the one to determine which ones are to be exempt. The right of exemption rests with the man that owns the cows, the householder. If this was a levy of execution, then under the law it would be

the duty of Mr. Harley to step forward and claim which ones of five cows he should claim as exempt, and it would be the duty of the officers to hand out the cows that he claimed, and they might leave with the rest. This is not a levy under an execution, but a chattel mortgage, and he [Mr. Harley] is the man that should determine which he proposes are exempt. . . . He should do it when he gives the chattel mortgage." It is contended by counsel for plaintiff that the court was in error in this part of the charge, that the wife had the right to determine which two of the five cows should be exempt; and that a chattel mortgage without the wife's signature is absolutely void, unless it appears that there are two remaining cows not encumbered, which are satisfactory to the wife,—that is, that the wife may make the selection of exempt property, and that, the plaintiff here not having determined which two of the five should be exempt, the mortgage is void. This statute can have no such construction. The property belonged to the husband. He could not mortgage all the cows he owned without his wife's signature to the mortgage, because, under this statute, two would be exempt; but the claim of exemption must necessarily rest with the husband. As stated by the court below, "If this was a levy of execution, it would be the duty of Mr. Harley to claim the exemption." The husband would also have the right to determine which two of the five cows he would leave out of the chattel mortgage. The law gives the wife a remedy only when the husband fails to claim the exemption. The giving of the mortgage on the two cows was a selection of those which were not exempt. But the court went further than this in his charge. The testimony showed that these two cows had been mortgaged before; and also the defendant's testimony showed that the wife knew just which cows her husband was giving the mortgage upon; that she made no objection, but, on the other hand told the defendant that the giving of the mortgage by her husband was all right. The court thereupon left the question of the exemption to the jury as one of fact. Certainly, the rights of the plaintiff were fully protected under this charge; and, if either party had a right to complain of the charge, it was not the plaintiff.

The judgment must be affirmed.

The other Justices concur.

MISSOURI SUPREME COURT.

John E. HAGGERTY *et al.*, *Appts.*,
v.

ST. LOUIS ICE MANUFACTURING &
STORAGE COMPANY, *Respt.*

(.....Mo.....)

1. Regulations for the protection and

NOTE.—As to the validity of a statute making it criminal to have the possession of certain property, see *State v. Lewis* (Ind.) 20 L. R. A. 52, and *note*. See also *Mon Luck v. Sears* (Or.) 32 L. R. A. 738. 40 L. R. A.

preservation of game are within the constitutional power of the legislature.

2. The intention of a person who commits an act which is made a misdemeanor by statute constitutes no element of the offense.
3. A contract for the "cold-storage" of game during the "close season," to be withdrawn during the open season when the game could be lawfully disposed of, is void under Rev Stat. 1890, § 3902, making it a misdemeanor to have such game in possession during the close season.

(March 15, 1898.)

APPEAL by plaintiffs from a judgment of the St. Louis Circuit Court in favor of defendant in an action brought to recover damages for breach of contract to preserve game in cold storage. *Affirmed.*

The facts are stated in the opinion.

Mr. R. H. Kern for appellants.

Mr. Henry E. Mills, for respondent:

The ownership of game is in the sovereign, and there can only be a limited or qualified ownership in the subject. The people of the states being the sovereign have a common ownership and control over game to which the casual custody of an individual citizen is subject.

Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 798; *State v. Farrell*, 23 Mo. App. 176.

Fish in the tidewaters of the several states are "common property" of the people of the states and subject to control and regulation by the several state legislatures.

McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159.

There is a very thorough discussion of the question involved in this case in—

Ex parte Maier, 108 Cal. 476.

No act which is forbidden by law, whether *malum in se* or *malum prohibitum*, can constitute a valid consideration for a contract.

Friend v. Porter, 50 Mo. App. 89; *Sprague v. Rooney*, 104 Mo. 360.

The option dealer who renders services and pays losses incurred on behalf of his principal, and by the direction of his principal, cannot recover.

Connor v. Black, 119 Mo. 142.

If the game had been stored and delivered, such service would not have been the basis of an action for the hire.

Garrett v. Kansas City Coal Min. Co. 118 Mo. 839; *Bick v. Seal*, 45 Mo. App. 475.

Sherwood, J., delivered the opinion of the court:

The business of plaintiffs, resident in St. Louis, was that of dealing in game, while the defendant corporation was engaged in that city in the business of "cold storage," which embraced the storing and preservation of produce and game of all kinds. Plaintiffs, during what is known as the "open season," were accustomed to buy and sell the different kinds of game, and, when what is known as the "close season" was about to arrive, were in the habit of storing such game as remained on their hands until such time as the "open season" again returned, when they would resume their erstwhile prohibited business. So it was that in the year 1892, between the 15th of November and the 26th of December, the defendant corporation made plaintiffs an offer to carefully store and preserve the same in a cold, frozen condition for such time as plaintiffs might store the same with it, and to restore the same to plaintiffs in as good condition as when received from plaintiffs. This offer was based upon the consideration of the payment of so much per pound for such storage. Plaintiffs desiring that such game be so kept and preserved, and intending that such game

should be stored with defendant corporation during the "close season," and withdrawing it when the "open season" should return, accepted the offer aforesaid, and on the 18th of November, 1892, stored with defendant a large quantity of game, to be withdrawn from defendant's custody when and at such times as the law would permit plaintiffs to dispose of the same. At the time of its being thus stored the game was in good condition. On November 18, 1893, defendant presented to plaintiffs a bill for such storage, amounting, etc., which plaintiffs paid. Thereupon plaintiffs proceeded to remove such game from the cold-storage rooms of defendant, and in doing so discovered that defendant had failed to preserve such game in a cold and frozen condition, whereby the same became rotten and worthless, and was not in good condition, as when delivered to defendant. For this breach of contract damages in the sum of \$7,000 were demanded, and, being refused, this suit was brought. This is the substance of the first count in the petition; the second count is like unto it. Defendant demurred to the first count on these grounds: "Now comes defendant, and demurs to the first count of plaintiffs' second amended petition, for the reason that it does not state a cause of action against defendant, and because it does show affirmatively that plaintiffs endeavored to make with defendant a contract for the storage of game during the period of the year when the possession of such game was prohibited by law, and that the alleged contract was unlawful, and in violation of a penal statute of the state of Missouri, and nonenforceable, and because it appears that, at plaintiff's request, said game was carried on plaintiffs' account during the season of 1893, prohibited by law." The trial court adjudged the petition insufficient in law, and, plaintiffs declining to plead further, final judgment was rendered; hence this appeal.

Section 3901, Rev. Stat. 1889, prohibits the killing of certain game at certain times of the year. Section 3902, Rev. Stat. 1889, makes it a misdemeanor for any person to "purchase, have in his possession, or sell any of the game birds or animals specified in the next preceding section, or any fresh pieces or parts of said animals, during the season when the catching and killing of same is prohibited, or shall purchase, have in possession, or sell any of the game birds or animals caught or killed contrary to the provisions of said sections." As shown by the very interesting and exhaustive opinion of Mr. Justice White in *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 798: "From the earliest traditions the right to reduce animals *ferre nature* to possession has been subject to the control of the lawgiving power." The exercise of this power has been definitely traced back, even as far as the time of Solon, who forbade the Athenians to kill game; and in France, as early as the Salic law, the right to reduce a part of the common property in game into possession, and consequent ownership, was regulated by law. Such regulations prevailed in every country in continental Europe and in England. Treating of this subject, Blackstone says: "There still remains another species of

prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals *feræ naturæ*, as are known by the denomination of 'game,' with the right of pursuing, taking, and destroying them; which is vested in the King alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery.

In the first place, then, we have already shown, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *feræ naturæ*, and therefore the property of nobody, but liable to be seized by the first occupant. And so it was held by the Imperial law, even so late as Justinian's time.

But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community." 2 Bl. Com. 410. This prerogative of the King, as an attribute of government, recognized and enforced by the common law of England by appropriate, and oftentimes by severe, penalties and forfeitures, was vested in the colonial governments of this country, and when these governments threw off the yoke of the mother country that right of sovereignty passed to and was vested in the respective states. This sovereign attribute and power, as existed in the states of this Union, has often been exercised by them by passage of laws in the most of these states for the protection and preservation of game, and it seems never to have been called in question. Numerous adjudications attest this fact. In such cases the common ownership of game, which otherwise would remain in the body of the people, is lodged in the state, to be exercised, like all other governmental powers in the state in its sovereign capacity, in trust for the benefit of the people, and subject, of course, to such regulations and restrictions as the sovereign power may see fit to impose. Such regulations appropriately fall within the domain of the police power of the state. In *Ex parte Maier*, 103 Cal. 476, it is said: "The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for the protection or preservation or the public good." Expressing the same view, it is said by the supreme court of Minnesota: "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative, and for the benefit, of all its people in common." *State v. Rodman*, 58 Minn. 393. In *Magner v. People*, 97 Ill. 320, in passing upon the subject now under consideration, it is said: "Stated in other language, to hunt and kill game is a boon or privilege, granted, either expressly or impliedly, by the sovereign authority,—not a right inhering in each individual; and, consequently, nothing

is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use, in the future, to the people of the state. But in any view, the question of individual enjoyment is one of public policy, and not of private right." This right of the states to provide and enforce regulations respecting the protection and preservation of game has received frequent recognition at the hands of the Supreme Court of the United States. Thus, in *McCready v. Virginia*, 94 U. S. 395, 24 L. ed. 248, the power of the state of Virginia to prohibit citizens of other states from planting oysters within the tide waters of that state was upheld by this court. In *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, the authority of the state of Massachusetts to control and regulate the catching of fish within the bays of that state was also maintained. See also *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, and *State v. Farrell*, 23 Mo. App. 176, and cases cited; *State v. Lewis*, 134 Ind. 250, 20 L. R. A. 52. A statute of New York prohibited the killing or having in possession game birds of the kind specified, after the 1st of March (Laws 1871, pp. 1671, 1677, chap. 721, §§ 7, 8, 33), and touching this statute the court of appeals of that state observed: "It is admitted in this case that the defendant had possession of the game after the 1st of March, and the fact alleged, that it was either killed within the lawful period or brought from another state where the killing was lawful, constitutes no defense. The penalty is denounced against the selling or possession after that time, irrespective of the time or place of killing. The additional fact alleged, that the defendant had invented a process of keeping game from one lawful period to another, is not provided for in the act, and is immaterial." And the validity of the statute was upheld. *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140. That case is directly in point, and fully sustains the action of the trial court in adjudging the petition insufficient. Plaintiffs in their petition, when speaking of their purpose in preserving such game, say, in substance, that they intended that said game should be stored with defendant corporation during the "close season," and withdraw upon return of the "open season." The offense prohibited by § 3902 is a misdemeanor, and in such case, the intention of the misdemeanor cuts no figure in the case, since in that class of crimes intention constitutes no element of the offense. It is the act done, and that alone, which violates the law, and the motive which prompts the violation is altogether *dehors* the crime committed. This point is illustrated by various adjudications respecting the sale of liquors to minors and the marriage of minors, supposing the parties in each case to be of age, etc. 1 Whart. Crim. L. 9th ed. pp. 35, 113, 115, §§ 23a, 88, and cases cited; *Hovell v. Stewart*, 54 Mo. loc. cit. 404. In this case the statute makes no ex-

ceptions to the rigid rule which it prescribes. The acts therein mentioned are unconditionally and absolutely forbidden, and this is so because the legislature doubtless thought that the best way of accomplishing the result they desired and the only means of attaining it. They therefore resorted to arbitrary prohibition. Had *scienter* been required by the statute, its very object would have been defeated, as *scienter* would be in the majority of instances impossible of proof. 1 Whart. Crim. L. 9th ed. p. 117, § 88. It was to prevent the easy evasions of the statute that the law was passed in its present shape; and on this ground it is analogous to statutes prohibiting the manufacture or sale of oleomargarine. (*State v. Bockstruck*, 186 Mo. 335), and it is the only ground upon which such enactments can be upheld. The end being granted, to wit, the power of the legislature to enact a law for the protection and preservation of game, the means to effectuate that end, to wit, the authority to prevent the law thus passed from being evaded, by prohibiting and making penal the possession of game after a certain period, follows as an indubitable corollary. *Ex parte Marmaduke*, 91 Mo. loc. cit. 262, 60 Am. Rep. 250, and cases cited. Recurring to the petition, it shows on its face that plaintiffs contracted with defendant corporation for the commission of a misdemeanor. It is true the offense is but *malum prohibitum*, but the consequences are the same as if the act were *malum in se*, since in principle there is nothing which should cause the result to differ in the former case from the latter. The law will not stultify itself by promoting on the one hand what it prohibits on the other, and will for this reason leave the parties to this suit where it finds them, unsanctioned by its favor, and unaided by its process. *Kitchen v. Greenabaum*, 61 Mo. 110.

Therefore the doctrine announced in *Sprague v. Rooney*, 104 Mo. 360, overruling the former decision in same case in which was a dissent, applies here, and hence judgment affirmed.

All concur.

(Division 1.)

Prudence C. OWINGS *et al.*, *Appts.*,
v.

James McKENZIE *et al.*

(133 Mo. 323.)

1. Extension for a valuable consideration without consent of the sureties of the first of two promissory notes secured by deed of trust will not release the liability of the sureties upon the other note which is not then due by its terms, although the deed of trust provided that upon default in payment of the first note at maturity the other should immediately become due and payable.

NOTE.—As to priority of notes secured by mortgage, see *note* to *Horn v. Bennett* (Ind.) 24 L. R. A. 800; also *Nashville Trust Co. v. Smythe* (Tenn.) 27 L. R. A. 663.
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2. Objection to the application of the proceeds of a sale under a deed of trust securing two notes in satisfaction of the first cannot be made by mesne conveyancers who by purchase and sale of the property acquire the position of sureties on the note because their liability had been released by an extension of the time of payment without their consent.

3. The mere nonpayment of the first of two notes secured by deed of trust without any action on the part of holders will not render the other note due, although the deed of trust provided that upon default in payment of the first note both should become immediately due and payable.

4. Each of several notes secured by a deed of trust is to be considered as a separate and complete contract within itself uncontrolled in its terms by anything contained in the deed of trust.

(March 10, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendants in an action brought to enforce their alleged liability on a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. Peak & Ball, W. M. Williams,
and *R. L. Yeager*, for appellants:

The relation of principal and surety exists as between the maker of the notes and the grantees who assume and agree to pay. As to the holder of the notes, both maker and grantees are principal debtors and an extension does not release the original debtor.

Connecticut Mut. L. Ins. Co. v. Mayer, 8 Mo. App. 18; *Brown v. Kirk*, 20 Mo. App. 524; *Corbett v. Waterman*, 11 Iowa, 86; *Shepherd v. May*, 115 U. S. 505, 29 L. ed. 456; *Cuculli v. Hernandez*, 103 U. S. 105, 26 L. ed. 322; *Rey v. Simpson*, 22 How. 341, 16 L. ed. 260; *Waters v. Hubbard*, 44 Conn. 344; *Boardman v. Larabee*, 51 Conn. 89; *Crawford v. Edwards*, 83 Mich. 354; *James v. Day*, 37 Iowa, 164; *Marsh v. Pike*, 1 Sandf. Ch. 210.

Whenever a debt is due, the debtor is bound to pay on demand. The note in suit was not "due" on default in the payment of the first note, because the debtor was only bound to pay the note due by its face. The maturity of both notes was only for the purpose of enforcing the deed of trust and disposing of the collateral.

Morgan v. Martien, 32 Mo. 438; *Hurek v. Erakine*, 45 Mo. 485; *Whelan v. Reilly*, 61 Mo. 565; *Phillips v. Bailey*, 82 Mo. 639; *Noell v. Gaines*, 68 Mo. 649.

In any case the default would not have the effect of making the other note due for any purpose except at the election of the holder. She did not, and was not bound to, declare it due.

Noell v. Gaines, 68 Mo. 649; 1 Jones, Mortg. 4th ed. § 742, and cases cited.

Each note is a separate and distinct cause of action, capable of separate ownership, whether secured or not; and the rule that all papers composing a part of one and the same transac-

For effect of mortgage on negotiability of note secured thereby, see *note* to *Brooke v. Struthers* (Mich.) 35 L. R. A. 536.

tion are to be regarded as one entire contract does not apply to the case of a promissory note secured by a deed of trust.

Hagerman v. Sutton, 91 Mo. 519; *Mayes v. Robinson*, 93 Mo. 114; *Jennings v. Todd*, 118 Mo. 296; *Horn v. Bennett*, 135 Ind. 165, 24 L. R. A. 804.

Messrs. Cook & Gossett and Warner, Dean, Gibson, & McLeod, for respondents:

The grantee in a deed to property encumbered by a mortgage or deed of trust, who, by the terms of the conveyance to him, assumes the payment of the indebtedness secured by the mortgage or deed of trust, becomes, as soon as the mortgagee knows of the arrangement, primarily liable to the mortgagee for the debt for which the mortgagor was already liable, and the relation of the grantor and grantee toward the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt, and any agreement for the extension of the time of payment of the debt, made between the mortgagee and the grantee, or any alteration of the original contract, releases the grantor from liability from the debt.

Jones, Mortg. 4th ed. § 741; 3 Pom. Eq. Jur. § 1206; *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. ed. 118; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Jester v. Sterling*, 25 Hun, 344; *Fish v. Hayward*, 28 Hun, 456; *Paine v. Jones*, 76 N. Y. 274; *Commercial Bank v. Wood*, 56 Mo. App. 214; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Union Store & Mach. Works v. Caswell*, 48 Kan. 689, 16 L. R. A. 85.

Where, even, the land is conveyed subject to the mortgage, the grantee incurring no personal liability thereon, if the mortgagee, by a valid agreement with the grantee, extends the time of payment of the mortgage debt without the consent of the mortgagor, the mortgagor is discharged from liability to the mortgagee to an amount equal to the value of the land at the time of such extension.

Murray v. Marshall, 94 N. Y. 611; *Spencer v. Spencer*, 95 N. Y. 358.

It is immaterial whether the extension may or may not prejudice the surety. If made without his consent he is discharged.

Sloan v. Latimer, 41 S. C. 219.

The notes and deed of trust formed part of one and the same transaction, and must be construed together.

Pingrey, Mortg. § 1:84; *Jones*, Mortg. 4th ed. § 1179; *Gregory v. Marks*, 8 Biss. 44; *Schoonmaker v. Taylor*, 14 Wis. 314; *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 520.

The note here sued on came due for all purposes.

Noell v. Gaines, 68 Mo. 649; *Detweiler v. Breckenkamp*, 83 Mo. 45.

With respect to payment, the surety's rights are exactly those of the principal debtor. With respect to the rights he acquires by such payment to the creditors, they are exactly those, by subrogation, of the creditor. If the creditor has extended a debt and the surety pays it before due, he cannot sue the debtor until due, and an extension, for that reason, without his consent, releases him.

Benne v. Schnecko, 100 Mo. 250; *Dozier v. Lewis*, 27 Miss. 679; *Brandt, Suretyship & 40 L. R. A.*

Guaranty, p. 261; *Allison v. Sutherland*, 50 Mo. 274; *Mayhew v. Boyd*, 5 Md. 102, 59 Am. Dec. 101.

Robinson, J., delivered the opinion of the court:

This is a suit by plaintiff, the original payee in a note secured by deed of trust on land, for a personal judgment against the maker thereof, and his grantees, who purchased the property securing the note, agreeing, as a part of the consideration for such conveyance, to assume the payment of the notes in suit together with another note mentioned in the deed of trust. We give the following facts of the case (as same appear in appellant's statement), that the origin, history, and nature of the transaction between the contending parties may be fully understood: "Plaintiff, Mrs. Owings, in November, 1886, sold a tract of land to defendant McKenzie; and, for a balance of the purchase money, Mackenzie gave her his two promissory notes for equal amounts, one maturing in two years and the other in three years after date, secured by a deed of trust on the property. Before the maturing of these notes, Mackenzie sold the property to his co-defendants, Tilhoff, Green, and Muelbach, and they, in turn, sold to Canine, both deeds being made subject to the prior deed of trust; and the respective grantees assumed and agreed to pay the notes as a part of the consideration of the conveyances. The deed of trust contained the usual provision that if default be made in the payment of either note, or any interest thereon, according to the terms thereof, then both of said notes should become immediately due and payable, and the trustee, at the request of the legal holder of said notes, might proceed to sell, etc. At the time the two-year note matured, Canine was the owner of the property, and shortly thereafter, by agreement between him and Mrs. Owings, this note was extended for three months, but there was no valuable consideration for this extension. After its expiration, the time of payment of the unpaid balance on this note was again extended three months, to May 27, 1889, in consideration of 1 per cent additional interest. After both notes had matured by their face, the trustee, at the request of plaintiff, was about to sell the property, when Canine, in order to stop the sale, agreed to pay, on account of costs and accumulated interest, the sum of \$500, and at the time put up \$100 of the amount. Plaintiff, after waiting for a week for the balance of said sum, again ordered a sale, which was made in May, 1891. All of the defendants were represented at the sale. The proceeds of the sale paid the costs, paid the two-year note in full, and paid a part of the three-year note. This suit was brought on the three-year note, to recover the unpaid balance thereof. Defendants' answers pleaded an extension, by agreement between plaintiff and Canine, of both notes, for a definite time, and for a valuable consideration, without defendants' knowledge or consent; also, that the property was much more valuable at the time the notes were given and the extension made on the first or two-years note than it was at the time the property was sold under the deed of trust. On this issue the trial court refused to

hear defendants' evidence. The record does disclose, however, that the property was originally sold by Mackenzie to Green and Tilhoff for the sum of \$14,000, and of this sum the two notes of \$3,760 each were a part of the consideration, and that at the trustee's sale the property only brought \$3,500. The evidence showed an extension, as stated, of the two-year note, but that no agreement was ever made relative to the extension of the note in suit."

One instruction for plaintiff was refused, to the effect "that, although the two-year note was so extended, yet this did not relieve the defendants from liability on the note in suit." And for the defendants Mackenzie, Tilhoff, and Muelbach, who alone filed answers, a corresponding instruction, stating the proposition in the affirmative, as follows, was given: "(2) The jury are instructed that if you believe from the evidence that the note sued on, and the deed of trust given to secure the same, and offered in evidence, with the other note therein described, were executed each as a part of and all constituting one and the same transaction, and that the plaintiff, Prudence C. Owings, knew of the conveyance of the land in the deed of trust described by defendant Mackenzie to defendants Tilhoff and Muelbach and William Green, and of said defendants and said Green to R. B. Canine, and of the assumption of payment of the indebtedness by said respective grantees in said deeds contained, and without their consent, for a valuable consideration, for the payment of additional interest, by agreement with Canine, extended the time for a certain or definite time for payment for either or both of said notes, then you will find for the defendants who did not consent to such extension." On the issues thus presented by the instructions, the jury returned a verdict for defendants, on which, in due time, judgment was rendered, and to reverse which this appeal is prosecuted.

Several very interesting and vexed questions in the adjudications of this court have been raised and discussed by the learned counsel in the able and elaborate briefs filed herein, such as: "What is the relation of the holder of the notes to the maker and the respective grantees, and what the effect of an extension without notice on the original maker and subsequent grantees?"—the plaintiff contending that, as to the holder of the notes, both maker and grantee, are principal debtors, and that, as such, an extension of the time granted to one by the holder of the notes will not operate to release the others; the defendants contending that in such cases, as between the parties, the purchaser, having assumed the payment of an existing mortgage, thereby becomes the principal debtor, and the mortgagor and maker of the note are securities for the debt merely, and that an extension of time of payment of the mortgage debt by an agreement between the holder of it and the purchaser, without the concurrence of the mortgagor, discharged him and all subsequent purchasers under him from all liability. Also, the question as to what extent notes and deeds of trust or mortgages given to secure them shall be construed as one instrument, and what the effect of a provision in a deed of trust securing a series of notes

"that the failing to pay the first will mature all others of the series" will have upon the last of the series, as to questions of rescission, demand, and notice, as if matured by expiration of time as indicated on their face. Under the particular facts of this case, we think it can be disposed of without a full review of all the points raised by the learned counsel, and we will discuss only such questions as, in our judgment, are absolutely decisive of the question necessarily involved.

If the note in suit did not become due absolutely for all purposes on the failure of the payment of the first note at the end of two years, then the court erred in refusing plaintiff's fourth instruction, and in giving for defendants their second instruction, and this case must be reversed; or if the extension granted on the two-year note did not operate, as a matter of law, to release the maker and first grantee of liability on both notes, then error was made by the court in giving the same, and in refusing instruction numbered 4 for plaintiff. The plaintiff might have brought suit on the first note at its maturity, against any and all of the defendants, for a personal judgment. She might have begun her suit to foreclose the equity of redemption, or begun her suit for the possession of the premises on condition broken by the nonpayment of the two-year note,—all remedies concurrent and independent to which plaintiff could have resorted at that time for the enforcement of her right. She was not bound to request a sale of the mortgage property. She was not compelled to institute proceedings to foreclose her lien. She was not required to institute suit at once for a personal judgment to maintain all her rights and claims against the defendant, and all of them. The liability of each of the defendants on that note was absolutely unaffected and uncontrolled by the other note due in three years, or by the deed of trust securing each and both. That note was due, and the liability of defendants thereon resulted from the face provisions of the note itself fixing the time of its payment. If we now, for the sake of this case, treat defendants as sureties as to both notes, and the notes and deed of trust as one instrument, and the provisions of the deed of trust dominating the time for payment of the notes, defendants were still liable at the maturity of the first note on both notes named in the deed of trust, by reason of their contract of assumption made with their respective grantors for the benefit of this plaintiff at the time of their respective purchases. If sureties, and if liable then, that liability would continue until released by contract with plaintiff, or, by operation of law, as a result of plaintiff's conduct. Plaintiff made a contract to extend the time of payment on the first note, by agreement with Canine at its maturity, for three months, without any valuable consideration therefor, and, after its expiration, the time of payment of the unpaid balance was again extended for three months, this time for a valuable consideration. By this last contract of extension with Canine, without the knowledge and consent of these defendants (if they are to be treated as sureties), plaintiff altered the terms of the contract, so as to relieve the sureties from personal liability

on that note. But she made no contract, as appears from the testimony, regarding the three-year note now in suit (and not then due, on its face, for nine months); and we are unable to find anything in the deed of trust or the three-year note that would authorize the inference that, by reason of the extension of the time of the first note, the payment of the three-year note was also extended for a like or any other period of time, if we were disposed to consider the deed of trust and the notes as one instrument, and to be construed together as such.

We are unable to conceive by the operation of what principle of law the trial court directed, in its instructions, a finding for defendants on the note in suit "if the jury should believe extension had been granted by plaintiff to Canine, on either or both of the notes named in the deed of trust." That a surety may be discharged, the creditor must do some act by which he deprives himself of the right of proceeding at law to the collection of the security obligation. The act or agreement must be such as to operate as an estoppel on the creditor, sufficient to prevent him or her from bringing an action before the expiration of the extended time. *Headlee v. Jones*, 43 Mo. 235. The note in suit was not due when the extension was granted on the two-year note; but, if you say it was due by the terms of the deed of trust, then the answer is that plaintiff never estopped herself from suing on it by contract with Canine, for she did not think or treat it as due, and, as a result, made no contract with reference to it. Neither plaintiff nor defendants were deprived of any remedy against anyone on the three-year note in suit by the extension of the two-year note. It might also be said that in this case the extension granted on the two-year note resulted in no injury to the defendants in any wise, but all to their good, for they were thereby released from personal liability, if we treat them as sureties merely. Defendants have no honest claim for a release in this case upon either legal or equitable grounds on account of the proceeds from the sale of the mortgaged property being applied to the satisfaction of the two-year note. By repeated adjudications in this state, the two-year note was a first charge on the lands named in the deed of trust by reason of its prior maturity; and no court or authority, so far as we have been able to ascertain, has ever held or claimed that an extension granted by the holder of a note to a subsequent purchaser of the mortgaged property ever lost to the holder the benefit of the collateral, or but that the notes would be first satisfied out of the proceeds of the land in the event of a trustee's sale or foreclosure of the deed of trust, as was done in this case, regardless of the question whether individual sureties had been relieved from liability or not by the action of the holder of the notes. If it be conceded, as contended by respondents, that notes and deeds of trust securing them form but one and the same transaction, and must be construed together, and that, when taken together, the note in suit becomes due at an earlier day than three years after its execution (as indicated on its face), by the happening of the contingency of the nonpay-

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ment of the two-year note at maturity absolutely, without any action on the part of the holder of the notes,—a proposition which we deny,—still the three-year note was not thereby extended. Nor was it by the contract of plaintiff with Canine, as appears from the testimony. For the court to declare that the extension of one note had the effect to extend the other was to declare the effect of a contract never made by plaintiff with Canine, and never contemplated or thought of, so far as the testimony discloses. Again, if the doctrine that all instruments evidencing a transaction must be construed together does not apply to the case of negotiable promissory notes secured by deed of trust, then instruction No. 2 given for defendants was erroneous. If the doctrine does apply, then it was not a question to be submitted to the jury for their determination and ascertainment, but should have been declared so by the court. There has arisen some confusion in the decisions of our court upon the question as to how these instruments executed as the notes and deeds of trust in this case are to be construed; but we think the great weight of authorities, and those most consonant with reason and the best rules of interpretation, support the proposition that the notes are to be considered each as a separate and complete contract within itself, uncontrolled in its terms by anything contained in the deed of trust; and that it was error in the trial court to submit to the jury that question for their determination.

The notes and deed of trust as executed in this case cannot be said to constitute one and the same contract so far as affects the question as to the time of the maturity for general purposes of the note in suit. In many ways the notes and deed of trust are to be treated as separate papers. They are separate instruments in form, and executed for different purposes, to different parties, affecting different subjects,—one an absolute promise on the part of the maker to pay a given sum of money in a given time, and subject to enforcement, independent of, and it might be said in disregard of, the other; the other is a conditional instrument, that may or may not be executed for any purpose, and is rendered lifeless by the execution of the promise of the former. The money obligated to be paid by the notes is the substance and the life of the transaction; the deed of trust securing it is but an incident. The note is governed by the law merchant; the deed of trust by the law affecting real property. We do not controvert the proposition that "when instruments are executed at the same time, for the same purpose, and in the course of the same transaction, they are to be considered as one instrument, and are to be read and construed together as such; but we think the doctrine cannot be said to apply to instruments of the kind and character now under consideration, so that the conditional provisions of one shall diminish control, and destroy the absolute provisions of the other. If, in the case at hand, that rule is to apply, then the positive, certain, and unmistakable time fixed for the maturity of the note in suit (and that, too, an essential prerequisite to give the instrument the designation and virtue of a note)

is to be destroyed by this collateral instrument, going merely as an incident to the note. In other words, we have this deed of trust given as a collateral security for the note, operating, not along with it to secure its fulfillment, but dictating the time of its payment, in such a way as, under the circumstances of the case, according to defendants' contention, to result in the defeat and destruction of the note itself,—the essence, the life, of the contract; the thing without which the deed of trust stands for and represents nothing.

If the note in suit and deed of trust securing same are to be considered as one entire contract, and used together as such, as if the promises of one and the provisions of the other were all embodied in one writing, what would become of the instrument we now call the note, with all its essential characteristic qualities,—In fact, all that entitled it to that designation? Read the two instruments together as one, and you have no note with which you invoke the rules governing such instruments to defeat the obligation of the defendants thereunder in this case. The deed of trust securing the note in suit provides that "if there is a default in the payment of the debt, or any part thereof, or the interest due thereon, when the same or any part thereof becomes due and payable, according to the true tenor, date, and effect of said notes, then the whole shall become due and payable, and the trustee, at the request of the legal holder of said notes, may proceed to sell the property," etc. How could the holder of one of the notes, transferred to him by indorsement to an innocent purchaser for value, shortly after its signing, tell when his note would mature if he cannot look to its face for his information. If this rule is to apply what becomes of that "courier that travels without luggage, whose countenance is its passport?" If the notes and deed of trust securing same are to be read together, and treated as one instrument for all purposes, then your courier, with its face as a passport, is a myth, and the whole fabric built up by the law merchant in its favor, and ingrafted now by legislative enactment onto and

as a part of the commercial law of every civilized country of the globe, is inoperative in the state of Missouri. We think the cases of *Brownlee v. Arnold*, 60 Mo. 79, and *Noell v. Gaines*, 68 Mo. 649, so much relied on by respondents, are in conflict with repeated adjudications of this court, made before and since the rendition of those decisions, in so far as they announce the doctrine that the time for the maturity of the notes, when same are secured by deed of trust, is to be dominated by the provisions of the deed of trust, and not determined by the face of the notes themselves. We are aware that our court has frequently made use of the expression found in the deed of trust before them for consideration, and has declared "that the notes secured by them have matured by reason of the happening of the condition specified therein," before the notes upon their face were in fact matured; but by an examination of all cases where these expressions have been found, except in the ones just cited, the term is applied only in a limited sense, and not in the sense that the note or notes have matured for all or general purposes. "Maturity," in the sense in which these terms are used, is that they are ripe for the purpose of receiving the application of the proceeds from the sale of the collateral security; by reason of the provision of the deed of trust itself, as well as from the necessity of the situation, that requires of a trustee the disposition of the trust in his hand in such a manner that its fruit is not permitted to waste or perish in his possession.

The judgment of the Trial Court will be reversed, and the cause remanded for new trial.

Brace, Ch. J., concurs.

Barclay and Macfarlane, JJ., concur in the judgment announced, but are of opinion that the cause should be transferred to the court in banc, because the necessary effect of the learned opinion of Judge **Robinson** is to disapprove and overrule the decision of *Noell v. Gaines* (1878) 68 Mo. 649.

MONTANA SUPREME COURT.

Robert MORRISON *et al.*, *Appts.*,
v.

Ora E. BENNETT, *Respt.*

(.....Mont.....)

1. **Men who associate themselves for the purpose of cheating** others cannot ask the courts to distribute their booty by adjudging the demands of one against the other, arising out of their quarrels over the plunder.
2. **A partnership for horse racing on a bet with a person whom the partners regard as a "sucker" and a "big snap" into**

NOTE.—As to the legality of wagers, see note to *Bernard v. Taylor* (Or.) 18 L. R. A. 859.
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which they induce him to enter by making him think he had a sure thing and by deceiving him into the supposition that their horse was untrained and undeveloped, while they deemed that they had a "dead mortal cinch," is a conspiracy to defraud such that a court will not aid either of the partners by compelling one who has pocketed all the profits to make an accounting.

(March 14, 1898.)

A PPEAL by plaintiffs from an order of the District Court for Fergus County granting a new trial after a finding in favor of plaintiffs in an action for a dissolution of a partnership and an accounting of moneys received by one of the partners. *Affirmed.*

Statement by **Hunt, J.:**

The plaintiffs and appellants, Morrison and Davis, sued the defendant and respondent, Bennett, for an accounting and a dissolution of partnership. It is alleged in the complaint that plaintiffs and defendant formed a copartnership for the purpose of owning, caring for, and racing a certain race-horse known as "Lady Wallace" on equal terms and shares, and that they entered upon and continued to transact the business of such copartnership, and were at the time of the suit copartners on equal terms in the said business; that on September 7, 1895, the defendant, Bennett, without plaintiff's consent, applied to his own use from the receipts and profits of said business the sum of \$1,000, and continues to withhold the same, to the detriment of the partnership, and the damages of plaintiffs. It is also alleged that the defendant is indebted to the plaintiff Morrison for certain moneys advanced by him to the partnership. The defendant denied the partnership, and alleged an ownership in common of the mare. The case was tried before the court with a jury. After the plaintiffs rested, the defendant moved for a nonsuit upon six grounds, the principal ones being that the claim upon which the suit was based is a gambling indebtedness, or wager upon the result of a horse race; and that, if there was any partnership, it was an illegal one, instituted or formed for illegal purposes and against public policy and good morals. The court overruled this motion, and thereupon the defendant declined to put in any evidence. The court then dismissed the jury, holding that the plaintiffs had a right to recover upon the issue of copartnership, as alleged in the complaint, but that an accounting was necessary in relation to the various transactions had between the plaintiffs and the defendant. This accounting was had before the court itself, and, after due consideration, findings were made in behalf of the plaintiffs. Subsequently the defendant moved for a new trial upon the grounds of insufficiency of the evidence to justify the findings, and of error in law in overruling defendant's motion for a nonsuit. The court granted this motion for a new trial, from which order the plaintiffs now appeal.

Messrs. Cort & Worden and J. C. Huntoon for appellants.

Mr. William M. Blackford, for respondent:

Wager contracts are against good morals and sound public policy.

Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110; *Scott v. Courtney*, 7 Nev. 419.

The mere licensing a thing, permitting it to be done or carried on under certain restrictions and within certain bounds or limitations, does not declare it moral nor embody it in any form of public policy in the jurisdiction in which it is permitted to be done.

Carrier v. Brannan, 3 Cal. 328.

A wagering contract upon the result of a horse race is against good morals and sound public policy.

Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110; *Hankins v. Ottinger*, 115 Cal. 454; *Wilkinson v. Tousley*, 16 Minn. 299, 10 Am. Rep. 139; *Shaffner v. Pinchback*, 133 Ill. 410; *Green-40 L. R. A.*

hood, Pub. Pol. rule 213, p. 222, and authorities cited; 7 Wait, Act. & Def. pp. 83 et seq.; *Corson v. Neatheny*, 9 Colo. 212.

Appellants and respondent entered into a business which was contrary to public policy and good morals, and therefore illegal and void.

Armstrong v. Lewis, 3 Myl. & K. 45; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706.

The law refuses aid to parties *in pari delicto*.

Greenhood, Pub. Pol. rule 2, pp. 1, 104; *Bartle v. Nutt*, 29 U. S. 4 Pet. 184, 7 L. ed. 825; *Shaffner v. Pinchback*, 133 Ill. 410; *Bowman v. Phillips*, 41 Kan. 364, 3 L. R. A. 631; *Hankins v. Ottinger*, 115 Cal. 454; *Mitchell v. Cline*, 84 Cal. 409; *Wheeler v. Sage*, 1 Wall. 518, 17 L. ed. 646; *Kelly v. Devlin*, 58 How. Pr. 487; *Craft v. McConoughy*, 79 Ill. 846, 22 Am. Rep. 171; Pom. Eq. Jur. § 401; Mont. Civil Code, § 4615; 17 Am. & Eng. Enc. Law, p. 893.

Mr. F. E. Strannahan also for respondent.

Hunt, J., delivered the opinion of the court:

Plaintiff Morrison testified that he and Bennett desired to get a race horse out to Fergus county for the purpose of racing; that Bennett said that he would write to Davis, the other plaintiff, in Ohio, which he did. Davis wrote back to Bennett that he would come out for \$50 a month and board, and that the three of them would buy the mare Lady Wallace, the expenses of caring for her and racing her being agreed to be divided equally, and the losses, if any, were to be borne equally. Davis came out, and plaintiff Morrison met him at Billings, and came up to Lewistown, Fergus county, with him. The mare was put into training, and finally a wager was made with a Mr. Kane for \$1,000—\$500 a side, against a horse named "Distance," owned by one Dan Crowley, of Lewistown. The mare won the race, but the defendant, Bennett, who received the money after the race was over, never gave any portion of it or accounted for it to the plaintiffs. The only receipts of the partnership was this sum of \$1,000. On cross-examination the witness said that Bennett first approached him with reference to buying the mare, the main object being to race Crowley; that it was agreed that they were to get a race with Crowley if they could, or any other race, but they wanted to beat Crowley's horse, and wanted to get a horse that could do that. The witness also testified fully in relation to the agreement between himself, Davis, and Bennett, saying that each one was to pay one third of the expenses of caring for the mare, and that Davis was to get \$50 a month and his board for his particular care and for driving. The wager with Kane was between Bennett, Kane, Davis, and plaintiff Morrison. Kane represented Crowley, and Bennett and Morrison represented the three owners of the mare. There was considerable testimony as to the amount of money bet upon the mare, items of care, etc., which we do not deem material to be stated on this appeal. W. H. Davis, one of the plaintiffs, said that he had brought the mare to

Montana after corresponding with Bennett; that Bennett, Morrison, and himself were to own one third of the mare each, but that for his working her he was to get \$50; that they only started her in the one race with Crowley, which she won, but that Bennett "grabbed the money down." The plaintiffs then offered certain letters in evidence as bearing upon the question of the alleged partnership between the plaintiffs and the defendant. The defendant objected to these letters upon the ground that they were not material or competent under the pleadings, and did not establish any facts. The court overruled this objection, and the letters then became part of the plaintiff's case. These letters become very important evidence, and were it not for their verbosity we should incorporate them in full. We refrain, however, from doing this, and shall only make excerpts from them which tend to show what the real object and purpose of the plaintiffs and the defendant were in bringing the mare from Ohio to Montana.

Under date of January 31, 1895, Bennett wrote to Davis as follows: ". . . There is a man here that has got some scrub horses that he thinks is fast trotters and pacers. He is a man that has got lots of money. Him and his friends will bet their money. His pacers are range stock without any mark. Can go along somewhere from 2:40 to 2:30. He is stuck to back the horses, as he is a man without any knowledge of horse racing. He has been in the country for a long time. Has done business in the early days with the half-breed Indians. He is a saloonkeeper. . . . I want a man to come and bring two good horses with him, one pacer and one trotter that can go along, rather have them with low marks, and we will match this man with a dead mortal cinch. We can win several thousand dollars, which is like finding it. The way I would want to bring the horses in the country would be to sneak them in the town, put hair brand on them . . . so they would appear as range stock. . . . Would want you to write to me, and tell me what you would bring if you would come. It is meat for someone. Let me hear from you, so on, and keep this a secret. I remain, as ever, your friend, O. E. Bennett, Lewistown, Fergus county, Montana. P. S. The main object is to make it appear that the horses are undeveloped. The object is to give him a sure thing in the way of thinking. . . . We would use one horse; rather have pacer. This is no funny work with me. It is a matter of business." We quote the following extract from another letter to Davis from Bennett, dated February 26: ". . . . You did not say in your letter whether this mare is a trotter or pacer. . . . This man that I speak of in my other letter has got two pacers that he would back for good money to make him think he has got the best of it, which is very easy to do through me. Stranger could not come in here, and handle him. He has two trotters, stallions, and one filly. He is a big snap for some one to match horse race. This is no josh. . . . I mean just what I say. We have got the biggest sucker here, I think, in the state, and has got plenty of money. You do not want to come unless you bring something along to put him to sleep, and his friends,

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which is very easy to do. Of course, we will have to keep him in the dark, and match him up and up. You know what you have to contend with in your country,—a world of competition. It is no object in me to misrepresent things to you or anyone else. There is no glory in this except to make some money. I don't want to mislead you from your best interest, or take you from your business where you would not prove to your and mine benefit." From another letter we quote the following: "I expect you to lease this mare, and come with her to Montana. . . . I will have a partner in putting up the money and to help us do this man, and during the season we are willing you shall share one third of all the money we can get out of this man, and will pay you \$30 per month and board or \$50 per month and board and we will take the winnings and pay all of the expenses. I will meet you at the railroad. I rather you would be one of the interested parties in the proceeds of the winning of the mare, for I think you would be more benefited. We don't want you to come out here and not be satisfied and make some money. . . . We want you to answer as soon as you can and tell us what you will do, . . . but will say, in short, we will not stand on any small things in our deal with you. Expect you to share the harvest with us and the benefit of the opportunity. . . . Please don't send your envelopes with your advertisements on or your name on. Don't want these people to get on to anything that would throw us off if you should come. . . ." Under May 8 Bennett again wrote Davis acknowledging the receipt of a letter from Davis to him, and saying: "I never gave Mr. Love any reason to say that we wanted to do any ring business with you or the mare. You know my reason for wanting to get the mare in here on the quiet is to do this man here on match race. I wrote to you, in the first place, what my object was, and willing to leave the matter with you that I never asked you to do anything dishonorable in this transaction. I am very sorry that I ever wrote to Mr. Love to do anything for me if he has got no more sense. I asked him to please not say anything about the matter. . . . I shall write a letter to Love to-day asking him kindly to not talk so much. . . . I wrote in my letter to my friends for Bishop to give bill of sale of the mare. You may say to my friends that it is not necessary to do it, as it would explain to Bishop where the mare is going. . . . Hope everything will be all right. . . . Will be at the railroad to meet you. . . . This is the place for such a mare. They quite 'horsy.' . . . Ship to Fort Custer, Montana, over the Northern Pacific Railroad. Yours truly, O. E. Bennett, P. S. Reship from Fort Custer to Billings, the next station. You will not have to unload; might be we may be at Fort Custer and go down with you to Billings." Again, under April 3, he wrote to "Friend Davis" as follows: ". . . . In regard to Lady Wallace, she is all right to do this man. . . . You wrote in your letter that you would be honorable, upright, and fair in your business with him. That is just what I want and expect of you, and, whatever business I have to do with you expect to be honorable and upright, and do as near as I

agree with you as possible for me to do. That is the only way for a person to transact business. . . . If you come out here, we expect to do this party up, which is no great trouble to do, and we can do well with her other places. . . . I don't think you had ought to tell the parties what you are going to do with this mare, as they will take the advantage of our opportunity which is our benefit. As to confine this match race with this man, I could not confine it to any defined amount, but am satisfied we can do well, or I would not be willing to go to the expense of paying the amount to get you and the mare out here." Under date of April 22, Bennett wrote that they would buy the mare, he and Morrison to pay two thirds of the cost, and Davis to take the other one third; Davis to pay one third of the expenses she would be, and Bennett and Morrison the other two thirds; they also to pay Davis \$50 a month and board; Davis to have one third of whatever they won with the mare. Defendant Bennett closed this letter by asking Davis to let him hear from him as soon as possible, and adding: "I feel satisfied that you will do the best you can. Glad to know there is a young man in Ohio that has got a little nerve to come to Montana."

Let us first look at the form of the ownership of the mare. We mention this because respondent suggests that it was not a partnership, but an ownership in common. Although it is not of importance to determine this point, we nevertheless distinguish the interests of the parties as those of partners. The testimony of the plaintiffs and their witnesses, and the last letters that were written agreeing to the purchase and ownership of the mare, shows a special agreement between the two plaintiffs and defendant, whereby they were to buy the mare, each one paying a third of her cost, train her under a like agreement, and divide profits and losses of their racing ventures. One of the plaintiffs was to be allowed a monthly salary for actual care and driving, but that does not alter their legal relations. The original capital of this partnership was represented by the mare, to purchase which it was agreed each should contribute a share. From time to time moneys were advanced for the concern, whether by one plaintiff or another or by defendant made no difference, for, on principle, it all became the subject of accounting in equity between the owners. In *French v. Styling*, 2 C. B. N. S. 357, the facts were these: Plaintiff was a trainer of race horses. Defendant was a merchant. A race horse was jointly purchased by plaintiff and one Cohen. Cohen afterwards sold to one Mallinson, and Mallinson and plaintiff agreed that plaintiff should keep the horse for the purpose of training him, and should have entire control and management of him; that a fixed sum should be allowed as expenses of keeping the horse; that plaintiff should pay the expenses of entering the horse and conveying him to the races; that each should pay half of the horse's keep and other expenses, and that the winnings should be equally divided. Mallinson sold to the defendant, who agreed with plaintiff that he (plaintiff) should go on and manage the horse upon the same terms as agreed upon with Mallinson. In an action at law to re-

cover of defendant the moiety of the keep and expenses of the horse since defendant became possessed of his moiety, it was argued that plaintiff and defendant were partners, and therefore plaintiff could not recover. The judges were not wholly agreed on the question of partnership. They thought that there was not a partnership in the horse, but a joint ownership, yet that there was a tenancy in common, which entitled plaintiff to recover for money advanced to put the horse in condition to race. Cockburn, Ch. J., was inclined to think there was no partnership in the horse, but, with other judges concurring, held that they were partners in the mode of working and managing it for their common benefit. The doctrine of that case is approved of by T. Parsons on Partnership, § 76; and, while it is to be distinguished from the case at bar, it yet, by analogy, is an authority of great weight, for Cockburn, Ch. J., reasoned that, if the two had agreed that a certain sum should be contributed by them in equal moieties as the capital of the partnership, the moment money was so paid in as capital it became part of the partnership fund, resulting only in matter of account. Here there was an equal payment of money by three persons under a specific agreement to buy a horse for a particular purpose, and to share equally in ownership, keep, and all expenses connected with the racing project for which the partnership was formed. The agreement, therefore, went much further than in *French v. Styling*, and it seems to us, made a partnership relation. This being so, was it a partnership the real object of which was the attainment of that which is contrary to law, or, if the object was a legal one, was the attainment of such object sought in a way which is forbidden by law? If either of these questions is answered affirmatively, the partnership was illegal, and the parties must abide the consequences. Lindley, Partn. *180.

We shall not decide that the racing of horses, conducted in a proper and fair manner, for purses offered by associations, is contrary to law. It was not illegal at common law. Nor is there a statute of the state against such a practice. Nor do we believe that it is against public policy, where the purse is offered in good faith, and not as a subterfuge for betting and gaming. Horse races are looked upon as a species of gambling largely because men bet on the results, thus wagering upon uncertain results; but that is a different matter. There are many evils incidental to many strifes for premiums, yet all competitive contests are not unlawful. Folger, Ch. J., in *Harris v. White*, 81 N. Y. 532, said: "A purse, prize, or premium is ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, and if he abide by his offer, that he must lose it and give it over to some of those contending for it is reasonably certain. Such is the meaning of the words now, in common understanding, in the practical use of them, and in the legislative purview," etc. Bearing in mind this definition of a purse or premium, it is difficult to see why it is really more immoral to honestly try the relative speed of horses in a fair contest for a prize

than it is to test the relative value of dogs at a bench show, where prizes are offered to the winners, or the beauty of fowls at a poultry exhibit, or the merits of cattle at a state fair for money premiums. If such contests are honestly conducted, but little objection can be well urged against them, or any of them; while, if there is cheating, the rascality renders them objectionable and immoral. But we shall inquire into the real purpose that Morrison and his partners had in this case. It appears that Bennett went to Morrison, and suggested the buying of a race horse, the "main object" being to beat Crowley's horse. To attain this object, they set on foot a scheme of deception, misrepresentation, and cunning. Their plan, as exposed by the language of the letters, being to match Crowley "with a dead mortal cinch." Bennett advised Davis to "sneak" the horse into Lewistown, and to put a hair brand on her, so as to have her appear as a range animal. The idea was to make Crowley, the selected victim, look upon the imported animal as "undeveloped," that he might have a "sure thing in the way of thinking." He was "a sucker," "to be put to sleep," "kept in the dark," and to be "handled" by the writer, Bennett. As a further part of the deception, Davis was cautioned not to address envelopes which contained his advertisement as a horse man in Ohio, lest the scheme be detected. They expected to "do this party [Crowley] up," although Bennett expressly wrote that between themselves they expected to be "honorable and upright." Morrison acknowledges the object of the partnership, and evidently saw the letters of Bennett to Davis, and, as agreed upon in them, went to Billings to meet Davis and the mare. They made the bet of \$1,000 with Kane, who acted for Crowley, Bennett, and Morrison acting for their partnership. The race was won by the mare, and thus the conspiracy to defraud Crowley appears to have successfully ended. No more races were sought. The partners evidently quarreled over the spoils, and that honor pledged between the three partners themselves seems to have been lost sight of in Bennett's greed in positively refusing to share the spoils which passed into his hands. No court will lend its aid to assist the plaintiff in enforcing an accounting in such a case. The very statement of the evidence proves that the object of the parties was most iniquitous, and that the methods agreed upon, and doubtless fully executed, were all dishonest, immoral, deceitful, and corrupt. Men who associate themselves for the purpose of cheating others cannot ask the courts to distribute their booty by adjudging the demands of one against the other, arising out of their quarrels over their plunder. As said by Justice Baldwin in *Bartle v. Nutt*, 4 Pet. 184, 7 L. ed. 825: "Public morals, public justice, and the well-established principles of all judicial tribunals alike forbid the interposition of courts of justice to lend their aid to purposes like this." And upon this broad principle, "*ex turpi causa non oritur actio*," the district court properly refused to carry out the illegal contract.

But, insist the appellants, if the agreement of partnership was unlawful and immoral, "the purpose of such partnership must also be

admitted to be accomplished and executed," and the proceeds should be divided as agreed upon by the partners. This argument proceeds upon the reasons advanced by some of the English courts, notably Lord Cottenham's opinion in *Sharp v. Taylor*, 2 Phill. Ch. 801, that one of the two partners cannot possess himself of the property of the firm, and be permitted to retain it, if he can prove that in obtaining it some provision of law has been violated. "Can one of two partners, in any import trade," said that distinguished judge, "defeat the other, by showing that there was some irregularity in passing the goods through the custom-house? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties." In *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, Jessel, M. R., however, speaks of Lord Cottenham's reasoning as "inconclusive and unsatisfactory." He said in part as follows: "The notion that because a transaction which is illegal is closed, that therefore a court of equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle, but to authority,—to authority in the well-known case of the highwaymen, where a robbery had been committed, and one highwayman unsuccessfully sued the other for a division of the proceeds of the robbery. So in the case he puts of one of two partners engaged in merchant trade. As I read it, he meant the trade of smuggling goods. If two persons go partners as smugglers, can one maintain a bill against the other to have an account of the smuggling transaction? I should say certainly not. It is not sufficient to say that the transaction is concluded as a reason for the interference of the court. If that were the reason, it would be lending the aid of the court to assert the rights of the parties in carrying out and completing an illegal contract. If the partnership is for the purpose of smuggling, that is an illegal contract, and the court cannot maintain it, and the court will not lend its aid at all to it. That reasoning, then, of Lord Cottenham's is not sufficient; and I should have answered the question—not as Lord Cottenham does, in the affirmative—but in the negative. I do not say that this observation at all affects the authority of *Sharp v. Taylor* as it stands; but I think it does affect very much the *dicta* which I have read from the judgment; and that is the reason I have read them. It is no part of the duty of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other."

There is a rule discussed by Chief Justice Marshall in *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468, that a subsequent collateral or independent contract founded on a new consideration, not immoral or illegal, is not contaminated by the original illegal agreement. But that rule does not apply, as counsel would have it, here; nor is it in conflict with the principle that a court of equity will

not sustain an action to enforce contributions between persons making profits realized from an illegal contract. This contract under investigation was illegal and immoral. The \$1,000 was paid to one of the partners. And it is to carry out the partnership agreement to divide profits that this action is brought. "There is nothing collateral in respect of which, the agreement being out of the question, a collateral demand arises." *Snell v. Dwight*, 120 Mass. 9. In this last case cited the court ably review the decision in *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732, cited to us by appellants herein, and properly, we think, treat it as an authority relating to subsequent or collateral contracts and transactions, in which the original illegal acts and contracts are held to form no part of the consideration. The supreme court of North Carolina, in *King v. Winants*, 71 N. C. 472, 17 Am. Rep. 11,—a somewhat similar case to the one at bar,—distinguish *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732, as did *Snell v. Dwight*, 120 Mass. 9, and after so interpreting it, decided that they would not examine into, settle up, and enforce an illegal contract itself between the parties to it. See also *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 9 C. C. A. 659, 27 U. S. App. 1, 61 Fed. Rep. 993, 4 Inters. Com. Rep. 578; Beach, *Modern Law of Contracts*, § 1522. The New York court of appeals, in *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706, restate the general rule as laid down by Mullett, J., in the earlier case of *Gray v. Hook*, 4 N. Y. 449, as follows: "The general rule on this subject is laid down in this court in *Gray v. Hook*, 4 N. Y. 449, by Mullett, J., as follows: 'The distinction between a void and valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an

agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases, no change in the form of a contract will avoid the illegality of the first consideration, while express promises based upon the last class of considerations may be sustained."

It is unnecessary to go further. By the evidence here offered for plaintiffs they seek to enforce directly an immoral contract, and to secure the fruits of such a contract. It cannot be done. Beach, *Modern Law of Contracts*, § 1431. Plaintiffs are entitled to little sympathy. They knowingly entered into the contract, and are only suffering the consequences of a dishonest transaction in which they united, and which they proved in presenting their case. The fault of the parties being mutual, they can only rely for shares of profits upon those sentiments of honor which one of them wrote would exist when they entered into their immoral combination. Being in *part delicto*, we apply the maxim, "*Potior est conditio possidentis*."

Appellants raise a point of practice, contending that no appeal lies in this case from an order granting a new trial, because the case was tried by a referee, and defendant omitted to except to the findings of such referee. It appears by the record that the court, on the trial, did suggest the appointment of a referee to take the testimony in relation to the accounting. But it also appears that the suggestion never was acted upon, as the court itself took the accounting, made its findings of fact and conclusions of law thereon, and rendered judgment accordingly. An appeal did, therefore, lie.

The order granting a new trial is affirmed, and the lower court is directed to proceed in accordance with the views herein expressed.

Pemberton, Ch. J., and Pigott, J., concur.

NORTH CAROLINA SUPREME COURT.

H. B. MAYO, *Appt.*,

v.

Town of WASHINGTON.

(.....N. C.....)

A debt for the purchase of an electric-light plant for a municipal corporation is not one of the "necessary expenses" of the town, within the meaning of Const. art. 7, § 7, so that it can be created without a vote of the majority of the qualified voters and legislative authority.

(Clark, J., dissents.)

(March 8, 1898.)

NOTE.—As to power of municipality to own electric-light plant, see also *Jacksonville Electric Light Co. v. Jacksonville (Fla.)* 80 L. R. A. 540; *Linn v. Chambersburg (Pa.)* 25 L. R. A. 217; and *Crawfordsville v. Braden (Ind.)* 14 L. R. A. 238, and note. 40 L. R. A.

APPEAL by plaintiff from a judgment of the Superior Court for Beaufort County refusing to enjoin defendant from proceeding to acquire an electric-light plant. *Reversed*.

The facts are stated in the opinion.

No appearance for appellant.

Mr. Charles F. Warren, for appellee:

No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

Const. art. 7, § 7.

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and pur-

poses of the corporation,—not simply convenient, but indispensable.

1 Dill. Mun. Corp. 4th ed. § 89.

Repairing and building bridges are necessary expenses of a county.

Brodnax v. Groom, 64 N. C. 244; *Satterthwaite v. Beaufort County Comrs.* 76 N. C. 153; *Evans v. Cumberland County Comrs.* 89 N. C. 154; *McKethan v. Cumberland County Comrs.* 92 N. C. 243.

Building a court house is a necessary expense. *Halcombe v. Haywood County Comrs.* 89 N. C. 346; *Vaughan v. Forsyth County Comrs.* 117 N. C. 429.

It would be difficult or impossible to draw a precise line between what are, and what are not, the necessary expenses of the government of a city. The analogy of the law of necessities for infants is the only one that occurs to us. It is held, that if, considering the means and station in life of the infant, the articles sold to him may be necessities under any circumstances, they come within a class for which the infant may be liable, and upon his refusal to pay it is for a jury to determine whether, under the actual circumstances, they were necessary.

Wilson v. Charlotte, 74 N. C. 748.

Nothing can be more conducive to the comfort, convenience, and safety of the dwellers in cities and towns than well lighted streets.

Raleigh Gaslight Co. v. Raleigh, 75 N. C. 274; *Croswell, Electricity*, § 190, citing *Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268; *Mauldin v. Greenville*, 38 S. C. 1, 8 L. R. A. 291; *Lott v. Waycross*, 84 Ga. 681.

Lighting cities is so necessary for the safety and convenience of the inhabitants that the municipal authorities are usually given powers more or less extensive in respect to it.

2 Dill. Mun. Corp. § 691.

The ownership of gas, electric-light plants, and waterworks of a municipality are closely allied. In *Charlotte v. Shepard*, 120 N. C. 411, the court says: "But we think that the furnishing of a supply of water to the people of the city is not in itself a necessary expense in the sense that the city must own and operate a system of waterworks."

Such power should exist in the municipal authorities, at least so far as lighting the streets and public places is concerned.

Croswell, Electricity, §§ 21, 188, 190; *Mauldin v. Greenville*, 38 S. C. 1, 8 L. R. A. 291; *Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268.

If the object for which the money was to be raised comes within the class of such as might be necessary for the city or town, it was left to the town commissioners or aldermen to decide whether in fact it was necessary or not, and their decision could not be reviewed by the court.

Wilson v. Charlotte, 74 N. C. 748; *Evans v. Cumberland County Comrs.* 89 N. C. 154; *Satterthwaite v. Beaufort County Comrs.* 76 N. C. 153; *Cromartie v. Bladen County Comrs.* 87 N. C. 184; *Vaughn v. Forsyth County Comrs.* 117 N. C. 429.

Furches, J., delivered the opinion of the court:

The defendant is a municipal corporation,

containing a population of about 5,000 inhabitants. By its charters it was given the general powers incident to such corporations, in the following words: That the commissioners of the town of Washington (naming them), and their successors in office "be and they are hereby created a corporation and body politic under the name and title of the commissioners of the town of Washington with full power to make by-laws not inconsistent with the Constitution of the state or of the United States; to contract and be contracted with, to sue and be sued, to plead and be impleaded, by that name and title; and they are hereby invested with all other powers and rights necessary or usually appertaining to municipal corporations." Priv. Laws 1846-47, chap. 199, § 1. The defendant has undertaken under this corporate power to buy, erect, and operate an electric-light plant, for the purpose of lighting the public streets of the town of Washington, at a cost of \$20,000, and to issue coupon bonds therefor, not to run more than thirty years, and not to bear interest at a greater rate than 6 per cent per annum. The plaintiff, a citizen and taxpayer of the defendant town, for himself and in behalf of other citizens and taxpayers, denies the right of the defendant to create this bonded debt for the purposes proposed, and thus to burden the citizens and taxpayers of the town of Washington. This action is brought for the purpose of restraining and perpetually enjoining the defendant from creating such debt and from issuing said bonds. Upon the hearing below the court refused to issue the injunction prayed for, and the plaintiff appealed. The appeal was not argued orally in this court; but we find a signed agreement of counsel, asking that it be heard on printed briefs, in which it is stated that the plaintiff's counsel does not wish to file any brief, and has not done so. This is to be regretted, as the appeal involves the consideration of a most important question of constitutional law. But the well-considered brief of defendant's counsel treats the case fairly, and contends that there is but one question of law involved, and that is the constitutionality of the proposed indebtedness and issue of bonds. And that depends upon one question of fact: Is it one of the necessary expenses of the town?

The defendant contends that the case, as it is constituted in this court, does not involve the question as to whether the defendant could furnish incandescent lights to its individual citizens for pay, and, if this court should sustain the order of the court below, that this question would still remain undecided. This seems to us a little like hedging, as we know of no electric-light plant in the state that does not sell incandescent lights to private parties, and we can hardly believe that the defendant would wish to go to this expense in erecting and operating an electric-light plant in the town of Washington without this means of defraying a part of the expense of operating the same. But, as the defendant contends that it does not involve that question, we will treat it in that way. We agree with the defendant's counsel that there is but one question of law involved, and that is the power of the defendant to make the debt and issue the bonds; and this depends upon the fact whether an elec-

tric-light plant, costing \$30,000, is one of the necessary expenses of the town government. The defendant contends that it is, and cites several cases as sustaining this contention. The case of *Tucker v. Raleigh*, 75 N. C. 267, is cited for two purposes,—to prove that electric lights are a necessary expense, and that the admission of this fact by the defendant is binding on the court. In our opinion it sustains neither contention. In that case, the facts admitted were that the debt sued on was money due for work performed on the streets, cleaning out wells, and the like. The court said: "These facts being admitted, we as a matter of law hold that the debt was for necessary expenses." In the case under consideration there is no dispute about facts. They are alleged by the plaintiff, and admitted by the defendant, as they were in *Tucker v. Raleigh*. And the defendant says, in its answer, that these facts show that to buy, establish, and operate this electric-light plant is one of the necessary expenses of his government. The defendant's contention cannot be sustained, for two reasons: First. It is not an admission of the defendant that it is a necessary expense, but an allegation that it is. It is not alleged by the plaintiff that it is a necessary expense, and, not being alleged, it cannot be an admission. But, if the plaintiff had admitted that this debt, if created, would be for a necessary expense, it would be an agreement as to a result,—a conclusion, and not a fact,—and the court would not be bound by the admission. But, as this is an application for an injunction, this court has the right to review the court below on the facts. *Jones v. Boyd*, 80 N. C. 258. *Brodnax v. Groom*, 64 N. C. 244, is cited by the defendant as sustaining his contention. But in our opinion it does not. The subject of litigation in that case was to enjoin the collection of taxes levied under a special act of the legislature to build and repair bridges. There was no dispute but what the act authorized the levy, and the only question involved was as to whether it was constitutional or not, as the question was not submitted to a vote of the people. This fact that it was not submitted to a vote of the people, made the constitutional question hinge upon the question as to whether building and repairing bridges was one of the necessary expenses of the county government, and the court held that it was. This is the only analogy that *Brodnax v. Groom* bears to the case under consideration. And it is so obvious that the building and repairing of bridges on the public highways of a county is a part of the necessary public expense of a county that we do not propose to discuss this question further. *Evans v. Cumberland Comrs.* 89 N. C. 154, is also cited by the defendant. But it is placed entirely on *Brodnax v. Groom*, and decides no more than that case does. *Mauldin v. Greenville*, 33 S. C. 1, 8 L. R. A. 291, is cited by defendant as sustaining its authority to create the debt and issue the bonds. We do not think it does, but that it sustains the contention of the plaintiff. There is no constitutional restriction in South Carolina, as there is in North Carolina, and the right of the defendant in that case depended upon its powers under its charter, and the

court held that it had the power. The opinion is made largely of quotations from Judge Dillon, defining general corporate powers. Quoting from Judge Dillon, these powers are defined as follows: "Those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared object and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation." . . . It is quite certain that such power is not 'essential' to the declared objects and purposes of the corporation, for heretofore the city has been lighted by contract, without owning the gas fixtures." The first part of this quotation, down to " . . . " was quoted by the South Carolina court from Judge Dillon, and from there down is a part of the comment of the South Carolina court. As there was no constitutional restriction of the corporate power in South Carolina, it depended on their general corporate power to contract. They were not restricted, as the defendant is. In South Carolina the power of the defendant to lend the credit of the town and to issue bonds was not restricted to the necessary expenses of the corporation. In the charter of the defendant there are no express powers. It therefore has only such powers as necessarily pertain to or arise from the fact that it is a municipal corporation, and therefore falls under the third division of Judge Dillon's definition, which, he says, does not mean simply "convenient, but indispensable." And "any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation." This case was called to our attention by the defendant as sustaining its position. *Lott v. Waycross*, 84 Ga. 681, is cited by the defendant. This case expressly states that it does not decide any constitutional question. The case bears a very slight analogy to ours, if it has any at all. That case is where the town of Waycross contracted with a company to furnish it with a certain number of electric lights at an agreed price per annum. The action was brought to enjoin the enforcement of this contract, for the reason that it was not submitted to a vote of the people. The court held that this did not involve any constitutional question; that if the contract was a reasonable one, and the annual rental was kept paid, the constitutional question might never arise. There is very little discussion of the case by the court, and we do not know what the constitutional provisions of Georgia are. But the case nowhere shows that the question of necessary expense was presented or considered by the court. The case of *Craufordville v. Bruden*, 130 Ind. 149, 14 L. R. A. 268, is also cited by defendant as sustaining its contention. But we do not think it does. There are no constitutional restrictions in the state of Indiana, as there are in North Carolina. The power of the defendant in that case depended entirely upon the powers contained in its charter, and the case is not put upon the ground of necessity, but upon the ground of convenience and benefit. But it may be observed that the reasoning of the supreme court of In-

diana places the power as to waterworks and electric plants on the same footing, and we do not see how they can well be distinguished.

This is a new question in North Carolina, so far as the right of a municipality to establish and operate an electric-light plant is concerned, without submitting the question to the people for their approval. But it is not new in principle. We have many opinions construing § 7, art. 7, of the Constitution. We also have many opinions defining the powers of municipal corporations. From these it seems that we ought to be able to arrive at a proper conclusion as to the law governing this case. There is no special act of the legislature authorizing the levy of a tax, as there was in *Brodnax v. Groom*. Nor is there any express power contained in the charter to do so. So the defendant's right to erect and operate an electric plant, and to create a debt and issue bonds, depends upon the general powers vested in the defendant as a municipal corporation. Every municipality in this state is subject to the provisions of § 7, art. 7, of the Constitution, and it does not matter what powers it has under its charter; if they are in conflict with the provision of the Constitution, they are void. To enable a municipal corporation to borrow money or to loan its credit for any purpose, except for the necessary expenses of the corporation, there must be an act of assembly passed and ratified, as required by the Constitution, authorizing it to submit the proposition to the people. *Union Bank v. Oxford*, 119 N. C. 214, 34 L. R. A. 487; *Stanly County Comrs. v. Snuggs*, 121 N. C. 394. And the question must then be submitted to and ratified by a majority of qualified voters thereof. It requires both the authority to submit the proposition and the ratification by a majority of the qualified voters to warrant the creation of the debt and the issue of the bonds. *Wilmington, O. & E. C. R. Co. v. Onslow County Comrs.* 116 N. C. 563. If the people want it, why not get it in this constitutional way?

This brings us to the final consideration of the question as to whether the purchase of an electric-light plant for the town of Washington, at the price of \$20,000 simply to light its streets, is one of the necessary expenses pertaining to its government; and it seems to us that the authorities cited by defendant's counsel show that it is not. We have seen that the power to establish electric light plants and waterworks plants stands on substantially the same footing. If we consider this to be so (and we are not able to see why they do not), we have at least one direct decision which holds that it is not one of the necessary expenses of a city government,—*Charlotte v. Shepard*, 120 N. C. 411. In the defendant's brief this case is treated as *obiter*. But that is not so. It was claimed, on the argument of the case of *Charlotte v. Shepard*, that this was one of the necessary expenses of the corporation, and that the plaintiff had the power, without any act of the legislature or submission of the question to the people, to make this debt and to issue bonds. And this is the second ground of error assigned in the plaintiff's petition for a rehearing. While a rehearing was granted as to the other assignments of error, it 40 L. R. A.

was denied as to this ground. This decision was made by a full bench and a unanimous court, and is entitled to the same weight as a precedent that any other opinion of this court is entitled to.

While we have had no case before this court as to the power to erect and operate an electric-light plant by a municipality, we find that it has been presented in other states, and considered and decided upon the very point involved in this case; that is, whether it is one of the necessary expenses of the corporate government. In *Spaulding v. Peabody*, 153 Mass. 129, 10 L. R. A. 397, decided in 1892, we find a very full and satisfactory discussion of the subject. There the town of Peabody proposed to erect an electric plant at a cost of \$30,000, to light the streets, and for other purposes. The court discussed both aspects of the question, and held that the defendant had no power to incur the expense of erecting such plant for the purpose of lighting the streets or for other purposes. The opinion is delivered by Chief Justice Field, and concurred in by all the judges. In the discussion of the case the court says that "it has also been uniformly held that cities and towns are under no obligation to light their streets for the purpose of making them safe and convenient for travelers"—citing *Sparhawk v. Salem*, 1 Allen, 30; *Tyson v. Booth*, 100 Mass. 258; *Randall v. Eastern R. Co.* 106 Mass. 276, 8 Am. Rep. 327. This opinion further says that all the power a municipal corporation has to tax is derived from the legislature, by express grant or necessary implication, and, where the legislature has a right to grant the necessary powers, the implied powers are strictly construed; that the exceptions to this rule are few, and being such as a town clock, hay scales, pumps, reservoirs, etc. These obtain by reason of ancient custom, and are "not to be extended." The opinion further states that it was contended, "if the town of Peabody can erect and maintain street lamps, it can maintain them by any appropriate means, and that to furnish them by means of such electric plant was one of the proper means of doing so." The rule as laid down by the Massachusetts court is "that where there is any considerable amount of money to be expended, it must be under legislative authority." This is, as we interpret it, any unusually large amount for that municipality. And the court says that, "it cannot be said that the erection of such works as are contemplated . . . in this case are in any strict sense necessary in order to enable the town of Peabody to light its streets." This case decides the very point upon which our case turns,—that it is not a necessary expense of a corporation to light its streets with electric lights, and therefore not necessary to incur the debt of \$20,000, and to issue the bonds.

To draw the line of demarkation between what are and what are not necessary expenses to be borne by a municipal corporation would be attended with difficulty. It is not necessary that we should attempt to do so in this case, and we do not attempt to draw the line. There are some things clearly within the line of power, and it is the duty of the corporate authorities to provide for them, such as court-houses and jails, as in *Vaughn v. Forsyth County*

Comrs. 117 N. C. 429, or public highways and public bridges, as in *Brodnax v. Groom*, 64 N. C. 244. There are others that are clearly outside the line of necessary expenses, such as appropriations to build railroads, cotton factories, to build and operate electric street-car lines, etc. These the municipality would have no right to pledge the faith and credit of a town or city to build without first obtaining authority from the legislature and from the popular vote. The erection of electric-light plants and waterworks plants may not be so far outside the line of power as some of the things mentioned. But we are of the decided opinion that they are outside. The claim of power upon the plea of necessity must stop somewhere. The restrictions contained in the Constitution were not intended to be meaningless. If they had not been for a purpose, they would not have been put into the Constitution. In our opinion, this provision of the Constitution was wisely put into that instrument, for a most beneficent purpose, and it must be judicially sustained and enforced by the courts. Suppose we hold it to be within the corporate power to buy and operate electric-light plants on a pledging of the faith and credit of the town; how long will it be until it will be claimed that electric street cars are necessary for the business, progress, and convenience of the town? And if we grant this claim of necessity, how will we resist that? What grounds have we to distinguish the one from the other? If we sustain the plea of necessity for street cars, what is there to prevent the same claim of necessity to the growth, prosperity, and convenience of the people of a town to which there is no railroad from pledging the faith and credit of the town to build a railroad? Especially so, if we allow the claim or admission of the corporate authorities to settle the question of necessity, as is claimed that they should do in this case. It is heard every day, in towns of much size, that a street railway is necessary to the growth and prosperity of the town, and in towns that have no railroad to hear it said that a railroad to this place is a necessity. And it is contended for the defendant in this case that if such town should make a subscription and issue bonds, or should propose to do so, and when suits should be brought to enjoin it from so doing, if the town alleged it was a necessary expense, it is to be taken as conclusive evidence that such street car or railroad is one of the necessary expenses of the municipality, and that the court is bound by this claim or admission. If this be so, every town in the state would soon have railroads running to it, and a line of electric street cars, based upon the pledged faith and credit of the town. This cannot be the law.

Smith v. Goldsboro, 121 N. C. 350, was cited for defendant, but it is not in point. The question of establishing electric lights was not involved in that case. The only question involved was the right of the city to use the streets in a territory lately added to the city by extending its corporate boundary. It was to give the same benefits and the same protection to the citizens of the new territory as to the citizens of the old territory. The Constitution must be observed and enforced. There is error.

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The judgment of the court below is reversed, and the injunction as prayed for must be granted.

Clark, J., dissenting:

It would seem that these propositions are established and settled in North Carolina: (1) That it is the duty of the town commissioners to light the town (*Smith v. Goldsboro*, 121 N. C. 350), and hence it follows that the cost of such lighting is a necessary expense. (2) That it is "for the courts to determine what class of expenditures falls within the definition of the necessary expenses of a municipal corporation," and that when an expenditure falls within that class the courts "have no authority to control the exercise of the discretionary power vested in the commissioners," either as to the manner of exercising that discretion or the reasonable limit of cost. *Vaughn v. Forsyth County Comrs.* 117 N. C. 429, citing *Brodnax v. Groom*, 64 N. C. 244, and *Satterthwaite v. Beaufort County Comrs.* 76 N. C. 153; *Evans v. Cumberland Comrs.* 89 N. C. 154; *Cromartie v. Bladen Comrs.* 87 N. C. 184. (3) That for such "necessary expenses" the commissioners are not prohibited by § 7, art. 7, from creating a debt without the approval of a majority of the qualified voters. *Tucker v. Raleigh*, 75 N. C. 267; *Wilson v. Charlotte*, 74 N. C. 748. Code, § 3800, authorizes town commissioners, *inter alia*, to "lay taxes for municipal purposes on all persons, property, privileges, and subjects within the corporate limits, which are liable to taxation for state and county purposes;" and § 3821 recognizes that municipal corporations may contract debts for such purposes, and provides for their payment.

On August 2, 1897, the commissioners of the town of Washington adopted the following order: "Whereas, the present method of illuminating the town of Washington by the use of gasoline lamps is entirely inadequate, and does not sufficiently and properly light the said town, and subjects the citizens and others to great inconvenience, as well as to danger and risk, and also involves great expense to the taxpayers of the town, considering the character of the light furnished; and whereas, the population of the said town is now more than 5,000 and is rapidly increasing, and the lack of proper and sufficient lights is detrimental to the business of the town and an obstacle to its advancement and progress; and whereas, the board of commissioners of the town of Washington, after a careful consideration and examination of the different methods and systems of lighting the town, are of the opinion that the best, most effective, and cheapest method is an electric light plant, to be purchased, owned, and operated by the corporate authorities of the town of Washington, and the said commissioners declare that the same is a public necessity: Therefore, be it resolved, that an electric-light plant be purchased by the town of Washington for the purpose of illuminating said town, and erected, established, and operated therein by the corporate authorities of the said town, at a cost for the purchase and erection of said plant not exceeding \$20,000; that, to pay for the purchase and erection of the said electric-

light plant, bonds of the town of Washington shall be issued and sold to the best advantage; that the said bonds shall bear a rate of interest not exceeding 6 per centum per annum, payable annually or semiannually, as may be agreed with the purchasers; that the said bonds shall be in denominations of \$500 and \$1,000, and shall run for a period not exceeding thirty years; that the said bonds shall be executed by the mayor of the town of Washington, and countersigned by the clerk of the board of commissioners, and the corporate seal thereto affixed." This was an action by a taxpayer to restrain the creation of this debt and the issuance of the bonds. The judge below, himself a citizen of the town of Washington and acquainted with its needs, refused the injunction, and the plaintiff appealed.

There is no statute specifically granting to the defendant the power to purchase and operate an electric-light plant, and issue bonds therefor, and the proposition to purchase said plant and issue bonds has never been submitted to a vote of the qualified electors of said town. The Constitution (art. 7, § 7) provides: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable." Dill. Mun. Corp. 4th ed. § 89. As the proposition to contract this debt has never been submitted to a vote of the qualified electors of the town, and there is no specific grant of power to contract it, the question arises: Is it for a "necessary expense" of the town, within the meaning of Const. art. 7, § 7?

This is the sole question to be decided. The power of the commissioners of the town to manufacture gas or electricity, and to sell the same to the citizens, is not presented in the case, and does not arise upon the facts. The resolution adopted by the defendant recites that "the present method of illuminating the town of Washington by the use of gasoline lamps is entirely inadequate, and does not sufficiently and properly light the said town, and subjects the citizens and others to great inconvenience, as well as to danger and risk, and also involves great expense to the taxpayers of the town, considering the character of the light furnished." It further recites that, "after a careful consideration and examination of the different methods and systems of lighting the town, the commissioners are of the opinion that the best, most effective, and cheapest method is an electric plant, to be purchased, owned, and operated by the corporate authorities of the town of Washington." The defendant then resolved "that an electric-light plant be purchased by the town of Washington for the purpose of illuminating the

said town." The question presented is the power of the defendant to contract a debt to purchase an electric-light plant for the purpose of lighting public buildings and streets of the said town,—a strictly public purpose.

Article 7, § 7, of the Constitution, in reference to the power of counties to contract debt, pledge faith, loan credit, or levy and collect taxes for "necessary expenses," has been frequently construed by this court. There would seem to be no distinction between counties and towns, as the section of the Constitution applies to both alike. There would be a difference as to what would be "necessary expenses" of each, due to the different purposes and objects for which the two classes of corporations are created. Repairing and building bridges are necessary expenses of a county. *Brodnax v. Groom*, 64 N. C. 244; *Satterthwaite v. Beaufort County Comrs.* 76 N. C. 153; *Evans v. Cumberland Comrs.* 89 N. C. 154; *McKethan v. Cumberland County Comrs.* 92 N. C. 243. Building a court-house is a necessary expense. *Halcombe v. Haywood Comrs.* 89 N. C. 346; *Vaughn v. Forsyth County Comrs.* 117 N. C. 429. In *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766, in the able opinion of Bynum, J., it is held (citing *Milne v. Davidson*, 5 Mart. N. S. 586, 16 Am. Dec. 189) that the city may without express statute erect public hospitals and (citing *Livingston v. Pippin*, 31 Ala. 542, and *Rome v. Cabot*, 28 Ga. 50) bore an artesian well. *McLin v. Newbern*, 70 N. C. 12, it is held that the town has inherent power, or by reasonable implication from its general power, to build a jail or guard house as a public necessity. In *Wilson v. Charlotte*, 74 N. C. 748, Rodman, J., says: "It would be difficult or impossible to draw a precise line between what are, and what are not, the necessary expenses of the government of a city." He likens it roughly to the inquiry as to what are the necessities which may be charged against an infant,—a question whose determination largely depends upon his means, condition in life, and surroundings. While the analogy is not exact, it is sufficiently so.

Nothing can be more conducive to the comfort, convenience, and safety of the dwellers in the cities and towns than well-lighted streets, market halls, and other public buildings, or more effective to prevent or detect vice and crime. If it be conceded that it is the duty of a city or town to light its streets and public buildings at all, why not provide the best method of illumination it can afford? If the defendants could light the town with kerosene lamps, or with gasoline, and pay the expenses from its taxes, then why could they not provide better light, by the use of gas or electricity? It would be merely a difference in the quality of the light furnished,—a difference in degree, and not in principle. In *Raleigh Gaslight Co. v. Raleigh*, 75 N. C. 274, it was assumed, without argument, that the purchase of gas for public purposes by the city was a necessary expense, and that the city was bound to pay a debt contracted therefor. "So far as lighting streets, alleys, and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities

have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and the financial condition of the corporation. The court further says that the municipal authorities thus possessing the power to light the streets, the power to furnish or procure electricity is carried with the principal power as an auxiliary." *Croswell, Electricity*, § 190, citing *Crawfordsville v. Braden*, 180 Ind. 149, 14 L. R. A. 268; *Mauldin v. Greenville*, 83 S. C. 1, 8 L. R. A. 291; *Lott v. Waycross*, 84 Ga. 681.

There can be no doubt that the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants, and as a check upon immorality. This is forcibly set forth by Judge Dillon, in his work on *Municipal Corporations*, as follows: "In a most important particular, however, Rome suffers by comparison with modern cities. Its public places were not lighted. All business closed with the daylight. The streets at night were dangerous. Property was insecure. No attempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lantern and torches."

No more forcible illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macaulay of the state of a great city buried in the darkness of night; and they show how clearly the power to provide for this is essentially and peculiarly one pertaining to municipal rule and regulation. Nor are these studies, and the facts that they reveal, without practical value to the jurist. They demonstrate that a large and dense collection of human beings, occupying a limited area, have needs peculiar to themselves, which create the necessity for municipal or local government and regulation, and this in its turn the necessity for corporate organization. The body thus organized, as it has duties, so it acquires rights, peculiar to itself, as distinguished from the nation or state at large." *Dill. Mun. Corp.* 4th ed. § 3a. Upon this paragraph, the supreme court of Indiana, in *Crawfordsville v. Braden*, 180 Ind., at page 157, 14 L. R. A. at page 272, says: "While Judge Dillon's remarks have, of course, special reference to great cities, the difference in that respect between the greater and minor municipal corporations is a difference in degree, and not in kind. Wherever men herd together, in villages, towns, or cities, will be found more or less of the lawless or vicious; and crime and vice are plants which flourish best in the darkness. So far as lighting the streets, alleys, and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the

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wants and the financial condition of the corporation. It is well settled that the discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused, to the oppression of the citizen,"—citing *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; 15 Am. & Eng. Enc. Law, p. 1046. "We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light. The only authority cited which holds a contrary doctrine is that of *Spaulding v. Peabody*, 153 Mass. 129, 10 L. R. A. 397. We are, however, unable to recognize the validity of the reasoning in that case. We are unable to see the analogy between the city of Boston, because authorized to light its streets, engaging in whale fishing to procure oil for that purpose, or the other supposed cases, and the generation and supply of electricity. Electricity is not a commodity which can be bought in the markets and transported from place to place, like oil."

To the same purport of this able opinion are many others, among them *Linn v. Chambersburg*, 160 Pa. 511, 25 L. R. A. 217 (in which it is said that "it is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age"); *Jacksonville Electric Light Co. v. Jacksonville*, 86 Fla. 229, 30 L. R. A. 540; *State, Atty. Gen., v. Toledo*, 48 Ohio St. 112, 11 L. R. A. 729; *Hequembourg v. Dunkirk*, 49 Hun, 550; *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469; *Mitchell v. Negaunee* (Mich.) 38 L. R. A. 157; *Sun Printing & Pub. Asso. v. New York*, 152 N. Y. 257, 87 L. R. A. 788. In some of these cases there was an act of the legislature authorizing the purchase or erection of the electric plant, and the last is noteworthy as sustaining an act authorizing the city to construct a street railroad at its own expense; but all of them are in point as recognizing that these purposes are "city purposes," and within the scope of duties for which cities and towns are incorporated.

In this court, at last term, it was said by a unanimous court, in *Smith v. Goldsboro*, 121 N. C. 850, at page 352, that the city "provides for its citizens electric lights and water, as it is its duty to do. . . . The defendant has taken possession of said streets in order that it may perform its duty to its citizens and furnish water and lights to the owners of said lots." And at bottom of page 353, 121 N. C., it is said that, "having been taken within the corporate limits of the city of Goldsboro, they are subject to all the burdens and entitled to all the benefits of citizenship. Paying city taxes, they have asked for two of the greatest advantages of the city, water and lights, and this the city was preparing to give them, but for the interference of the plaintiff. Such interference is without warrant in law, and cannot be sustained upon any principle of equity."

This decision is abreast of the times, and is simply a recognition of the fact that cities and towns are not incorporated for the primary purposes of government, the protection of person and property, since that could be done by the justice of the peace and constable, as in the country districts, without the expensive machinery of municipal government; but municipalities are in fact not so much for governmental purposes as for business needs, such as paving, lights, security against fire, water, sewerage, and the like, which are the necessities of a dense population, and which can be furnished more cheaply and effectively by the representatives of the municipality chosen to administer its common interests than by subjecting each citizen to the unrestricted demands of organizations of private capital. Lighting being one of those necessities, whether the town shall furnish kerosene, gasoline, gas, or electric lights, and, if either of the latter, whether it shall procure the lights by paying exorbitant prices to combinations of private capital, or shall procure them at about one third the cost (as is common knowledge) by the city owning and operating the plants, are matters which must be left to the discretion of the local legislature, elected by the people of the municipality for these very purposes; for the small criminal jurisdiction vested in the mayor as to the violation of town ordinances is purely incidental. In *Brodnaz v. Groom*, 64 N. C. 244, Pearson, Ch. J., said that the discretion of local commissioners over expenditures, within the range of what are necessary expenses, could not be supervised by this court without "erecting a despotism of five men." The same is held in *Wilson v. Charlotte*, 74 N. C., at bottom of page 759, and reaffirmed in *Satterthwaite v. Beaufort County Comrs.* 76 N. C. 153. While electric lighting might not have been a necessity years ago, it has become so by general adoption to-day; and, while it would not be a necessity for a smaller, poorer, and less progressive town even to-day, it may be indispensable for a larger and wealthier town, rapidly increasing in population; and the local board of commissioners may be intrusted with passing upon that question, and when, as here, their finding that electric lighting is a necessity is not gainsaid in the pleadings, this court cannot, as a matter of law, reverse the judgment below, and hold that it is not a necessity.

In *Charlotte v. Shepard*, 120 N. C. 411, there is a *dictum* (since it was not necessary to the decision of the case) that "the furnishing of a supply of water to the people of the city is not, in itself, a necessary expense, in the sense that the city must own and operate a system of waterworks." But there is a wide distinction between that case and this, in two essentials, at least: There was no finding of the commissioners, acquiesced in by the other party, that, as a matter of fact, it was a necessity that the city should own waterworks; and, secondly, the reference in that case was to the city's owning waterworks for the purpose of "furnishing water to the people,"—i. e., to individuals,—whereas, in the present case the commissioners are establishing the electric plant for the city itself, to light its streets, public buildings, and squares, as they are

compelled to do. There is no question of furnishing lights to the people as individuals, though, if the city plant is established for city purposes, we know of nothing which will forbid its furnishing private citizens. But waterworks are comparatively little used by the city as a corporation, except for protection against fire, and it is principally for the purpose of furnishing water to individuals at a moderate rate that municipalities own their own waterworks; and it may be argued, therefore, that waterworks, unlike lighting, are not a necessity, and hence cannot be established until the question of incurring a debt therefor is submitted to the people. It would seem, however, that city ownership of water as well as lighting plants is a matter vested in the discretion of the city government. Light and water, sewerage and sanitation, paving and fire protection, are necessities, and are objects to be obtained by municipal organization. Transportation is not necessary, but the right to own and operate street-car lines can be conferred on municipalities by legislative action.

There is an unmistakable trend the world over towards municipal ownership of lighting, waterworks, and even (to some extent) street railways. Judge Dillon refers to this, and intimates that it is commended by wisdom and sound policy. 2 Dill. Mun. Corp. § 691, note 1. In Germany, two thirds of the cities own their electric lighting and car plants, and the proportion is increasing. The same is true of the other countries of continental Europe, there being a great increase in municipal ownership since Judge Dillon wrote. In Great Britain and Ireland, 203 cities and towns, being in fact every city of any importance save 5, own their lighting plants, not only for their own corporate uses, but for furnishing light to citizens, and the average price of gas furnished to the citizen, with a profit, too, to the municipalities, is 54 cents per thousand. In this country, too, a large number of cities own their gas plants. Our neighboring capital, Richmond, Virginia, which is one of them, has owned its gas plant since 1852, and furnishes gas at \$1 per thousand, and shows a large annual profit. A large and increasing number of cities and towns (already over 200) in the United States own their electric-lighting plants, with the result that the cost to the municipalities, from official reports, is less than one third of the average cost in cities buying their lights from private companies. The number of cities in this country owning their waterworks is 1,690 (over one half), out of a total of 3,196 having water supply; and municipal ownership is steadily increasing. In the 50 largest cities in the Union 19 have recently changed from private ownership to municipal ownership, leaving only 9 of the 50 which are still dependent for their water supply upon private companies. At the beginning of this century only 17 towns in the United States were supplied by waterworks, and only 1 of them owned its waterworks plant. In Great Britain one third of the street railways (two thirds excluding London) are owned by the cities themselves, with the result of lower rates and better accommodations, as well as a profit to the municipalities, which have thus been enabled to lower taxation. On the continent of Europe, where

ever a city does not own its street railways, they are under city control, which fixes their rates, especially requiring a minimum rate (usually 1 cent, or 2 cents, at most) to be charged the working classes going to and from work, and a division of profits with the city. New York is among the cities which own the ferries, though at present it leases them out. Thus, the concept of a municipality is scarcely governmental at all, except incidentally, for the enforcement of its ordinances; but it is, in truth, a great business agency, to supply its people with the prime necessities of a crowded population,—light, water, sanitation, clean and well-paved streets, and protection against fire. Indeed, one of the most fruitful causes of inequality of condition, and the creation of a few enormously wealthy men at the expense of the general public, has been the great profits made by private ownership of the public franchises of furnishing light, water, and transportation to large bodies of men, incorporated into cities and towns. Judge Dillon, *supra*, cites other countries in which light and water are furnished, either altogether, or in a majority of

cases, by the municipality. The general movement of the age in which we live is towards the ownership and operation of these franchises by the people of towns and cities, for themselves, though the agency of their municipal corporations, as one of the recognized and chief purposes of town and city charters. The point immediately before us, however, is far short of that, and is fully sustained by the authorities above cited, to wit, that the lighting of streets and public squares and buildings is a necessary expense, and that to procure such lighting the town commissioners, by reasonable implication from their general powers, and without express statutory enactment or popular vote, have a right to establish an electric-light plant, just as they can build a guard house, buy a fire engine, erect a public hospital, or bore an artesian well. It would be otherwise, of course, if the corporation undertook to operate a cotton factory, or some other enterprise not within the scope of its recognized duty, as lighting the town is universally held to be.

MASSACHUSETTS SUPREME JUDICIAL COURT.

LADD

v.

City of BOSTON.

(.....Mass.....)

1. The removal of a water meter by a commissioner who is empowered "to furnish and attach meters where he deems it necessary," whereby the consumer is required to pay according to the number of fixtures used, does not infringe the rights of a water consumer who had so arranged his fixtures when he had the meter that, on its removal, he would have to pay more than twenty times as much as other water takers pay for the same quantity of water, when it does not appear that the rates charged for fixtures were unreasonable or unjustly discriminating.
3. The fact that a man was using a water meter when he put in fixtures in his building does not affect his rights with respect to the removal of the meter, when he had no contract for its continuance.

(February 26, 1898.)

APPEAL by complainant from a decree of the Supreme Judicial Court for Suffolk County in favor of defendant in a suit brought

to enjoin the removal of a water meter from complainant's house. *Affirmed.*

The facts are stated in the opinion.

Mr. Nathaniel W. Ladd for appellant.

Mr. John T. Wheelright for appellee.

Knowlton, J., delivered the opinion of the court:

Under Stat. 1895, chap. 449, § 18, the water commissioner of the city of Boston, acting for the city, is authorized to take the waters to be used for a water supply, and "to sell said waters, or parts thereof, and to fix the rates to be paid therefor by the owner of the premises to which any of said water is furnished, or by the person or persons using any of said water," etc. The plaintiff is the owner of a building to which water is furnished by said city, and he complains that, while he has been accustomed to have the water measured by a meter, and to pay for it under the rules applying to water furnished through meters, the water commissioner threatens to take out the meter, and to compel him to pay for the water under the rules applying to unmeasured water, which is charged for at an established rate for each fixture through which it is used. The statute above quoted allows the water commissioner

NOTE.—For water rates as taxes, see *Wagner v. Rock Island (Ill.)* 21 L. R. A. 519, and *note*; also *Silkman v. Yonkers Water Comrs. (N. Y.)* 37 L. R. A. 327.

For governmental power to regulate rates, see *note* to *Winchester & L. Turnp. Road Co. v. Croxton (Ky.)* 33 L. R. A. 177, on page 181; also *Brymer v. Butler Water Co. (Pa.)* 36 L. R. A. 200; *Detroit v. Detroit Water Comrs. (Mich.)* 31 L. R. A. 403; *San* 40 L. R. A.

Diego Water Co. v. San Diego (Cal.) 38 L. R. A. 460.

For right to compel water supply, see *note* to *Rushville v. Rushville Natural Gas Co. (Ind.)* 15 L. R. A. 321; also *Wood v. Auburn (Me.)* 29 L. R. A. 376; and *American Waterworks Co. v. State, Walker (Neb.)* 30 L. R. A. 447.

As to furnishing separate supply to tenants in same building, see *Kelsey v. Marquette Fire & Water Comrs. (Mich.)* 37 L. R. A. 675.

"to furnish and attach meters where he deems it necessary." It authorizes him to fix the rates to be paid for water furnished without meters as well as for that which is measured. It implies that there may be at least two general methods of determining prices,—one for water which is measured, and one for water which is not measured. It appears by the plaintiff's bill that the method adopted where water is not measured is to establish the price for each fixture of a certain kind at which water is supplied. There is no averment in the bill that this is not a reasonable method, or that the water commissioner has not established uniform rates for all fixtures of a particular kind. There is no averment that the rates established for measured water are not reasonable for water supplied in that manner, nor is it averred that rates for buildings generally, which are charged at a certain price per fixture, are not reasonable as compared with the rates for measured water, when the nature of the uses and the methods of furnishing in different places are taken into account. The bill does not show that the plaintiff's building is not of a class in which the charges for water are usually at the established rate per fixture.

Considerable discretion in determining the methods of fixing rates is necessarily given by the statute to the water commissioner. Money must be obtained from water takers to reimburse the city wholly or in part for the expense of furnishing water. An equitable determination of the price to be paid for supplying water does not look alone to the quantity used by each water taker. The nature of the use and the benefit obtained from it, the number of persons who want it for such use, and the effect of a certain method of determining prices upon the revenues to be obtained by the city, and upon the interest of property holders, are all to be considered. Under any general and uniform system other than measuring the water, some will pay more per gallon than others.

It appears by the bill that the plaintiff has so arranged fixtures in his building that he and his tenants can obtain the convenience and benefit of having water to use in many places, while the quantity which they want to use in the whole building, paid for at the rate per gallon charged for measured water, would cost only \$5 per year. He has been accustomed to pay \$15 per year, because, however small the quantity used, that is the lowest sum per year for which water will be furnished, under the rules, through any meter. The only averment in the bill which tends to show that the charge for his building after the meter is removed will be unreasonable is that he "will be obliged to pay more than twenty times as much as other water takers pay for the same quantity of water." This means that the arrangement of fixtures in his building is such that, paying by the fixture at the ordinary rate the aggregate quantity used will be so small as to make the price per gallon twenty times as much as the price paid for measured water where meters are allowed to be used, or the lowest price paid at rates by the fixture where the largest quantities are used through the fixtures. This does not show that charging by the fixture is an improper method. It only shows that the number and arrangement of the fixtures in the plaintiff's building are uneconomical for the owner as compared with a different construction and arrangement of the conveniences for using water in some other buildings. The rights of the parties are not affected by the fact that plaintiff was using a meter when he put in his fixtures. He knew that he had no contract for the future with the city in regard to the mode of fixing the price to be paid for water, and it appears that the quantity which he has been using is only about a third of the smallest quantity for which water is ever charged by the gallon, running through a meter. The bill does not state a case for relief in equity.

Bill dismissed.

UTAH SUPREME COURT.

Joseph M. THOMPSON, *Respt.*,

v.

SALT LAKE RAPID-TRANSIT COMPANY, *Appt.*

(..... Utah.....);

***1. When both parties are negligent,** the true rule is held to be that the party who last has a clear opportunity to avoid the accident,

*Headnotes by MINER, J.

NOTE.—As to the rule of the last clear chance in negligence cases, see also *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 287; and *Pickett v. Wilmington & W. R. Co.* (N. C.) 30 L. R. A. 257.

In the present case the negligence of the boy who was killed seems to have been subsequent to that of the railroad company, and it seems to have been 40 L. R. A.

notwithstanding the negligence of his opponent, is considered solely responsible for it.

2. A plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding the injury to him.

3. A street-car company operating

the boy who had the last clear opportunity to avoid the accident. The verdict of the jury that the direct and proximate cause of the accident was the negligence of the railroad company must have been rendered by ignoring the rule as to the effect of the last clear opportunity.

electric cars in a public street which increases the hazards and dangers to pedestrians is held to a degree of care proportionate to the increased danger arising from the use of such propelling power. The greater the danger, the greater the care must be to avoid injury.

4. Where deceased was deaf and dumb, but a well-grown boy of fourteen years, possessing average intelligence and good eyesight, — *Held*, that, under such circumstances, he was the more bound to use his eyesight, and that the question of his contributory negligence was properly submitted to the jury.

5. Where it appeared that when the motorman saw the deceased approaching the track, with an evident intention to cross, without seeing the car, the motorman applied the brakes, but they were so defective that they did not work, and he received a shock from the defective motor that delayed his purpose for a second; that he could not stop the car until the injury was done, because of the defective brakes; that the car ran 50 feet after striking the deceased; that the defendant had repeated notice of the defective brakes and motor, but failed to repair them; that, if the car had been in repair, it could have been stopped within 8 feet, — *Held*, that the defendant was negligent in the use of such car.

6. If the defendant knowingly placed in operation upon the public street a defective car that could not be controlled because the appliances provided for that purpose were out of repair, and the injury complained of was occasioned by such defective brakes and appliances, and the motorman was unable to avoid the effect of the contributory negligence of the deceased, because of such defects, then it could properly be said that the defendant's negligence was the proximate cause of the injury.

7. The defendant should not be allowed to excuse its own want of reasonable care, and avoid liability, by showing that, prior to and at the time of the accident, it had knowingly been negligent in keeping its car and appliances in order and repair, and that on account of such negligence it was unable to prevent the injury complained of at the time by the use of ordinary care.

(February 19, 1898.)

APPEAL by defendant from a judgment of the District Court for Salt Lake County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's minor child. *Affirmed.*

Statement by Miner, J.:

This action was brought to recover damages for negligently causing the death of the plaintiff's son. The complaint charges that the defendant negligently and carelessly failed to have its cars supplied with suitable brakes, switches, and motors, and that by reason thereof, and of the negligent and careless operation of its cars, it was driven on and over the plaintiff's son, a minor child of fifteen years, who died from the effects of the injuries received. The testimony on the part of the plaintiff was to the effect that, upon the day in question, the defendant's car was proceeding in an easterly direction along Fourth South street, Salt Lake City, at the rate of 6 or 7 miles an hour; that at this time the plaintiff was engaged in vending in said city, and had stopped

his cart on the east side of the street, at a distance of about 40 feet from the railroad track; that the deceased, a deaf and dumb boy between fourteen and fifteen years of age was with him, and was sent on an errand across the street, and across the railroad track. The plaintiff, when he sent his son across the street, did not look up and down the track to see if a car was approaching. If he had done so, he would have seen the car in question. No obstruction prevented his view of the car. After the boy had started across the street, the plaintiff was busy, with his face turned in the opposite direction. The boy had proceeded but a short distance when the plaintiff's attention was attracted by the ringing of the bell on the street car. He looked up, and saw the car approaching, at a distance of about 39 feet from the place where the boy was. At the same time, the boy was about 20 feet from the place of the accident. He said at first he was not alarmed; that he did not think there was any danger; that, if the boy had had his hearing, the ringing of the bell would have attracted his attention, but when the boy had gotten within 3 or 4 feet of the track, and the car was then within a short distance, he then for the first time became alarmed. Plaintiff did not see the deceased look up or look in the direction of the approaching car. The motorman rang the bell three or four times, and then, finding it did not attract the attention of the boy, attempted to stop the car, but failed; and the car struck the boy, who died from the effect of the injuries. The car was 40 or 50 feet from the plaintiff at this time, and the boy was passing on north, towards the railroad track, seemingly intent on his errand, and without noticing the car. The car struck the boy as he passed over the north rail. The car passed on about 58 feet beyond where the boy was struck before it was stopped. The boy attended school, and could understand signs in writing. Plaintiff did not consider it as safe for the boy to be out as it would be if he could hear and speak. The boy had no other defect except that he was deaf and dumb. He was a well-grown boy, a little over the average size, and equalled the average of intelligence and quickness of comprehension as compared with children in the full possession of their faculties. He knew of the existence of street cars and lines. The motorman testified that the car was running at a rate of about 6 miles an hour; that he saw the boy coming north when about 20 feet from the track; that he put his foot on the gong, and turned off the power, intending to reverse the car; that, when he turned off the power, he had one hand on the brake, and received a shock from the motor that disabled him for a second; that the hind brake of the car was loose, and kicked off; that the brakes on the car were not in good condition; that the car had been disabled in a collision in March before the accident, and after that it could not be controlled by the brakes; that shocks from the brakes were frequent; that, when he turned off the power, he intended to reverse but for the shock he received; the car had been out of repair for a considerable length of time before the accident, and witness had reported it to the proper officer of defend-

ant every time he used it for weeks prior to the accident; that the brakes would not stop the car; that he applied the brakes as soon as he saw the boy was likely to cross the track, and did all he could to warn the boy and stop the car, but could not stop it in time to save him; that the boy did not look up towards the car, but looked straight ahead; that, if the car had been in repair like other cars, he thought he could have stopped it, by reversing in about 8 feet. Other witnesses testified that the motor was out of repair; that the axles were sprung; that the brakes would not work; and that motormen would frequently be shocked by electricity from the motor. Such reports came from the motormen to the night inspector very frequently before the accident. The defendant offered testimony tending to show that the car and brakes were in good condition at the time of the accident.

Messrs. Williams, Van Cott, & Sutherland, for appellant:

In the case at bar the deceased, so far as the evidence shows, did not look up or down the track before starting across the street or at any time thereafter. If there can be such a thing as the establishment of contributory negligence as a matter of law, by reason of failure of a person to make use of his senses before crossing a railroad track, surely it was established in this case.

Ehrisman v. East Harrisburg City Pass R. Co. 150 Pa. 180, 17 L. R. A. 448; *Carson v. Federal Street & P. Valley R. Co.* 147 Pa. 219, 15 L. R. A. 257; *Ward v. Rochester Electric R. Co.* 43 N. Y. S. R. 84; *Hamilton v. Third Ave. R. Co.* 6 Misc. 382; *Davidson v. Denver Tramway Co.* 4 Colo. App. 283; *Kelly v. Hendrie*, 26 Mich. 255; *Boerth v. West Side R. Co.* 87 Wis. 288; *Chicago West Div. R. Co. v. Bert*, 69 Ill. 389; *Philadelphia & R. R. Co. v. Peebles*, 28 U.S. App. 405, 67 Fed. Rep. 591, 14 C. C. A. 555; *Booth, Street Railway Law*, § 5816; *Thompson v. Buffalo R. Co.* 145 N. Y. 196; *Buzby v. Philadelphia Traction Co.* 126 Pa. 559.

The fact that the deceased was deaf and dumb, and was of the age of only fourteen or fifteen years, does not excuse him from full legal responsibility for his contributory negligence.

Purl v. St. Louis, K. C. & N. R. Co. 72 Mo. 168; *Schernadrye v. Texas & P. R. Co.* 46 La. Ann. 248; 2 Shearm. & Redf. Neg. § 481; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164; *Wendell v. New York C. & H. R. Co.* 91 N. Y. 420; *Tucker v. New York C. & H. R. Co.* 124 N. Y. 308; *Reynolds v. New York C. & H. R. Co.* 58 N. Y. 248; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602; *Rodgers v. Lees*, 140 Pa. 475, 12 L. R. A. 216; *Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765; *Messenger v. Dennie*, 137 Mass. 197, 50 Am. Rep. 295; *Ecliff v. Wabash, St. L. & P. R. Co.* 64 Mich. 196; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413.

The plaintiff himself was also guilty of contributory negligence, and this would prevent a recovery irrespective of the negligence of the deceased.

Beach, Contrib. Neg. § 44; *Pratt Coal & I. Co. v. Bravely*, 83 Ala. 371; *Johnson v. Reading City Pass. R. Co.* 160 Pa. 647.
40 L. R. A.

In the case at bar, whatever negligence there was on the part of the defendant in sending out a car with defective brakes and motor had already occurred. It preceded, or at most was concurrent with, the negligence of the deceased. The negligence of the deceased in running in front of the approaching car was later in time or at most was concurrent with that of the company in that respect. In either event, nothing more being shown, the defendant would not be responsible.

If the boy was guilty of contributory negligence, the defective condition of the car was not the proximate cause of the injury, but the negligence of the boy was.

Hays v. Gainaville Street R. Co. 70 Tex. 602; *Beach, Contrib. Neg.* pp. 58 et seq.; *Keefe v. Chicago & N. W. R. Co.* 92 Iowa, 182; *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 287.

Not only was the contributory negligence of deceased subsequent to the negligence of the defendant in sending out a defective car, but if the motorman was negligent in not stopping or slowing up, the contributory negligence of the deceased was concurrent therewith down to the moment before he stepped on the track in front of the advancing car.

Missouri P. R. Co. v. Moseley, 12 U. S. App. 601, 57 Fed. Rep. 921, 6 C. C. A. 641; *Kirtley v. Chicago, M. & St. P. R. Co.* 65 Fed. Rep. 386; *Watson v. Mound City Street R. Co.* 133 Mo. 246.

Messrs. Franklin S. Richards and James H. Moyle, for respondent:

The case is purely one of proximate cause, and, by analogy, comes clearly within the principle laid down in *Hyde v. Union P. R. Co.* 7 Utah, 356.

It is enough that when the opportunity was presented it was unavailing, solely because of the defendant's negligence.

Hall v. Ogden City Street R. Co. 13 Utah, 243; *Penny v. Rochester R. Co.* 7 App. Div. 595.

Miner, J., delivered the opinion of the court:

The court submitted the question of the negligence of the defendant, the contributory negligence of the deceased, in connection with his age, capacity, and condition under the circumstances, and the condition of the car, to the jury. The court instructed the jury, among other things, that, "even though you believed the son of the plaintiff was guilty of contributory negligence by crossing the track without observing whether or not the cars were running thereon and in operation, or by any other act, and that, if he had been free from such contributory negligence, the injury would not have occurred, yet if the motorman, after the act of contributory negligence complained of, had the opportunity, or could, by the use of reasonable care, had the brakes and motor of the car been in proper condition, have avoided the accident, then the act of said motorman, which is the act of defendant company, was the proximate cause of the injury complained of by the plaintiff." "If you believe from the evidence that the defendant company exercised due care and caution in operating the car at the time of the

accident, and that the accident was not in any way the result of any defect in the appliances for controlling the car, then the defendant would not be liable." Exceptions were taken to these instructions. Appellant's counsel contend that conceding the fact that the defendant was negligent in sending out a defective car, and that the deceased was also negligent in crossing the track in front of the car, in such a case it was the only duty of the defendant, after discovering the dangerous situation of the deceased caused by his own negligence, to exercise all reasonable care and diligence at his command at the time of the injury, and that when the motorman did all he could to stop the car, although its brakes were defective, the defendant could not be held liable, even if the car had been sent out in a defective condition with the defendant's knowledge; that, as nothing could be done by the motorman after the discovery of the boy's negligence to remedy the defective condition of the car, all that he was required to do was to use the defective appliances which he had to stop the car; that, if the deceased was guilty of contributory negligence, the unsafe and defective condition of the car, although known to the defendant, was not the proximate cause of the injury. The result of such a doctrine would be that under such circumstances, when the defendant discovered negligence in a plaintiff, he could legally excuse the exercise of his own want of reasonable care, by showing that its appliances and brakes were in such a wretched condition at the time, on account of its previous and continued negligence, that it was incapacitated from preventing the injury complained of at the time by the use of reasonable care. This position of the able counsel for the defendant is not only ingenious, but is apparently supported by some authority bearing upon the general question of contributory negligence; but we cannot subscribe to such a doctrine when applied to the operation and management of electric cars upon the streets in a city where the lives and safety of pedestrians are largely dependent upon the safe equipment and perfect condition of the appliances with which a street car is propelled, operated, and controlled. If such a doctrine should be established, it would practically place the exclusive right to the use of the street occupied by the street-car company in such company, to the exclusion of the citizen. If the citizen used the street, he would do so at the peril of his own safety. If such rules were applicable to contributory negligence, his safety in crossing a street where street cars were operated, with his right to recover damages in case of negligence, would largely depend upon the option of the company to keep its appliances in good repair. In case of his injury by its negligence, the fact of such negligence on the part of the company would be a bar to his recovery in case he contributed to the accident, which the company could, by the use of reasonable care, have avoided.

Persons traveling upon a public street, and crossing street-car tracks, are not held to the same degree of care as when crossing a steam-railroad track. This is so because in the one case the street car can or should be in such a

condition as to be brought readily under control, and because the public have a right to travel upon all of the public streets, while such rights do not usually exist with reference to steam-railroad tracks. When the streets were originally platted, they were not designed for street railways, but were confined to the right of public travel, with equal rights to all persons traveling thereon. The right conferred upon a street railway is not superior to that of the public at large, except the right to lay its tracks and operate its cars, which must be done with as little inconvenience as possible to the public travel. The right conferred includes no exclusive right to use the track or street. Neither has the citizen the exclusive right to the use of the street or track. The cars have the right of way in case of meeting vehicles or persons on the track, but each party is bound to exercise such ordinary care, prudence, and precaution to avoid injury as the surrounding circumstances may require. That which might be ordinary care in running horse cars might be gross negligence in operating street cars propelled by electricity or running at a high rate of speed. The electric car is propelled by a force that cannot be easily controlled except by such appliances as are expressly provided for that purpose. Without these appliances to control it, it becomes dangerous. Neglect to provide these safeguards for its control and management is negligence. "The duty of the company to recognize the rights of persons in the lawful use of the streets is imperative, and, if it adopts a propelling power which increases the hazards of such persons, it must be held to a degree of care proportionate to the increase of danger because of such propelling power. This is so because, the more dangerous the appliance, the more likely it is for casualties to happen; and, consequently, the greater the degree of care which must necessarily be exercised in order to avoid their occurrence." When the defendant placed its cars upon the track for service, the deceased had a right to expect that the usual appliances required for starting, stopping, and controlling the car were provided. Knowingly placing an electric car upon a track in a public street, and allowing it to run without such appliances for its control, is not only gross negligence, but it may amount to criminal negligence in case of injury to one without his fault.

In the case at bar, the motorman saw the deceased when he was about 20 feet from the track. He rang the bell, and as the deceased approached the track, with the evident intention of crossing without looking up or seeing the car, he applied the brakes, and intended to reverse the car; but the handle of the brake was so out of repair that he received an electric shock from the motor that disabled him for a second, and delayed his purpose. The brakes were out of repair, and would not work, and he could not stop the car with the appliances furnished until the injury was done; and, with all his efforts to stop the car, it ran about 50 feet after it struck the boy before he could stop it. Notice of the defective condition of the car had been given the defendant company many times prior to

the injury, but the defect had not been remedied. The testimony shows that, had the car been in repair like other cars, the motorman could have stopped it by reversing it in about 8 feet. These facts undoubtedly present a clear case of negligence on the part of the defendant company. If the motorman had not received the shock from the motor, he could have reversed and stopped the car. If the brakes had been in order, he might have stopped the car, and prevented the injury.

The testimony also shows that the deceased was deaf and dumb, but a well-grown boy, a little over fourteen years of age, and possessed of at least average intelligence and quickness of comprehension. He was acquainted with street cars. His eyesight was good. He was of sufficient age and intelligence to understand the dangers that surrounded him in that locality, and, on account of the defect he was laboring under, was more bound to use the sight he possessed for his own safety. The question of his contributory negligence was properly submitted to the jury. 2 Shearm. & Redf. Neg. § 481. Both parties being negligent, the true rule is held to be that "the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." 1 Shearm. & Redf. Neg. § 99. It is also well settled that a plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding the injury to him. 1 Shearm. & Redf. Neg. § 99.

Under such circumstances, the obligation rested upon the defendant to exercise reasonable care to avoid the consequences of the deceased's negligence; and the question as to whose negligence was the direct and proximate cause of the accident was one of fact for the jury to determine, under all the facts and circumstances of the case. The question was properly submitted for their determination, and they found against the defendant. Under the circumstances shown, it was clearly the duty of the defendant to have had the car supplied with sufficient brakes, motors, and appliances, with which it could be controlled. The motorman should have been furnished with suffi-

cient means and suitable appliances with which to slow down and stop the car immediately on the first appearance of danger. Allowing the appliances adopted and in use for the purpose of controlling the car to become out of repair and useless for that purpose, and the inability of the motorman to stop the car for that reason, were doubtless, as the jury found, the proximate cause of the accident. The defendant should not be allowed to excuse its own negligence and want of reasonable care in such cases, and avoid liability, by showing that prior to and at the time of the accident he had knowingly been negligent in keeping his car and appliances in order and repair, and that on account of such negligence he was unable to prevent the injury complained of at the time by the use of ordinary care. If the defendant knowingly placed in operation upon the public street a defective car, that could not be controlled because the appliances provided for that purpose were out of repair, and the injury complained of was occasioned by such defective brakes and appliances, and the motorman was unable to avoid the effect of the contributory negligence of the deceased, because of such defects, then it would properly be said that the defendant's negligence was the proximate cause of the injury. In the case of *Penny v. Rochester R. Co.* 7 App. Div. 595, it appears that a box of sand was usually provided for use upon the car, but was not provided for use at the time of the accident. The court held the following instruction proper: "If the jury shall find that, by the use of sand at the time this accident happened, the car might have been stopped in a shorter space than it was, it was a question for them to say whether it was not negligence on the part of the defendant that there was no sand there to use." We are of the opinion that the court committed no error in its instructions to the jury. *Hall v. Ogden City Street R. Co.* 13 Utah, 243; *Penny v. Rochester R. Co.* 7 App. Div. 595; 1 Shearm. & Redf. Neg. §§ 481-483; 2 Shearm. & Redf. Neg. §§ 481-483; Booth, Street Railway Law, § 305, *Dederichs v. Salt Lake City R. Co.* 13 Utah, 34. We are also satisfied that there was evidence to support the verdict. We find no reversible error in the record.

The judgment of the District Court is affirmed.

Zane, Ch. J., and Bartch, J., concur.

OHIO SUPREME COURT.

E. J. LETTS, *Plff. in Err.*,

v.

Margaret KESSLER.

(54 Ohio St. 73.)

"L and K owned adjoining lots, and L erected on his lot a board fence reaching to the roof of K's house which stood on the line of the two lots, which fence shut off light and air

from the windows of the house of K to its injury, which fence was so erected by L for no useful or ornamental purpose, but from motives of un-mixed malice towards K. In an action by K against L to compel the removal of the fence—*Held*, that L had a legal right to erect and maintain such fence, and that neither law nor equity could compel its removal.

(January 21, 1896.)

*Headnote by the COURT.

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a

NOTE.—Liability for the malicious erection of a fence.

- I. Introduction.
- II. Malice gives no ground of action.
- III. Contrary doctrine.
- IV. State statutes and decisions thereunder.

As to the American law upon the question of easements in light, air, and prospect, see *note to Case v. Minot* (Mass.) 22 L. R. A. 536.

Upon the question of malice as an element of a cause of action, see *note to Chambers v. Baldwin* (Ky.) 11 L. R. A. 546.

This note is confined exclusively to the question of the malicious erection of a fence, and does not include other cases wherein action has been brought for the obstruction of light and air, whether claimed under a title by prescription or by grant in which the question of malice has not arisen.

I. Introduction.

There is conflict of opinion upon the question presented in the principal case, *LETTS v. KESSLER*. Many of the cases support the doctrine established therein, and hold that an act, legal in itself, violating no legal right, cannot be made actionable even though it is prompted by malice, and is prejudicial and injurious to others. Other courts of equal ability have, however, held that if one does an act wholly on his own land, legal but prejudicial to his neighbor, not for his own ornament or profit, but through un-mixed malice to his neighbor, then he has done his neighbor an injury that is actionable.

It is presumed, however, that the courts upholding the first doctrine would hardly hold it to apply in cases where the plaintiff or party damaged by such acts has obtained a title by grant or by prescription, if one can be acquired thereby,—at least where malice actually exists. The rule established by the first line of cases springs from the fact that the courts of the several states of the Union have refused to recognize the English doctrine of ancient lights, and hold that a man has a right to do anything he pleases upon his own land, provided he does it legally and does not create a nuisance. They uphold the maxim *Cujus est solum ejus est usque ad cælum*, in its fullest sense.

This conflict of opinion has in some states been remedied by express statutory enactment, making the person erecting a fence for malicious motives, or contrary to the provisions of the statute relating thereto, liable in damages to the party injured.

II. Malice gives no ground of action.

In *Pickard v. Collins*, 23 Barb. 458, it is said that it is a general rule that the owner of land may use it according to his pleasure, but the rule is subject to the qualification that he must not use it in such a manner as to infringe the rights of others. So use your own that you injure not other's property, is a maxim of law supported by the soundest wisdom. But the injury intended is a legal injury, an invasion of some legal right, as erecting a building or carrying on a business on one's own land

which so obstructs the enjoyment by another of his property as to amount to a nuisance, or removing soil or placing something on the soil of another, such acts being violations of absolute legal rights and strict legal injuries. But darkening another's windows, or depriving him of a prospect by building on one's own land, where no right to the light unobstructed has been acquired by grant or prescription, digging by a person on his own soil so as to endanger the foundation of the building of the adjoining owner, and numerous similar acts by an owner of land impairing the enjoyment and value of the land of another short of what the law deems a nuisance, invade no legal right, and hence are not legal injuries.

So, in *Levy v. Brothers*, 4 Misc. 48, wherein plaintiff sought an injunction to restrain defendant from erecting a sheet-iron fence on the extreme boundary of his own land maliciously, for the express purpose of shutting out the light and air from plaintiff's premises, the court, in refusing the relief, stated that, under the rule prevailing in that state, an owner of property might place windows in the walls of his house, though they overlooked his neighbor's land, and that it was his right so to do, yet the neighbor had some rights also, for he might, if he chose to do so, build to the extreme end of his land, and in that way shut off the offending windows. Indeed, he might build for the express purpose of shutting them off, and whether the erection consisted of poles with sheet-iron plates or of solid brick, was all the same, and the motive was of no consequence whatever, for where an act was legal the motive with which it was done was wholly immaterial. *Nihilus videtur dolo facere, qui suo jure utitur*. The acts complained of did not constitute, in a legal sense, the use by the defendants of their property to the injury of another, for no one, legally speaking, is injured or damaged unless some legal right of his has been infringed.

The mere fact that a structure built by one upon his own land obstructs the view, and shuts off the light and air from his neighbor's premises, affords no ground of action, and the doctrine of prescription has no application. *Knabe v. Levell*, 23 N. Y. Supp. 818, 824.

Under ordinary circumstances, a man has a right to build a block and occupy every inch of his land; and may do as he sees fit, and judge what is fit, so long as he does no injury to adjoining property, and does no more injury than a fence possibly could do; and it will be an injury for which there is no remedy, it being a man's right to use his premises as will best subserve his purpose, when he is doing it in a lawful manner, and not doing it to injure or annoy his neighbor or adjoining property. *Peck v. Bowman*, 22 Ohio L. J. 111, 113.

A person may do what he pleases upon his own land, and, so long as he violates no legal duty which he owes his neighbor, he is not liable although he may perform the act for the sole purpose of injuring his neighbor. *Dawson v. Kemper*, 32 Ohio L. J. 15; *Paine v. Chandler*, 184 N. Y. 385, 19 L. R. A. 90,

judgment of the Court of Common Pleas in favor of plaintiff in an action brought to enjoin defendant from maintaining a fence in such a manner as to shut out the light and air from plaintiff's windows. *Reversed.*

Statement by Burket, J.:

The plaintiff below, defendant in error here, filed her petition in the court of common pleas against defendant below, plaintiff in error here, averring that she was the owner by purchase under a land contract of certain premises in the city of Cleveland, that defendant owned and occupied the lot on the east side thereof,

that she used her premises as a hotel and boarding house, that he was erecting a high board fence on his ground which would obstruct her windows and deprive her of light and air, that said fence was not being erected for any useful or ornamental purpose, but from motives of pure malice alone, and for the express malicious purpose of annoying plaintiff, and excluding light and air from her house so as to render her house uninhabitable, to injure the value thereof, and that said fence would exclude the light and air and thereby greatly injure the value of her house. She prayed that he might be restrained from completing said

So the maxim, *Sic utere tuo, ut alienum non lædas*, applies only to cases where the act complained of violates some right, and an act, legal in itself, violating no right, cannot be made actionable upon the ground of the motive which induces it. Dawson v. Kemper, 32 Ohio L. J. 15; Phelps v. Nowlen, 72 N. Y. 46, 25 Am. Rep. 93.

Bad motives, in doing an act which violates no legal right of another, cannot make that act a ground of action. Pickard v. Collins, 23 Barb. 458.

It has been stated that malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful. As long as a man keeps himself within the law, by doing no act which violates it, his intentions must be left to Him who searches the heart, and damages can never be recovered where they result from a lawful act of the defendant. Dawson v. Kemper, 32 Ohio L. J. 15; Jenkins v. Fowler, 24 Pa. 306.

Where a person exercises his legal rights in acts done upon his own property, without infringing upon the rights of his neighbor, the mere fact that he is influenced in his actions by a wrong and malicious motive is no ground for the interference of the courts. Phelps v. Nowlen, 72 N. Y. 30, 25 Am. Rep. 93.

A man may erect upon his land the smallest or most temporary kind of dwelling house or store in close proximity to the finest mansion, block, or building, and that for the mere sake of spiting the owner of such mansion or block by the contrast, without becoming subject to restraint at the hands of the courts, for if the improvement itself is legitimate and lawful, it is not *per se* a nuisance, and the law will not inquire into the motives with which he acts. Falloon v. Schilling, 29 Kan. 295, 44 Am. Rep. 642.

A man has a right to improve his property in any way he sees fit, provided the improvement is not such a one as the law will pronounce a nuisance, and this he may do although he makes such improvement through spite. Falloon v. Schilling, 29 Kan. 295, 44 Am. Rep. 642.

The universal rule is that the size and quality of the improvements a man erects upon his own land will not of themselves constitute the same a nuisance. Falloon v. Schilling, 29 Kan. 295, 44 Am. Rep. 642.

And in Triplett v. Jackson, 5 Kan. App. 777, 779, the court upheld the doctrine that one when using his property for any lawful purpose may build thereon any structure which is not a nuisance *per se*, and the law will not inquire into the motives with which the owner acts in its inception, although it stated that there might be some special prohibition by city or town ordinance or state statute which would render the act illegal.

An action on the case does not lie against a person for erecting a fence on his own land, whereby he obstructs the lights of his neighbor, let the motive of the obstruction be what it may, if the lights be not ancient lights or his neighbor has not acquired a right by grant or occupation and acqui-

escence. Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461.

In Auburn & C. Pl. Road Co. v. Douglass, 9 N. Y. 444, it was held that the owner of property may put it to any use he pleases so long as he does not interfere with the legal rights of another, and any loss or damage occasioned by his acts to an adjoining owner is *damnum absque injuria*, provided no prior legal right to restrict such use has been acquired, and in such a case the motives of such owner are immaterial.

It is error to charge the jury, in an action to recover damages for erecting a fence upon defendant's premises, immediately adjoining those of the plaintiff, thereby obstructing the light and air, that the defendant has no right to build such fence for the purpose of excluding the light from the plaintiff's premises, and that, if he has done so, he is liable for damages, as no liability attaches in such a case, even though the defendant may have been actuated by some motive, his liability not depending upon the question of motive. Packard v. Collins, 23 Barb. 444, 458.

In Rideout v. Knox, 148 Mass. 368, 2 L. R. A. 81, the court said that respectable authors have intimated that even at common law the extent of a man's right in cases of this sort might depend upon the motive with which he acted. And the following authorities are cited to the proposition: Greenleaf v. Francis, 18 Pick. 117, 119, 122; Carson v. Western R. Co. 8 Gray, 423, 424; Poath v. Driscoll, 20 Conn. 533, 544, 52 Am. Dec. 352; Wheatley v. Baugh, 25 Pa. 523, 64 Am. Dec. 721; Swett v. Cutta, 50 N. H. 430, 447, 9 Am. Rep. 276.

The court, however, stated that it did not so understand the common law, and conceded that to a large extent the power to use one's own property maliciously, in any way which would be lawful for other ends, was an incident of property which could not be taken away even by legislation.

So, in Triplett v. Jackson, 5 Kan. App. 777, 779, the court dissolved the injunction of the court below restraining the defendant from erecting a high board fence on and near the line dividing the lots of the contending parties, the same not being a nuisance.

In Lapere v. Luckey, 23 Kan. 534, 33 Am. Rep. 196, the plaintiff sought to recover damages from defendant for the obstruction of light and air from his premises by means of a high board fence, alleged to have been erected by the defendant wrongfully, unlawfully, maliciously, and wickedly. The court refused relief, as the doctrine of ancient lights did not prevail in that state.

In Falloon v. Schilling, 29 Kan. 295, 44 Am. Rep. 642, the erections were placed upon the defendant's lands, not for the purpose of improvement, but from spite and in order to annoy the plaintiff, who had refused to sell his property to defendant at an under value. The court refused relief, even though spite existed, the erections being lawful ones and not nuisances.

In Ladd v. Flynn, 90 Mich. 181, the defendant

fence, and that upon a final hearing a mandatory injunction might compel its removal.

Defendant below demurred to this petition, and the demurrer was overruled and exceptions taken. The ruling upon this demurrer is reported in 7 Ohio C. C. 108.

He then filed an answer, in substance a general denial, with an averment that the fence was erected to prevent the rush of water and eve drip from her premises onto his. This she denied in her reply. The case went to the circuit court on appeal, and that court overruled the demurrer, and on the trial made a finding of facts containing in substance the allega-

built a board fence 16 feet high, shutting off the light from complainant's windows maliciously. Defendant averred that the same was built to screen his tenants from view, and from unpleasant observations and comments of the complainant's tenants. The court set aside an injunction of the court below, as the order of the court attempted to interfere with defendant's claimed rights, and to abate the fence, the court having no power to determine the rights of the parties on affidavits, or on a motion for a preliminary injunction.

The enjoyment of light and air from adjoining premises cannot be acquired in Ohio by prescription, and the owner of premises may utilize their entire area by constructing upward and downward, and if by his structure he cuts off the light and air which his neighbor has theretofore enjoyed, and works positive injury to the health, happiness, and property of the adjoining proprietor, yet the latter takes the chance of losing the use of his windows by such construction, and has no legal remedy. *Dawson v. Kemper*, 32 Ohio L. J. 15.

In *Dawson v. Kemper*, 32 Ohio L. J. 15, the defendant had nailed a frame-work of boards upon the wall completely covering the apertures in which the plaintiff's windows were, and thereby had shut out the air and light from the plaintiff's house. The plaintiff alleged that the defendant's acts were not to subserve any useful or lawful purpose, but were actuated by malice, and were for the purpose of injuring the plaintiff and his property, and an injunction was therefore sought. The defendant denied the malice, and averred facts sufficient for closing up the windows. The court refused the relief sought, holding that the defendant's act was *damnum absque injuria*, stating that the distinction between common right and the absolute right attached to the ownership of land was a controlling cause in such cases, as the plaintiff had no right in the defendant's land, or in the light and air above, but the defendant's right thereto was absolute and positive, no common right existing between them, and the defendant therefore infringed no right of his when he used his own estate, the element of malice or motive being immaterial.

In the above case the court declined to follow the decision of the circuit court in *Kessler v. Letts*, 7 Ohio C. C. 108, upon the ground that it considered that case wrongly decided, the court intimating that the dissenting opinion of Baldwin, J., stated the law in that state on the question involved.

In *Haverstick v. Sipe*, 33 Pa. 368, plaintiff's windows were obstructed by a fence. The defense showed that the defendant was much annoyed by the window shutters of plaintiff being left standing and obstructing an alley way, and from his family throwing dirt through the windows into the alley, rendering it extremely offensive, and by the fact that the windows were used by his family for the purpose of overlooking and watching all that passed

on the premises, and that the fence was erected for the purpose of preventing such annoyance. The court held that the plaintiff had no implied easement to light and air, and, the fence being erected for his own protection, and in the proper enjoyment of his property, was entitled to be maintained, but intimated that if the fence was not so constructed, but was erected simply to annoy and injure the plaintiff, the circumstances might be different.

The dissenting opinions of Campbell, Chief Justice, and Champlin, J., in *Burke v. Smith*, 69 Mich. 380, 383, 389, 8 L. R. A. 184, note, *infra*, III., support the doctrine held by many of the courts, that the plaintiff, having no easement in the light and air, either by grant or prescription, can acquire no right to the same as against his adjoining neighbor, and the mere fact that the obstruction or fence is erected maliciously makes no difference, the act being done upon the defendant's own property.

So, the dissenting opinion of Baldwin, J., in *Kessler v. Letts*, 7 Ohio C. C. 108, *infra*, III., holds that the plaintiff was not entitled to the relief sought, as he had no right to the light and air over the premises of the defendant, and that no right of heirs was infringed upon, and that such decision would be a bad precedent, and lead to the overruling of the doctrine in that state against prescriptive rights in light and air.

Upon appeal from the circuit court the holding of the majority of the court was reversed and the principles stated in the above dissenting opinion were upheld. See *Letts v. Kessler*.

In *Symonds v. Seabourne*, Cro. Car. 325, it was claimed that the defendant maliciously erected a structure upon his land, for the purpose of depriving the plaintiff of light coming from his windows into his house, thereby totally darkening the house. It was held that an action on the case would lie for obstructing the light of an ancient messuage. In this case, however, the court did not pass upon the question of malice, but decided it upon the ground of ancient lights.

In *Honsel v. Conant*, 12 Ill. App. 250, the plaintiff claimed that the hedge or fence erected by the defendant intercepting the current of air from plaintiff's premises, had rendered the same unwholesome and unhealthy, and was wilfully maintained with an intent to injure the plaintiff. The court stated that, as it was not shown that the fence in question was made of offensive material, and was a nuisance, the plaintiff had no cause of action, as the defendant had a right to erect such a fence on his own land, no right to the contrary existing either by prescription or grant.

And in *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570, the plaintiff alleged that the defendant had wrongfully, maliciously, wilfully, and injuriously darkened plaintiff's windows by means of a board fence of such height as to hide the original fences, but, no prescriptive right or other agreement being shown to exist, the plaintiff failed to recover, the doctrine of ancient lights having no application in that state.

plaintiff as a boarding house. Defendant owns and occupies premises adjoining plaintiff on the east. Between the two houses is a driveway and open space about 20 feet wide. Plaintiff and defendant had litigation in May, 1891, on account of defendant having attached a shed roof to her building without consent of said plaintiff. About two weeks after the trial of said law suit, the defendant took down said shed roof and built up against the house of said plaintiff a tight board fence. The said fence was 86 feet long. The scantlings were placed against the wall of said plaintiff's house and reached up under the eaves of the

same. Boards were nailed onto said scantlings, beginning about 2 feet from the ground and extending to the sills of the second-story windows. Defendant nailed on the rear portion of said fence and extending about 40 feet toward the front, a shed roof. Under this shed roof defendant had lumber piled. Said board fence completely covered up the bathroom, kitchen, bedroom and library windows, rendering said portion of house dark, damp, and uninhabitable, and causing a substantial damage to the same. Said structure was erected upon the land of the defendant and belonged to him. The structure was erected by said de-

So, in *Ward v. Neal*, 35 Ala. 602, the plaintiff sought to have a fence, erected by the defendant near to plaintiff's windows, enjoined and abated, and alleged that the same was wrongfully and injuriously erected, but the case turned upon the question of the plaintiff's right in ancient lights and title by prescription, and not upon the question of the malicious or wilful motives of the defendant.

See also *Carson v. Western R. Co.* 8 Gray, 423; *Fifty Associates v. Tudor*, 6 Gray, 255, *infra*, III.

III. Contrary doctrine.

At common law a man has a right to build a fence on his own land as high as he pleases however much it may obstruct his neighbor's light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only. But it is plain that the right to use one's own property for the sole purpose of injuring others is not one of the immediate rights of ownership. It is not a right for the sake of which property is recognized by law, but is only a more or less necessary incident of rights which are established for very different ends. *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81.

It cannot be regarded as a maxim of universal application, that malicious motives cannot make that a wrong which in its own essence is lawful. *Burke v. Smith*, 69 Mich. 380, 8 L. R. A. 184, *note*; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569.

The wanton infliction of damage can never be a right. It is a wrong, and a violation of right, and is not without remedy. *Burke v. Smith*, 69 Mich. 380, 388, 389, 8 L. R. A. 184, *note*.

In *Kessler v. Letts*, 7 Ohio C. C. 108, the court stated that the doctrine that one may erect anything on his own land for no use or ornament, but merely to injure his adjoining neighbor, seemed to it to be a monstrous doctrine, one most offensive to the principles of equity, most unjust, fostering and cloaking with a false mantle of justice, wrong, malice, and a malignant and wanton injury to another.

The holding in this case has, however, been reversed. See principal case *LETTS v. KESSLER*.

No man has a legal right to make a malicious use of his property, not for any benefit or advantage to himself, but for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine, in such cases, to injure and destroy the occupation and comfort, and to damage the property, of one's neighbor, for no other than a wicked purpose which itself is or ought to be unlawful. *Burke v. Smith*, 69 Mich. 380, 388, 8 L. R. A. 184, *note*.

The right to breathe the air and enjoy the sunshine is a natural one, and no man can pollute the atmosphere or shut out the light of Heaven for no better reason than that the situation of his property is such that he is given the opportunity for so doing, and wishes to gratify his spite and malice towards
40 L. R. A.

his neighbor. *Burke v. Smith*, 69 Mich. 380, 388, 389, 8 L. R. A. 184, *note*.

Where the structure is maliciously erected in a stealthy manner, and is injurious to the adjoining owner, the court will enjoin its continuance. *Harbison v. White*, 48 Conn. 106.

In *Burke v. Smith*, 69 Mich. 380, 8 L. R. A. 184, *note*, as a result of a quarrel and petty annoyances between the parties, the defendant erected a screen or fence upon his own land in front of the windows in plaintiff's house, not for any necessary or useful or ornamental purpose, but simply to shut out the view of his premises. The statements made by the defendants showed that it was done for the sole purpose of annoying plaintiff, and with malice. The court by equal division affirmed the decree of the court below abating the fence as a nuisance, although Chief Justice Campbell, and Champlin, J., dissented.

That doctrine was affirmed by a unanimous court in *Flaherty v. Moran*, 81 Mich. 52, 8 L. R. A. 183. There the defendant built a screen or board fence, about 10 feet in height, along the line of lots and upon his own premises, extending from the front wall of the complainant's house backward the whole length thereof. It was claimed that the same was built maliciously and for the purpose of darkening the complainant's room, and for no useful purpose. The bill was filed to compel the defendant to remove such fence. It being proved that the fence served no useful or needful purpose, and was built out of pure spite and malice, a decree of the court below enjoining its erection was upheld.

Again in *Kirkwood v. Finegan*, 95 Mich. 543, it was sought to enjoin the erection and maintenance of a fence between premises occupied by the parties, which was the outcome of a quarrel between them, and its character and style indicated the motive which prompted its construction. The court therefore affirmed the decree of the court below in favor of the plaintiff, holding that the case was ruled by that of *Flaherty v. Moran*, 81 Mich. 52, 8 L. R. A. 183.

In *Sankey v. St. Mary's Female Academy*, 8 Mont. 265, the court granted an injunction restraining the defendant from obstructing the plaintiff's windows by means of a fence, which would, if erected, have entirely closed the windows in his house excluding both light and air, thereby rendering the house uncomfortable, unhealthy, and undesirable for habitation, and thus causing irreparable injury.

Where the defendant erected a very high fence up to the eaves and gables of the plaintiff's house, thereby excluding the light and air from the house, for no useful or ornamental purpose, but purely out of spite, and for the express and malicious purpose of annoying him, and to render the house uninhabitable and to injure its value, thus creating an intolerable nuisance, the court overruled a demurrer to the plaintiff's petition and granted an injunction restraining the erection of such fence, the act done from pure malice being within the reach of the principles of equity. *Kessler v. Letts*, 7 Ohio C. C. 108. This holding, is,

fendant from motives of unmixed malice toward said plaintiff and for no useful or ornamental purposes of the property of said defendant, except said shed roof, and its back wall below the shed roof, which may subserve some useful purpose of defendant in the use of his property by protecting his lumber piled thereunder. The court, upon the foregoing facts, finds and decrees that said defendant be and is hereby enjoined from proceeding further with the erection of said fence. Adjudged and decreed that said defendant, within twenty days from the entering of this decree, take

down all of said fence and scantling projecting above the roof of said shed, and all the remainder of said fence outside of and beyond said shed, and it is considered that the plaintiff recover his costs expended in the case, taxed at \$—— and that the defendant pay his own costs for which it is ordered that execution issue; to all of which the defendant excepts."

A motion for a new trial was made, overruled, and exceptions taken. Thereupon a petition in error was filed in this court to reverse the judgment of the circuit court.

however, reversed. See principal case *LETTS v. KESSLER*.

In *Peck v. Bowman*, 22 Ohio L. J. 111, 113, plaintiff sought an injunction to restrain defendant from erecting a fence 10 feet in height, of rough, unsightly boards, wholly upon the defendant's land, designed to serve no useful or ornamental purpose, but for the purpose of damaging the plaintiff and injuring his property and diminishing its value, from motives of unmixed malice, and designed expressly to shut out the view of the plaintiff, because of a bad state of feelings existing between the parties. The court, under the circumstances, continued the injunction until the further order of the court, until an opportunity was given for a full hearing, the act complained of constituting in every essential particular a nuisance.

A wall built with windows in it as a scheme to get light for defendant's factory surreptitiously, and in direct violation of law, was enjoined in *Vollmer's Appeal*, 61 Pa. 118, as a nuisance, being built contrary to the provisions of the rule as to party walls in Philadelphia, as provided by the act of 1721. *Vafsyckel v. Tryon*, 6 Phila. 401, to the same effect.

In *Fifty Associates v. Tudor*, 6 Gray, 256, the action was in tort to recover damages for breaking and entering the plaintiff's premises, and throwing down a wall which he had erected upon his own land and which obstructed the light and air from the defendant's windows. The defendant justified his actions upon the ground that he had the use and enjoyment thereof for twenty years or more. The court held that his action in removing the fence was not justifiable, as it was not shown that he was entirely or substantially deprived of light and air. The question of malicious intent, however, did not appear in this case.

In *Carson v. Western R. Co.* 8 Gray, 423, action was brought to recover for injuries occasioned by the accumulation of snow upon the plaintiff's farm in consequence of the erection and maintenance of a fence by the defendant company. It was not alleged or proved that the defendants, in erecting the fence, acted wantonly, negligently, or maliciously, or with any purpose of inflicting injury on the plaintiff or his property, but, on the contrary, that the fence was built by defendants upon their land for the legitimate object of preventing their tract from being encumbered with snow. The court therefore held that there was no cause of action, the erection of such a fence being a proper and reasonable use of the property, even though it might have caused annoyance or injury to the plaintiff, the act not falling within the maxim *Sic utere tuo, ut alienum non laedas*, but within another legal apothegm *Qui jure suo vitur neminem laedit*.

See also *Haverstick v. Sipe*, 33 Pa. 368, *supra*, II.

IV. State statutes and decisions thereunder.

The California act of March 9, 1895, regulating the height of division fences and partition walls in 40 L. R. A.

cities and towns, prohibits the erection of any fence or partition wall exceeding 10 feet in height, without a permit from the board of supervisors or city council of the city or town, and also provides that the consent of the adjoining owner shall be obtained before such permit is granted.

In *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111, plaintiff claimed that the defendant had obstructed the light and air in his premises by means of a tight board fence 20 feet high, wantonly and maliciously, but the court below did not find that the defendant acted wantonly or maliciously. It was, however, claimed that the act of the defendant was unlawful as violating the statute. The defendant contended that the said act was unconstitutional as in violation of §2, art. 11, of the state Constitution, conferring power to make and enforce such police regulations as were not inconsistent with general laws, and also upon the ground that it gave the owner of the adjoining property power to prevent such structure. The court construed the statute as constitutional, and not contrary to the general doctrine of the law which allows a man to erect anything on his own land so long as it is not a nuisance, and, as the fence in question was a division one, ordered the removal of such portion of it as exceeded the height provided for by the statute.

Section 1277 of Conn. Gen. Stat. ed. 1888, chap. 88, p. 299, provides: "An injunction may be granted against the malicious erection by or with the consent of an owner, or lessee, or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjoining land in respect to his use or disposition of the same."

In *Harblson v. White*, 46 Conn. 106, it was held that if the structure contemplated by the above statute was erected maliciously, and injured the adjoining owners, the mere fact that it screened the defendant's premises from being overlooked by the plaintiff and his family was no defense.

In *Gallagher v. Dodge*, 48 Conn. 387, 390, 40 Am. Rep. 182, the structure which it was sought to enjoin was a show case erected by the defendants upon their own premises in front of their store, so as to obstruct a side window in the plaintiff's store, for the object of displaying their own goods to the best advantage, and preventing the public from seeing those of the plaintiff through his side window. The plaintiff claimed that the action was done from malicious motives. The court held that, under the statutes, the malicious quality of the act was the predominant cause, and that the mere petty hostilities of the two parties in their business did not show sufficient maliciousness to bring the cause within the provisions of the statute, the structure intended by the statute being one which must be judged of more by its character, location, and use than by the actual motive the party had in mind at the time.

By § 5, chap. 17, *Freeman's Supplement*, Me. Rev. Stat. p. 178, chap. 188, p. 205, Me. Stat. 1893, it is provided, *inter alia*, that "any fence, or other structure

Messrs. L. A. Willson and Edward David, for plaintiffs in error:

Motive makes no difference.

Frazier v. Brown, 12 Ohio St. 294.

The maxim *Cujus est solum, ejus est usque ad eorum et ad inferos* applies to its full extent, and whatever damage may result from the exercise of this absolute right of property to adjoining proprietors is *damnum absque injuria*.

Mullen v. Stricker, 19 Ohio St. 185, 2 Am. Rep. 379.

An easement of light and air, to be supplied to one's windows from the premises of another, cannot be acquired in Ohio, by use or prescription.

Washb. Easem. 2d ed. p. 458, *380, chapter on *Rights in Subterranean Waters*.

The fence in the case at bar is not a nuisance.

in the nature of a fence, unnecessarily exceeding 8 feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

Under the above statute it has been held that in order to render the defendant liable, the plaintiff must prove that malevolence was the dominant motive and that without it the fence would not have been built or maintained; and further, that if the height above 8 feet is shown to be necessary there can be no liability, no matter what may be the motive of the owner in erecting it. The gist of the action is the fact that the structure is "maliciously kept and maintained." *Lord v. Langdon* (Me.) 39 Atl. 552.

So, a finding by the jury in a case under the Maine statute, under instructions from the court, that the controlling dominant motive of the defendant was malicious, and that the fence was erected for the purpose of annoying the plaintiff, to which no exceptions are taken, will not be disturbed upon appeal,—especially where the evidence justifies such conclusions. *Lord v. Langdon* (Me.) 39 Atl. 552.

By § 1 of chap. 358, p. 591, Mass. Stat. 1887, Supplement to Mass. Pub. Stat. 1882-1888, it is provided: "Any fence, or other structure in the nature of a fence, unnecessarily exceeding 6 feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

Section 2 of the same statute also provides that "any such owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an action of tort for the damages sustained thereby, and the provisions of chap. 180 of the Public Statutes concerning actions for private nuisances shall be applicable thereto."

In *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, it was held that the above statute was constitutional, and applied to fences erected before, as well as to those erected after, the passing of the act.

Mass. Stat. 1887 is also held constitutional in the case of *Smith v. Morse*, 148 Mass. 407.

Although, under the Massachusetts Constitution, the legislature would have no power to prohibit putting up or maintaining stores or houses with malicious intent, and thus make a large part of the property of the commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner, yet it does not follow that the rule is the same for a boundary fence unnecessarily built more than 6 feet high contrary to the provisions of the statute. *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81.

In an action for illegally maintaining a fence 40 L. R. A.

Falloon v. Schilling, 29 Kan. 293, 44 Am. Rep. 642; *High, Inj.* § 488; *Mahan v. Brown*, 13 Wend. 261. 28 Am. Dec. 461; *Greenleaf v. Francis*, 18 Pick. 123.

The proprietor, in the absence of any agreement subjecting his estate to another, may consult his own convenience in his operations above or below his ground.

Chatfield v. Wilson, 28 Vt. 49.

An act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it.

Quintini v. Bay St. Louis, 64 Miss. 483, 60 Am. Rep. 62; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 359.

The maxim "So use your own as to not injure another's property" extends only to legal injuries.

Pickard v. Collins, 23 Barb. 458; *Pierre v. Fernald*, 26 Me. 426, 46 Am. Dec. 573.

contrary to provisions of the above statute, the fence must have been erected or maintained from an actual malevolent motive, as distinguished from mere technical malice, without which it would not have been erected or maintained, in order to render it a nuisance; and if such extra height is necessary, for any reason, there is no nuisance created, and therefore no liability, and in such a case the owner is at liberty to think for himself and act on his own opinion. *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81.

Malevolence must be the dominating motive, a motive without which the fence would not have been built or maintained. A man cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor, merely because he feels pleasure at the thought of his giving annoyance, if that pleasure alone would not induce him to maintain it, and if he would maintain it even if that pleasure be denied him. *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81.

If the motives of the defendant in allowing the fence to stand are malicious the defendant may be liable although he has done nothing upon it since the passing of the statute. *Smith v. Morse*, 148 Mass. 407, *Following Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81.

Even though the word "nuisance" is used in § 1 of Mass. Stat. 1887, yet it in no sense creates an easement in favor of plaintiff, but only makes it unlawful to do malevolently what the defendant still has a right to do from other motives. *Smith v. Morse*, 148 Mass. 407.

The right of action given by § 2, Mass. Stat. 1887, to an "owner or occupant injured either in his comfort or the enjoyment of his estate by such nuisance," means that the owners may have an action under some circumstances although not in occupation. *Smith v. Morse*, 148 Mass. 407.

If the jury upon a view of the fence in question are able to say that it would have the effect of diminishing the rent, or make it more difficult to let the premises, and so be an injury to the comfort or the enjoyment of his estate, what they see is evidence in the case. *Smith v. Morse*, 148 Mass. 407.

Where the action was brought by the owner, who had never occupied the premises, and there was no evidence of injury other than that gathered by the jury from a view of the premises, it was held that the comfort or enjoyment which must be enjoined must be comfort or enjoyment in the use of the premises, and that it is not enough that the owner not in occupation was disturbed in his mind when he thought about the fence, although an owner might suffer an actionable injury, as if the fence was likely to diminish his rents or to make

Whatever a man has a legal right to do, he may do with impunity, regardless of his improper motives.

Pittsburgh, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 369, 23 Am. Rep. 751.

Messrs. C. J. Estep and S. S. Ford, for defendant in error:

If one does an act, wholly on his own land, legal but prejudicial to his neighbor, not for his own ornament, but through unmixed malice to his neighbor, then he has done an injury which is actionable.

Chesley v. King, 74 Me. 164; *Chasemore v. Richards*, 7 H. L. Cas. 387; *Greenleaf v. Francis*, 18 Pick. 117; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Peck v. Bowman*, 22 Ohio L. J. 111; *Burke v. Smith*, 69 Mich. 395.

Burket, J., delivered the opinion of the court:
The only question in this case arises upon

it more difficult to get tenants, the injury to his comfort or the enjoyment of his estate on account of that reasonable anticipation being within the act. *Smith v. Morse*, 148 Mass. 407.

Where the husband participated in erecting a lawful fence upon his wife's land at a greater height than declared by Mass. Stat. 1887, it was held that he was not liable to a prosecution under the provisions of the act for erecting or maintaining the nuisance no matter what his intentions might be, and that such fact did not prove the erection of the fence. *Rideout v. Knox*, 148 Mass. 385, 2 L. R. A. 81.

In *Rice v. Moorehouse*, 150 Mass. 482, defendant was sued for unnecessarily maintaining a fence over 6 feet in height for the purpose of annoying the plaintiff. The facts showed that the fence, at the time of action brought, was 16 feet in height, but that between such time and the trial the defendant cut it down to 7½ feet, and therefore contended that the judgment of the court below ordering the abatement of such a fence was wrong. The court held that, by reducing the height of the fence either before or after the trial, the defendant did not prevent the court from exercising its discretion, the facts showing that the defendant unnecessarily and for the purpose of annoyance maintained the fence, the maintenance of an unlawful structure giving the court jurisdiction of which the defendant could not deprive it by making alterations either material or immaterial in that which constituted the nuisance.

In *Spaulding v. Smith*, 162 Mass. 543, action was brought under the above statute. The facts showed that the fence was not a boundary one between the lots of the parties, but was upon the opposite side of the highway at least 21 feet from the nearest part of the land owned by the plaintiff, and separated from all his land which was not a part of the highway by a space 42 feet wide. The court held that the action could not be maintained as the fence was not situated with reference to the land of the adjoining owner who complained of it as a private nuisance so as to be within the meaning of the statute, and that to hold such a fence within the meaning of the statute would be a greater limitation of the rights of owners than the legislature intended to impose.

By N. H. Pub. Stat. ed. 1891, chap. 143, § 28, p. 398, it is provided: "Any fence or other structure in the nature of a fence, unnecessarily exceeding 5 feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance." And by § 29 of the same, "any owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an

the following findings of fact by the circuit court:

"Said structure was erected upon the land of the defendant and belonged to him. The structure was erected by said defendant from motives of unmixed malice toward said plaintiff, and for no useful or ornamental purposes of the property of said defendant."

It is not claimed that the person of the plaintiff was interfered with in this case, so that we have for consideration only the rights of property.

The fence complained of is upon the land of the defendant and belongs to him. Plaintiff fails to aver, and the court fails to find, that she has any right to or upon the lot of defendant below by contract, statute, or any other way known to the law for acquiring a right to, in, or upon lands, unless such right may be acquired by, and transferred to, her by

action of tort for the damage sustained thereby;" and § 30 of the same provides that "if the plaintiff recovers judgment in the action, the defendant shall cause the removal of the nuisance within thirty days from the date of the judgment, and for each day he shall permit the nuisance to remain, after the expiration of said thirty days, he shall incur a penalty of \$10 for the use of the party injured."

Where the structure complained of was about 20 feet long, 11 feet high, and had been erected for some ten years, and plaintiff complained that it excluded the light and air, obstructed the view, and was maintained by the defendant for the purposes of annoyance, and the defendant claimed to have maintained the structure as a sign board for his furniture store, and as a support against which to pile his furniture, and that it was useful to him, and the court charged, in substance, that the defendant was liable if he was actuated by two motives, one of annoyance and the other of utility, if the former was the controlling one,—it was held that the charge was sufficiently favorable to the plaintiffs. *Hunt v. Coggin*, 66 N. H. 140, decided under chap. 91 of the Laws of 1887.

By § 4697, chap. 193, title 81, Vt. Stat. ed. 1894, p. 843, it is provided: "No person shall erect or maintain an unnecessary fence or other structure, more than 6 feet in height, for the purpose of annoying the owners of adjoining property by obstructing their view or depriving them of light or air; and the selectmen, if the owner thereof fails, after twenty-four hours notice from them, to remove such fence, or structure, may enter and remove the same at the owner's expense;" and § 4698 provides: "If a person violates the provisions of the preceding section he shall be fined not more than \$100."

Where the fence was erected for the express purpose of preventing the plaintiff using a way, thereby causing him damage, and the village trustees, upon his application, consented to have the way declared a public highway if he would pay the defendant land damages, it was held in an action brought by plaintiff for obstructing the way that the amount so paid could not be recovered from defendant. *Holmes v. Fuller*, 68 Vt. 207.

By Hill's Annotated Statutes and Codes of Washington, vol. 2, ed. 1891, title 6, chap. 8, § 298, p. 154, it is provided an injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure, or annoy an adjoining proprietor. And where any owner or lessee of land is maliciously erecting such a structure with such intent a mandatory injunction will lie to compel its abatement and removal.

R. W.

means of the aforesaid "motives of unmixed malice." This is a manner of acquiring on the one hand, and of transferring on the other, a right to property unknown to the law.

But it is urged in her behalf, that even if she had no right of property, and even if he was the owner of the lot, that he could not use his own land for the purpose of erecting structures thereon which subserve no useful or ornamental purpose, and are erected through motives of unmixed malice towards his adjoining neighbor.

It is and must be conceded that he might, by erecting a building on his lot, shut off her light and air to exactly the same extent as is done by this fence, and that in such case she would be without right, and without remedy, even though done with the same feelings of malice as induced him to erect the fence; thus making his acts lawful when the malice is seasoned with profit, or some show of profit to himself, and unlawful when his malice is unmixed with profit, the injury or inconvenience to her, meanwhile, remaining the same in both cases. If through feelings of malice he desires to shut the light and air from her windows, it is nothing to her whether he makes a profit or loss thereby. Her injury is no greater and no less in the one case than in the other. As to her it is the effect of the act, and not the motive. In effect he has the right to shut off the light and air from her windows by a building on his own premises, and she is not in effect concerned in the means by which such effect is produced, whether by a building or other structure; nor is she concerned as to the motive, nor as to whether he makes or loses by the operation. In the one case she might have a strong suspicion of his malice, while in the other such suspicion would be ripened into a certainty. But this is nothing to her as affecting a property right. As long as he keeps on his own property, and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so would not be enforcing a right of property, but a rule of morals. It would be controlling and directing his moral conduct by a suit in equity, by an injunction.

To permit a man to cause a certain injurious effect upon the premises of his neighbor by the erection of a structure on his own premises if such structure is beneficial or ornamental, and to prohibit him from causing the same effect in case the structure is neither beneficial nor ornamental, but erected from motives of pure malice, is not protecting a legal right, but is controlling his moral conduct. In this state a man is free to direct his moral conduct as he pleases, in so far as he is not restrained by statute. But it is said that such acts are offensive to the principles of equity. Not so. There is no conflict between law and equity in our practice, and what a man may lawfully do cannot be prohibited as inequitable. It may be immoral, and shock our notions of fairness, but what the law permits, equity tolerates. It would be much more inequitable and intolerable to allow a man's neighbors to question his motives every time that he should un-

dertake to erect a structure upon his own premises, and drag him before a court of equity to ascertain whether he is about to erect the structure for ornament or profit, or through motives of unmixed malice.

The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells, or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises and conveyed to the premises of another; but in this case nothing is sent, but the air and light are withheld. A man may be compelled to keep his gas, smoke, odors, and noise at home, but he cannot be compelled to send his light and air abroad. *Mullen v. Stricker*, 19 Ohio St. 185, 2 Am. Rep. 379.

If smoke, gas, offensive odors, or noise pass from one's own premises to or upon the premises of another to his injury, an action will lie therefor, even though the smoke, gas, odor, or noise should be caused by the lawful business operations of defendant and with the best of motives. *Broom, Legal Maxims*, 372.

In such cases it is the effect or injury, and not the motive, that is regarded. The true test is, whether anything recognized by law as injurious passes from the premises of one neighbor to that of another. Anything so passing invades the legal rights of him whose premises it reaches, and such rights will be protected. But courts cannot regulate or control the moral conduct of a man, unless authorized so to do by statute.

The following cases, cited by plaintiff in error, bear more or less upon the question involved in this case, and seem to produce a decided weight of authority in his favor: *Frazier v. Brown*, 12 Ohio St. 294; *Falloon v. Schilling*, 29 Kan. 292, 44 Am. Rep. 642; *Mahan v. Brown*, 18 Wend. 261, 28 Am. Dec. 461; *Greenleaf v. Francis*, 18 Pick. 123; *Chaffield v. Wilson*, 28 Vt. 49.

The following additional authorities are to the same effect: *Gould, Waters*, § 290, citing *Chasemore v. Richards*, 7 H. L. Cas. 349; *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282; *Acton v. Blundell*, 12 Mees. & W. 324; *Hammond v. Hall*, 10 Sim. 552; *Cooper v. Barber*, 3 Taunt. 99; *Bolston v. Bensted*, 1 Campb. 483; *Galgay v. Great Southern & Western R. Co.* 4 Ir. C. L. Rep. 456; *Chase v. Silvester*, 62 Me. 175, 16 Am. Rep. 419; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Ocean Grove Camp Meeting Asso. v. Asbury Park Comrs.* 40 N. J. Eq. 447; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Dexter v. Providence Aqueduct Co.* 1 Story, 387; *Wheatley v. Baugh*, 25 Pa. 523, 64 Am. Dec. 721, note; *Haugh's Appeal*, 102 Pa. 42, 48 Am. Rep. 193, note; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Coleman v. Chadwick*, 80 Pa. 81, 21 Am. Rep. 93; *Trout v. McDonald*, 83 Pa. 146; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Smith v. Adams*, 6 Paige, 435; *Elster v. Springfield*, 49 Ohio St. 82; *Ellis v. Duncan*, cited in 29 N. Y. 466; *Radcliff v. Brooklyn*, 4 N. Y. 195, 200, 53 Am. Dec. 357; *Pirley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Goodale v. Tuttle*, 29 N. Y. 466; *Bliss v. Greeley*, 45 N. Y. 671, 6 Am. Rep. 157; *Clark v. Conroe*, 38 Vt. 469;

Taylor v. Welch, 6 Or. 198; *Mosier v. Caldwell*, 7 Nev. 363; *New Albany & S. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 673, 82 Am. Dec. 179; [*Kinnaird v. Standard Oil Co.* 89 Ky. 463, 7 L. R. A. 451], 30 Cent. L. J. 269, 23 Am. L. Rev. 376; *Davis v. Afong*, 5 Haw. 216.

The defendant in error cites the cases reviewed in *Frazier v. Brown*, 12 Ohio St. 294, and also the case of *Burke v. Smith*, 69 Md. 395. Most of the cases cited are cases arising out of interference with wells, springs, and percolating waters; such cases bear but slightly upon the question. The Michigan case is substantially like the case under consideration. In that case the lower court enjoined the defendant, and that judgment was affirmed by an equally divided court. The syllabus says that the court being equally divided, nothing is decided. As nothing was decided, the case is not an authority on either side of the question.

But it is strongly urged by counsel for defendant in error, that the maxim, "Enjoy your own property in such a manner as not to injure that of another person," applies in such cases as this, and that as it must be conceded that the fence in question is an injury to the property of defendant in error, that his acts are in conflict with the above maxim.

At first blush this would seem to be so, but a careful consideration shows the contrary. The maxim if a very old one, and states the law too broadly. In this case, for instance, it is conceded that the plaintiff in error had the right to enjoy his property by erecting a house so as to do the same injury which was done by the fence, and that while that would be an injury to the property of defendant in

error, she would be without remedy, and his act in erecting such house would not be regarded as violating the maxim.

In *Jeffries v. Williams*, 5 Exch. 797, it was claimed, and in *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 369, 23 Am. Rep. 751, it was held, that the true and legal meaning of the maxim is, "So use your own property as not to injure the rights of another." Boynton, J., in that case, says: "Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong." The maxim should be limited to causing injury to the rights of another, rather than to the property of another, because for an injury to the rights of another there is always a remedy, but there may be injuries to the property of another for which there is no remedy, as in draining a spring or well, or cutting off light and air or a pleasant view by the erection of buildings, and many other cases which might be cited.

Thus limiting the maxim to the rights of the defendant in error, it is plain that the acts of plaintiff in error in the use which he made of his property did not injure any legal right of hers, and that therefore what he did was not in violation of such maxim.

The circuit court erred in overruling the demurrer to the petition, and in rendering judgment in favor of defendant in error upon the facts as found by the court.

The judgment of the Circuit Court is therefore reversed, and proceeding to render such judgment as the Circuit Court should have rendered upon the facts found, the petition of plaintiff below is dismissed at her cost.

MAINE SUPREME JUDICIAL COURT.

F. X. MARCOTTE

v.

C. V. ALLEN.

(.....Me.....)

A public officer receiving fees to which he is not entitled, from a party whom he knows to be ignorant of the law, without informing him that he was not bound to pay, receives money fraudulently, and is liable to an action for money had and received.

(December 13, 1897.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Androscoggin County made during the trial of an action brought to recover back money which plaintiff had paid defendant as fees for burial permits. *Sustained.*

The facts are stated in the opinion.

Mr. J. G. Chabot, for plaintiff:

The money was paid under a mistake of

fact; plaintiff acting under the belief that it was the rule for the undertaker to pay for such recording.

Evans v. Hughes County, 3 S. D. 244; 15 Am. & Eng. Enc. Law, p. 645, note 2.

Money paid under a mistake of fact may be recovered back.

Haven v. Foster, 9 Pick. 129, 19 Am. Dec. 353; 18 Am. & Eng. Enc. Law, p. 227, and cases note 1; Chitty, Contr. 5th Am. ed. 633, 664, note; *Goodspeed v. Fuller*, 46 Me. 150, 71 Am. Dec. 572; 2 Greenl. Ev. § 123.

Even if mistake arises from negligence of plaintiff.

1 Parsons, Contr. 482; *Appleton Bank v. McGilroy*, 4 Gray, 522, 64 Am. Dec. 92; *Quimby v. Carr*, 7 Allen, 417.

Or he might have discovered or known the facts by using all the means of information at his command.

Douglas County v. Keller, 43 Neb. 635.

He can recover if he has been guilty of negligent failure to use the means of knowledge opened to him.

Indianapolis v. McAvoy, 86 Ind. 587, and cases cited in 18 Am. & Eng. Enc. Law, p. 226, note 1.

NOTE.—As to extortion by officers, see *Brackenridge v. State* (Tex. App.) 4 L. R. A. 360, and cases in note thereto.

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This kind of action for money had and received is a most liberal action, and may be as comprehensive as a bill in equity.

Keene v. Sage, 75 Me. 140; *Hall v. Marston*, 17 Mass. 575; *Dana v. Kemble*, 17 Pick. 549; 2 Greenl. Ev. § 117; *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264.

And lies for the recovery of money which in equity, justice, and good conscience belongs to plaintiff, and which defendant ought not under all the circumstances to retain.

Lawson v. Lawson, 16 Gratt. 280, 80 Am. Dec. 102; *Norton v. Marden*, 15 Me. 46, 32 Am. Dec. 132; *Brady v. Horroth*, 64 Ill. App. 264; *Freeman v. Curtis*, 51 Me. 143, 81 Am. Dec. 564; *Healey v. United States*, 29 Ct. Cl. 115; *Haven v. Foster*, 9 Pick. 180, 19 Am. Dec. 353.

No demand before bringing action is necessary.

Sturgis v. Preston, 184 Mass. 373; *Moore v. Moore*, 127 Mass. 23.

In this state the rule is stated that when money claimed as rightfully due is paid voluntarily and with full knowledge of all the facts, it cannot be recovered back, when the party to whom it has been paid can in good conscience and equity retain it.

Smith v. Readfield, 27 Me. 147; *Fellows v. School Dist. No. 3*, 39 Me. 561; *Brisbane v. Dacres*, 5 Taunt. 144; *Parker v. Lancaster*, 84 Me. 515.

In one sense a person may be said always to have the means of knowledge. He may have access to books and to the assistance and instructions of his fellow men. But those means are not such as the law contemplates and requires.

Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132.

Having the means of ascertaining the real facts is not the same as actual knowledge of them.

3 Greenl. Ev. 15th ed. § 123 note A.

Mistake of law is an erroneous conclusion as to the legal effect of known facts.

15 Am. & Eng. Enc. Law, p. 684, and cases cited.

Mistake of law constitutes a mistake only when it arises from, (1) a misapprehension of the law by all parties, all supposing that they knew and understood it and all making the same mistake as to the law; or (2) a misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify.

15 Am. & Eng. Enc. Law, p. 635, note; *United States v. Barlow*, 182 U. S. 271, 38 L. ed. 346, notes.

Where money has been paid under a mistake of law and facts, relief will be granted, especially if the opposite party will not thereby be injured.

Lane v. Holmes, 55 Minn. 379; *Freeman v. Curtis*, 51 Me. 140, 81 Am. Dec. 564; *Benson v. Markoe*, 37 Minn. 30.

If one party is mistaken as to the law, and the other, with knowledge, contracts with him, knowing that he is proceeding upon a mistake in law, there might arise a consideration of fraud in his taking advantage of the other's mistake.

Benson v. Monroe, 7 Cush. 181, 54 Am. Dec. 40 L. R. A.

716; *Powell v. Smith*, L. R. 14 Eq. 85; 18 Am. & Eng. Enc. Law, p. 226, notes; *Higgins v. Mendenhall*, 51 Iowa, 135; *Whelens's Appeal*, 70 Pa. 425; *Hardigree v. Mitchum*, 51 Ala. 154; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303; *Renard v. Clink*, 91 Mich. 1; 2 Greenl. Ev. §§ 120, 121, cases cited.

There was a marked disparity in the position and means of knowledge of the parties, and therefore they were not on equal footing, and money so paid cannot in good conscience and equity be retained, no rights of third parties having intervened.

Jordan v. Stevens, 51 Me. 81, 81 Am. Dec. 556; *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 265.

As between the parties, no distinction should be made between mistake of law and mistake of facts.

Jordan v. Stevens, 51 Me. 80, 81 Am. Dec. 556; *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 265.

Defendant was a public officer duly sworn to do his duty to and with the public with whom he was dealing, by virtue of his office; he was presumed to know his duty, to execute it with justice and honesty, and, by continuing to take and receive plaintiff's money for each and every burial permit, his continued silence there was equivalent to deceit and fraud.

Sartwell v. Horton, 28 Vt. 373; *Walker v. Ham*, 2 N. H. 288; *Carew v. Rutherford*, 106 Mass. 12, 8 Am. Rep. 287; *American Exch. F. Ins. Co. v. Britton*, 8 Bosw. 148; *Laterrade v. Kaiser*, 15 La. Ann. 296.

Defendant was bound in duty and conscience to disclose the fact to plaintiff, and cannot retain money so received.

Fears v. Albee, 69 Tex. 437; 8 Am. & Eng. Enc. Law, pp. 644, 655, and notes; *Laidlaw v. Organ*, 15 U. S. 2 Wheat. 178, 4 L. ed. 214; *Paddock v. Strobbridge*, 29 Vt. 470; *Planters' Bank v. Neely*, 7 How. (Miss.) 95, 40 Am. Dec. 51; *Cosby v. Buchanan*, 90 U. S. 420, 23 L. ed. 138; *Cleveland v. Smith*, 132 U. S. 318, 33 L. ed. 384, and notes.

Messrs. W. H. Newell and W. B. Skelton for defendant.

Savage, J., delivered the opinion of the court:

The plaintiff is an undertaker. The defendant is city clerk of the city of Lewiston. The plaintiff sues in this action, for money had and received, to recover back fees paid to the defendant for 376 burial permits issued under the provisions of Pub. Laws 1891, chap. 118, as amended by Pub. Laws 1895, chap. 154. At the conclusion of the plaintiff's evidence, the presiding justice directed a nonsuit, to which ruling the plaintiff excepted.

By statute, the fees of city clerks for issuing burial permits are to be paid by the cities and towns; and it was admitted that "the defendant was paid his legal fees by the city of Lewiston for all the burial permits mentioned in this action prior to March, 1896."

Assuming, as we must, that the plaintiff's evidence was true, the case discloses the following facts: The plaintiff paid the money sued for to the defendant, as fees for burial

permits issued by him. A fee of 25 cents was paid each time the plaintiff had occasion to require a permit. The plaintiff did not know that the statute required the city to pay the city clerk for his services in issuing permits, nor that the defendant was being paid by the city for the same. The defendant received and kept the money, and did not inform the plaintiff that the city was bound to pay, or was paying, his legal fees. The evidence does not show that the defendant demanded pay of the plaintiff, as a prerequisite to the issuing of the permits; but the defendant's predecessor in office asked the plaintiff to pay for such permits, which he did, and he "supposed it was the same rule, and paid him [the defendant] right along." From these facts it can hardly be inferred that the defendant thought these payments were gratuities, and we are satisfied that he must have known that the plaintiff paid these fees because he supposed he was bound to. It is clearly a case of payments made in ignorance of the law, and the defendant relies upon the well-settled rule that voluntary payments, made with full knowledge of all the facts, but under a mistake or through ignorance of the law, cannot be recovered. *Norris v. Blethen*, 19 Me. 348.

The defendant is a public officer, and, though he did not expressly demand the payment of these fees, he took them, knowing that the plaintiff was acting upon a mistaken view of his legal rights. The parties did not stand upon a level. The defendant was in a position where the plaintiff was justified in relying upon his conduct. A public officer must deal fairly with the public. Some courts have sustained actions like this on the ground of public policy. In *American S. S. Co. v. Young*, 89 Pa. 186, 33 Am. Rep. 748, the court said of the relations between a public officer and the public: "He and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand

for his services. But with them it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not, and as a general rule, relying on his honesty and integrity, they acquiesce in his demands." See *Baltimore v. Lefferman*, 4 Gill, 425, 45 Am. Dec. 145, note; *Walker v. Ham*, 2 N. H. 238; *Stevenson v. Mortimer*, 2 Cowp. 805.

But, without deciding that this action is maintainable on the ground of public policy, we think it can be maintained upon another ground. Whenever a payment made in ignorance of the law is induced by the fraud or imposition of the other party, and especially if the parties are not upon an equal footing, an action to recover it back is maintainable. *Stover v. Poole*, 67 Me. 217; *Silliman v. Wing*, 7 Hill, 159; *Bank of United States v. Duriel*, 12 Pet. 32, 9 L. ed. 989; This court has declared, in *Freeman v. Curtis*, 51 Me. 140, 81 Am. Dec. 564, and in *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 558, that when one who himself knows the law, and knows another to be ignorant of it, takes advantage of his ignorance, it may be regarded as fraud. His very silence may be fraudulent. *Downing v. Dearborn*, 77 Me. 457.

For a public officer, whose fees, by law, are to be paid by the city, and are paid by the city, to receive fees to which he knows he is not entitled, and which he knows are being paid to him by a party ignorant of the law, who would not pay if he did know the law, and not to inform him that he was not bound to pay, is fraudulent; and such officer should restore the money, which he cannot conscientiously retain. To hold otherwise would be a reproach to the law.

It is the opinion of the court that the admission of the defendant, and the evidence introduced by the plaintiff, brought the case within this rule, and that the order directing a nonsuit was erroneous.

Exceptions sustained.

MARYLAND COURT OF APPEALS.

INTERNATIONAL FRATERNAL ALLIANCE OF BALTIMORE CITY, *Appt.*,

v.

STATE of Maryland.

(86 Md. 550.)

1. Policies for more than \$1,000 on one life, when they are policies of insurance such as co-operative assessment associations issue, and not certificates such as fraternal beneficiary associations issue, cannot be lawfully issued by a corporation subject to Code, § 128, although its charter provides, not only for insurance, but "for social or fraternal beneficial purposes, or both."

NOTE.—For certificates of benefit societies as insurance, see note to Penn Mut. L. Ins. Co. v. Mechanics' Savings Bank & T. Co. (C. C. App. 6th C.) 38 L. R. A. 33.

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2. A corporation having a capital stock in which many members do not share, and conducting business for the pecuniary benefit of the stockholders, is not acting "for the sole benefit of its members and their beneficiaries, and not for profit," within the meaning of Code, § 143e, so as to be entitled to issue fraternal beneficiary certificates.

3. Conditions and limitations attaching by law to the exercise of any given corporate purposes cannot be destroyed or subverted by combining such purposes with some other, under one corporation.

4. Proceedings to forfeit a franchise are not excluded by Code, art. 23, § 263, authorizing proceedings to restrain an assumption or exercise of any franchise, liberty, or privilege, or the transaction of unauthorized business.

5. A deliberate attempt by a corpora-

tion to evade the insurance law of the state in one of its most important provisions is ground for forfeiting the charter.

6. An insurance corporation forfeits its franchise by deliberately exceeding the amount for which it is allowed by law to issue policies on any one life.

(January 4, 1898.)

A PPEAL by defendant from a judgment of the Superior Court of Baltimore City annulling the charter of defendant for doing illegal business. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles Marshall, John Prentiss Poe, and Charles L. Wilson, for appellant:

None of the alleged grounds of forfeiture amount to either an abuse or misuse of the corporate powers of the appellant. Abuse or misuse of corporate privileges is any positive act in violation of the charter and in derogation of public right, wilfully done or caused to be done by those appointed to manage the general concerns of the corporation.

Erie & N. E. R. Co. v. Casey, 26 Pa. 285.

The judgment of forfeiture was erroneous, for the reason that the acts complained of are not alleged to have been wilfully and knowingly wrong.

Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 106; State v. Consolidation Coal Co. 46 Md. 1.

Corporations under the Code may be formed for manufacturing purposes, and corporations may be formed for mining purposes. And so also may one corporation be lawfully formed for the purpose of combining these two purposes and carrying them on together.

Basshor v. Dressel, 34 Md. 503.

So, fraternal beneficial associations may be formed for the conducting exclusively of the business belonging to such associations, or if the incorporators think the "general interests" of the corporation will be promoted by blending with the fraternal beneficial business the business of accident insurance on the assessment plan, or the business of endowment or mortuary insurance, our Code authorizes the formation of one single corporation for any or all of these legitimate purposes.

Messrs. H. M. Clabaugh, Attorney General, and George R. Gaither, Jr., for appellee.

Boyd, J., delivered the opinion of the court:

By direction of the governor, the attorney general instituted proceedings in the superior court of Baltimore city against the appellant, alleging that it had been guilty of abuse and misuse of its corporate powers and privileges. The authority for this proceeding is given by article 23, § 255, of the Code; and the succeeding sections, to 262, inclusive, regulate the practice. The grounds relied on in the petition are, in substance: (1) That the defendant, as shown by the by-laws, was not organized for "fraternal beneficial purposes," and that, in conducting the operations described in its by-laws, it was guilty of both abuse and misuse of its corporate franchises, and is carrying on operations without due warrant of law. (2) That while purporting to be organized for "fraternal beneficial purposes," under the pro-

visions of chapter 295 of the Laws of 1894, it is organized with a capital of \$10,000, and subject to the control and management of its stockholders, and although purporting to give representation to its certificate or policy holders, under its by-laws it subjects them to the will of the stockholders. (3) That the business carried on is substantially in the nature of insurance business, and it has issued a policy known as the "Golden Cycle Policy," which would mature in seven years, and the holders of which are subject to certain dues and assessments; that, in addition to the regular dues, the corporation has levied a "note assessment" of \$650 on each "maturing holder" in or about the last year of the maturing of the policy, and, in the event of the notes not being given for such assessment, the policies would lapse; that the levying of such excessive assessments was a practical forfeiture of the policies, and an abuse and misuse of the charter powers. (4) That the defendant, though incorporated with a capital of \$10,000, and having deposited with the state insurance commissioner the sum of \$10,000, is issuing, or offering to issue, policies for more than \$1,000 on any one life. (5) That it is pretending to operate under the scheme of a fraternal beneficial society, as set out in chapter 295 of the Laws of 1894, and at the same time is subject to the rights, privileges, and control of its stockholders. (6) That, purporting to carry on the business of a fraternal beneficial society, it has issued policies of insurance, to the number of 2,400, to infants under ten years of age, which is contrary to the purposes of such societies. (7) That the business carried on by said corporation is substantially in the nature of an insurance business, and not within the scope of the scheme of fraternal beneficial societies, and not in accordance with its charter rights. The defendant filed an answer which denies that it has violated its charter, and gives a history of its organization. In June, 1888, a corporation was formed, under the name of the Order of the International Benevolent & Fraternal Company of Baltimore City, "for social, benevolent, fraternal, and beneficial purposes," with a capital stock of \$5,000, divided into 1,000 shares of \$5 each. In January, 1889, the charter was amended, whereby the stock feature was omitted, and the name changed to the Order of the International Fraternal Alliance of Baltimore City; and in June, 1893, it was further amended by changing the name to the International Fraternal Alliance of Baltimore City, and providing for a capital stock of \$10,000, divided into 100 shares of \$100 each. It is stated in these amended articles that the corporation was formed "(a) for social or fraternal beneficial purposes, or both," etc.; "(h) to grant and issue insurance on the lives of individuals of both sexes, upon the mutual, assessment, or co-operative plan, as provided in § 127 of article 23 of the Code of Public General Laws of the state of Maryland, and the other sections of said article applicable to such mutual, assessment, or co-operative insurance," etc. It is also authorized to provide in its by-laws for loans to its members, policy or certificate holders, of any surplus accumulations, upon the building association plan, as defined in §§ 95 to 124, in-

clusive, of article 28. In November, 1895, the charter was further amended, and the defendant was operating under the articles as thus amended at the time these proceedings were instituted, and hence we are to determine whether or not they have been violated as charged, so far as we can from the answer, as the case was submitted on demurrer to the answer.

In the case in 77 Md. 547, against this corporation, this court had before it the charter of January, 1889, and held that the appellant had no authority under that charter to carry on the insurance business. The lower court had ordered that its charter be forfeited, but this court, although fully concurring with the judge below that the appellant had exceeded its powers, decided that it should be permitted to continue, and either report to the appropriate jurisdiction to adjust and wind up its insurance business, or amend its charter under §§ 17 and 38 of article 23 of the Code, and bring itself within the provisions of the insurance laws of the state. That case was decided on the 21st day of June, 1893; and five days afterwards the charter was amended by the articles of June, 1893, above referred to. Chapter 295 of the Laws of 1894 having been passed, another amendment to the charter was adopted in 1895, as above stated. After the passage of the act of 1894, some of the members of the appellant filed a bill alleging that it was insolvent, charging fraud in the management of its affairs, and claiming that the whole scheme of the corporation has been changed, in violation of the rights of the complainants. *Barton v. International Fraternal Alliance*, 85 Md. 14. In that case we said: "A corporation of this character is clearly within the terms of the act of 1894, chap. 295. Its charter authorizes it to be, and it is, a fraternal beneficial association operating on the lodge system, and carried on for the sole benefit of its beneficiaries." The relief prayed for was refused because, under our construction of § 143e of chapter 295 of the Laws of 1894, we were confined to the single question whether or not the corporation was insolvent, and that it was not shown to be. It has thus been determined by this court that this appellant could unite the insurance business with the original purposes of its charter, by a proper amendment, and that the act of 1894 was applicable to it. Let us, then, see whether it has violated its charter in any of the particulars alleged in the petition.

One of the most serious and important charges is that embodied in paragraph 7, wherein it is alleged that the appellant is unlawfully issuing policies for more than \$1,000 on any one life. The answer admits that it had issued, in all, fifty-nine policies, for amounts ranging from \$1,250 to \$5,000, and that it still had in force 31 of them, but it denies that it is a violation of its charter. The charter as amended in 1895, provides for a corporation "for social or fraternal beneficial purposes, or both," and "to grant and issue insurance or benefits upon the lives of individuals of both sexes, as provided in § 127, art. 23, of the Code, and as provided in § 143e," etc. The language used in stating the purposes of the organizations, as to the social or fraternal

beneficial feature, is the same as that in the charter of 1889, which was before this court in 77 Md. 547. It was distinctly held in that case that the appellant was not authorized to issue the policies then being considered, which were those in the Golden Cycle class, because it was thereby conducting an insurance business, which its charter did not empower it to do; and it would seem to follow as a necessary consequence of that decision that it cannot now, under that branch of its charter, issue policies either of the Golden Cycle class, or of the other classes in the record; the latter being clearly as much subject to the insurance law of the state as the former. Prior to the passage of chapter 295 of the Acts of 1894, the only possible excuse for the appellant's issuing any policies of insurance was by virtue of § 127 of article 23 of the Code, "and the other sections of said article applicable to such mutual, assessment, or co-operative insurance," as its charter of 1893 expressly relied on them for such power. That section provided for imposing penalties on those who fail to comply with the insurance laws, and defined what was to be deemed a life insurance company, within the meaning of article 23, but provided that the business might be conducted on the mutual or co-operative plan, on the terms therein set out. Section 128, as amended by chapter 488 of the Laws of 1892, provided that "organizations, as described in § 127, other than fraternal orders issuing certificates for the payment of money or other benefits in the event of sickness, accident, or death, or other contingency, either to the member, policy or certificate holder," etc., but issuing no certificates for the payment of a greater sum than \$1,000 upon one life, could be formed either on the mutual, co-operative, assessment, or stock plan, and, if on the latter, should have a paid-up capital of at least \$10,000, and required every such company to keep the sum of 10,000, in money or securities, with the insurance commissioner. The appellant fixed its capital stock at \$10,000, and alleges in its answer that it has deposited \$10,000 with the insurance commissioner, although we suppose, from the connection, it meant to say that the deposit had been made under chapter 295 of the Acts of 1894. Section 128 was further amended by chapter 256 of the Acts of 1894, and in that amendment it omits the words "other than fraternal orders," but continues the provisions as to stock, and requires all such companies, whether formed on the mutual, co-operative, assessment, or stock plan, to keep \$10,000 on deposit with the insurance commissioner, and still limits the certificates to \$1,000 upon any one life. The amendment of 1895 provided for issuing insurance or benefits upon the lives of individuals of both sexes, as provided in § 127 and § 143e, subject to the supervision of, and the making of reports and the payment of fees to, the insurance commissioner, under chapter 295 of the Laws of 1894. Section 143e does not provide for the formation of corporations, but it does provide for the corporations, etc., therein described, continuing business under the provisions governing fraternal beneficiary societies, orders, or associations, on the condition that each shall deposit the sum of \$10,000, in dividend-bearing securities, with

the insurance commissioner, as a guaranty of the payment of certificates issued by it. The certificates therein referred to are such as fraternal beneficiary associations issue, and not insurance policies, such as those in the record are. The latter are of the character that co-operative assessment associations issue. This corporation could not issue such policies of insurance, as a fraternal beneficiary society. It was decided in 77 Md. 547, that it must become an insurance company in order to do so; and the act of 1894 did not aid it in that respect. It did become an insurance company, and, although it amended its charter, and, in terms, referred to § 143e, etc., it cannot escape from the requirements and limitations of the insurance laws by such means. It is evident that the legislature did not intend, by the provisions in § 143e, to authorize a corporation to issue such policies as the court had said could only be issued by insurance companies; and, if there were any doubt on that question § 143r ought to remove it. It says that "any association entitled to do business in this state under the provisions of § 143e to § 143r (both inclusive) of this article, which shall so conduct its affairs, or shall in any manner change its charter, constitution, or laws, so that it shall not answer to the description of a fraternal beneficiary association, as set forth in § 143e, shall thereupon cease to be entitled to the privilege of said section." It cannot be said that a corporation having a capital stock, and issuing policies such as these, is then acting "for the sole benefit of its members, and their beneficiaries, and not for profit" (the description of a fraternal beneficiary association set forth in § 143e); and hence it cannot issue these policies, under that section, and, if it attempts to do so, it ceases to be entitled to the privileges of it. When the appellant became an insurance company, it made itself subject to all the provisions of article 28 applicable to life insurance companies, excepting so far as it brought itself within some of the exemptions. By § 116, every life insurance company incorporated under that article is required to have a guaranty capital of not less than \$100,000 to be invested in securities, which shall be deposited in the treasury of the state as a guaranty for the payment of the policies issued by it; and §§ 112 and 136 provide that the capital stock, excepting mutual companies, shall not be less than \$100,000. It was doubtless to avoid these requirements that § 127 was referred to in appellant's charter. Section 128, as we have seen, authorizes the formation of organizations as described in § 127, with a capital of \$10,000, and a deposit of \$10,000, but it is upon the express condition that no policy should issue upon any one life for more than \$1,000. The appellant is therefore not authorized to issue such policies as those in the record for more than that amount on any one life, and has violated its charter by doing so. Indeed, so far as we can gather from the answer, it would appear that only one sum of \$10,000 had been deposited with the commissioner, and that under the act of 1894; but, as that is not clear, we have assumed, for the purposes of the discussion, that it had made the deposit under the insurance branch of its charter, as well as under the act of 1894.

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We do not deem it necessary to discuss at length the question, which occupies considerable space in the very able brief of the appellant's attorneys, whether, under our laws, there can be a "double incorporation" for such purposes as those named in the appellant's charter. It is proper to say that we do not understand, as contended in that brief, that the learned judge below decided that question in the negative, but, on the contrary, he did not pass on it. He did hold, however, and very properly so, "that, where the law attaches certain conditions and limitations to the exercise of any given corporate purposes, those conditions and limitations cannot be destroyed or subverted by combining such purpose with some other, under one incorporation. If the two cannot be united in a joint prosecution, their administration must, at least, be kept separate. The statute will not permit the evasion or abrogation of prescribed requisites and conditions by a scheme of combination." So, although it may be that one corporation can, as a fraternal beneficiary association, carry on certain parts of its business "for the sole benefit of its members and their beneficiaries, and not for profit," and can, as an insurance company, conduct another part of its business for the benefit of its stockholders, yet it is impossible that the business of two such classes can be so blended as not to be separable; for, if that be done, it can no longer be for the sole benefit of its members. Assuming that the appellant could issue certificates of the kind contemplated in chapter 295 of the Laws of 1894, for such sums as it saw proper, it cannot issue insurance policies for any amount under that law, and under the insurance law is limited to \$1,000. If there be profits in the insurance business, are the stockholders, exclusively, or all the members, to share in them? Undoubtedly the former would be the case, unless there be some express provision in the charter or by-laws to make it otherwise. It is true there are some by-laws of the appellant which apparently vest the control in the hands of the members, to some extent, at least, but there is in the book of the by-laws adopted in 1896 a note which states that certain by-laws of 1895 are to remain in force. Among them is article 7 of part 2, which says: "The stockholders may at any special or annual meeting exercise all or any of the powers conferred upon this corporation by the public general laws of the state of Maryland, anything to the contrary in these by-laws notwithstanding," etc. It is not necessary to enumerate the powers stockholders have under our general incorporation laws in corporations having capital stock. We find no provision in the charter or by-laws requiring the members to be stockholders, and it would, of course, be impracticable, as there are only 100 shares of stock. The "members," as they are called, are at the mercy of the stockholders, and the business is conducted for the pecuniary benefit of the latter, so far as we can see from the by-laws and the conduct of the business; and, notwithstanding the space given in the charter and the by-laws to the regulations and provisions of the social or fraternal features of the alliance, the conclusion is irresistible that it is in reality a life insurance company, and is seeking to relieve itself of

some of the burdens imposed on corporations of that character, for the protection of the public, by assuming the guise of a fraternal beneficiary society. Its answer, and article 6 of part 2 of the by-laws, show that it is engaged in issuing and offering policies to the amount of \$5,000, while it has no authority to issue them in a larger amount than \$1,000 on any one life, even if it has made the deposit as required by § 128 of article 28. But it is urged in its behalf that it was innocent of any intentional violation of the law, and therefore its charter should not be forfeited. This court has previously been called upon to deal leniently with it, and, although legal cause was shown for the forfeiture of its charter, yet, being of opinion that the public interest did not then demand it, we permitted it to continue its existence. But it would be going very far, when we for the second time have found that it was exceeding its charter powers, to again grant it such indulgence. That it has abused and misused its corporate powers by issuing policies in sums in excess of \$1,000, we have no doubt. It is true that § 268 of article 23 authorizes proceedings to restrain a corporation from assuming or exercising any franchise, liberty, or privilege, or transacting any business, not allowed by the charter, but that does not exclude other proceedings; and in this instance, in the exercise of them there have been

both an abuse and a misuse of its corporate powers by the appellant. When a company is authorized to insure under provisions that expressly limit the amount of the policies to be issued, and it deliberately exceeds that amount, it clearly abuses and misuses the powers vested in it. It is no longer safe to permit it to continue to exercise even the powers that were authorized. Nor can we doubt that there has been a deliberate attempt to evade the insurance laws of the state, and that, too, in one of its most important provisions. There are so many schemes to catch the unwary, and so many inducements offered to attract people, especially those of limited means, desirous of making some provision for those dependent upon them, that it is of the utmost importance that all corporations, organizations, and individuals that engage in life insurance be made to understand that they must at least obey the laws of the state, and that no evasion of them will be tolerated. This is necessary for the protection of the public, as well as those conducting their business in accordance with law.

It is not necessary that we should discuss the other grounds relied on by the state, as we are of opinion that those already referred to are sufficient to require us to affirm the order of the court below.

Order affirmed, with costs.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Mary A. INGERSOLL *et al.*

v.

Charles W. HOPKINS *et al.*

(.....Mass.....)

1. **A will made before Stat. 1892**, chap. 118, took effect is within its provisions as to revocation by marriage, when the testator married after the act took effect.

2. **The fact that a will was made in contemplation of marriage** does not "appear from the will itself" so as to prevent its revocation by the testator's subsequent marriage, under Stat. 1892, chap. 118, merely because he wills all his property to a woman whom he appoints as one of the executors and afterward marries.

(February 28, 1898.)

REPORT by the Supreme Judicial Court for Suffolk County of an appeal from a decree of the Probate Court admitting to probate the will of Charles D. Ingersoll, deceased.

Reversed.

The facts are stated in the opinion.

Messrs. W. H. H. Emmons and Wilfred Bolster, for appellants:

It does not "appear from the will itself," as

required by the statute, "that the will was made in contemplation of such marriage."

By his own act of marriage, testator revoked the will by bringing himself within the terms and prohibition of the statute. He lived nearly four years after this marriage had revoked his will, and he could easily have made a new one if he had desired to carry out the provisions of the previous will.

See *Sloninger v. Sloninger*, 161 Ill. 270; *Crum v. Sawyer*, 182 Ill. 443.

In *Swan v. Sayles*, 165 Mass. 177, this court decided: (1) "It does not appear from the will or codicil that either was made in contemplation of the marriage." (2) "A statute revoking wills at any time before the death of the testator for any cause probably would be within the constitutional power of the general court."

See also *Sherman v. Sherman*, 8 Barb. 385, and cases there cited; also *Cushing v. Aylwin*, 12 Met. 169.

The English statute is the same as ours, without the exception about the will being made in contemplation of marriage.

Under this statute it has been held that no intention of testator and no hardship to the beneficiary can prevent the revocation, even when made in contemplation of marriage, and in favor of the woman to whom he was married immediately after making the will.

Otway v. Sadleir, 33 L. T. 46; *Goods of Cadywood*, 1 Swab. & T. 54; *Marston v. Roe*, Fox, 8 Ad. & El. 14; 1 Jarman, Wills, 6th ed. pp. 145, 146; *Warter v. Warter*, L. R. 15 Prob. Div. 152.

NOTE.—For revocation of will by marriage, see some cases in *note to Riggs v. Palmer* (N. Y.) 5 L. R. A. 346; and also in *note to Davis v. Fogle* (Ind.) 7 L. R. A. 485, and the cases of *Roane v. Hollingshead* (Md.) 17 L. R. A. 592, and *Re Hulitt* (Minn.) 84 L. R. A. 384.

40 L. R. A.

The same has been held in the United States.

Fransen's Will, 26 Pa. 202; *Edward's Appeal*, 47 Pa. 144; *Walker v. Hall*, 34 Pa. 483.

And the same construction should be given to it by this court.

Com. v. Hartnett, 3 Gray, 450.

The parol evidence offered to show that the will was executed in contemplation of the marriage was properly rejected. In order to save the will from revocation by a subsequent marriage, the will itself must contain the requisite evidence that the event was contemplated.

Deupree v. Deupree, 45 Ga. 415; *Ellis v. Darden*, 86 Ga. 368, 11 L. R. A. 51.

Revocation resulted absolutely as a legal consequence of the marriage, and was absolute the instant of the marriage.

Edward's Appeal, 47 Pa. 144.

Messrs. Alfred Hemenway and Edward B. Adams, for appellees:

The facts admitted in evidence showed beyond the possibility of a doubt that the will was in fact made in contemplation of the marriage with the sole beneficiary subsequently solemnized.

According to the ordinary rule applied in the construction of wills, it appears "from the will itself" that the will was made in contemplation of marriage with the sole beneficiary. In order to ascertain the testator's intention, as expressed in his will, it is the duty of the court, while excluding evidence of expressions of intention by the testator outside the will, to admit all material facts surrounding the testator at the time he made his will, and to read the will in the light of those facts.

Reed v. Merchants' Mut. Ins. Co. 95 U. S. 23, 30, 24 L. ed. 348, 349; *Blackburn, Contract of Sale*, 50, note; *Lamb v. Lamb*, 11 Pick. 371; *Heard v. Read*, 169 Mass. 216.

In every case the words used must be translated into things and facts by parol evidence.

Doherty v. Hill, 144 Mass. 465; *Wigram, Wills*, 2d Am. ed. p. 152.

In England it seems to be the accepted doctrine that whatever appears from the words of the will, properly interpreted by the surrounding facts, appears from the will.

Cole v. Scott, 1 Macn. & G. 518; *Wilson v. Eden*, 18 Q. B. 474; *Mattheus v. Foulsham*, L. R. 2 Eq. 669; *Kimball v. Ellison*, 128 Mass. 41.

The word "itself" can add no more force to "from the will" than the adjectives "clearly and manifestly" which are used in Rev. Stat. chap. 62, § 8.

Brimmer v. Sohler, 1 Cush. 118; *Denfield, Petitioner*, 156 Mass. 265.

The statute did not change the ordinary rule applied to the interpretation of wills by requiring express statement of the testator's matrimonial intentions in his will.

"From the will itself" does not mean "from express statement in the will," but does mean "from the will itself, rather than from declarations of the testator outside of it."

Brimmer v. Sohler, 1 Cush. 118; *Fay v. Fay*, 1 Cush. 93; *Swan v. Sayles*, 165 Mass. 177.

To allow the statute to operate to revoke a will in which the wife is made sole beneficiary would be to put a construction on it which

would defeat the manifest purpose of its framers. This the court will not do.

Holbrook v. Holbrook, 1 Pick. 248; *Com. v. Kimball*, 24 Pick. 366, 35 Am. Dec. 326; *Church v. Crocker*, 3 Mass. 17; *Langdon v. Potter*, 3 Mass. 215; *Thaxter v. Jones*, 4 Mass. 570; *Somerset v. Dighton*, 12 Mass. 388; *Whitney v. Whitney*, 14 Mass. 88; *Burlingame v. Bell*, 16 Mass. 318; *Com. v. Cambridge*, 20 Pick. 267; *Stanislaus v. Raymond*, 4 Cush. 314; *Opinion of the Justices*, 136 Mass. 578.

Field, Ch. J., delivered the opinion of the court:

The will of Charles D. Ingersoll, of Boston, was executed on October 20, 1891, and in it he gave all his property to Mary Alice Payson, of said Boston, "single woman," and appointed her one of the executors, and requested that the executors "be required to give no sureties on their official bonds." It appears from the testimony admitted by the justice who reported the case to this court that the testator and Miss Payson were married on October 19, 1892; that the testator died on September 28, 1896; that prior to the time when the will was executed the testator and Miss Payson had mutually promised to marry each other; that the contract of marriage remained in force from the time of the engagement until the marriage, and that she lived with him as his wife from the time of her marriage until his death. From this evidence, in connection with the will, the presiding justice found, as matter of fact, so far as he properly could, that it appears from the will itself, "by fair inference from its provisions as applied to the parties and the subjects to which it relates, that the will was made in contemplation of the marriage that was subsequently solemnized," and he affirmed the decree of the probate court allowing the will. The question of law in this case depends upon the construction to be given to Stat. 1892, chap. 118, of which the 1st section is as follows: "The marriage of any person shall act as a revocation of any will made by such person previous to such marriage, unless it shall appear from the will itself that the will was made in contemplation of such marriage, or unless and except so far as the will is made in exercise of a power of appointment and the estate thereby appointed would not, in default of appointment, pass to the persons that would have been entitled to the same if it had been the testator's own estate and he or she had died without disposing of it by will." It is manifest, we think, that from the will itself, considered independently of the testimony admitted by the presiding justice, it does not appear that the will was made in contemplation of marriage with Miss Payson. It is impossible to hold, in every case where a testator, by his will, gives property, or all his property, to a woman who is unmarried, and makes her his executrix, that it appears from this that at the time when he made the will he contemplated marrying her, and made his will in contemplation of such marriage. It does not appear that there was any dispute or uncertainty as to the Mary Alice Payson intended, or that any evidence was necessary to identify her or the estate which was devised and be-

queathed to her. The evidence was admitted to show another fact existing at the time when the will was made, namely, that at that time the testator was under a contract of marriage with her; and then, by considering this fact in connection with the provisions of the will, the presiding justice drew the inference that the will was made in contemplation of the marriage with her which afterwards took place. It was, in effect, conceded by both sides that, although the will was made before Stat. 1892, chap. 118, took effect, yet, as the marriage took place after the statute took effect, the statute was applicable to the case. See *Swan v. Sayles*, 165 Mass. 177.

The counsel for the appellees cite the decisions of this court upon the construction of what is now Pub. Stat. chap. 127, § 21, which section is as follows: "When a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless they have been provided for by the testator in his lifetime, or unless it appears that the omission was intentional and not occasioned by accident or mistake." Under the statutory provision which now constitutes this section, the court held that parol evidence is admissible to show that the omission by a testator to provide in his will for any of his children, or for the issue of a deceased child, was intentional, and was not occasioned by accident or mistake. *Converse v. Wales*, 4 Allen, 512. But the section does not require that it should appear from the will itself that the omission was intentional, and it well may be that the reason for using the different phraseology in Stat. 1892, chap. 118, was that the legislature did not intend to leave the question whether a will was made in contemplation of a marriage, which subsequently took place, to the uncertainty which often attends the proof of facts by oral evidence.

The counsel for the appellees also rely upon the construction which has been given to what is now Pub. Stat. chap. 127, §§ 24, 25. *Fay v. Fay*, 1 Cush. 93; *Brimmer v. Solier*, 1 Cush. 118. These sections are as follows:

"Sec. 24. Every devise shall be construed to convey all the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate.

"Sec. 25. An estate, right, or interest in lands acquired by a testator, after the making of his will, shall pass thereby in like manner as if possessed by him at the time when he made his will, if such manifestly and clearly appears by the will to have been the testator's intention."

The decisions are to the effect that the intention of the testator under these sections need not be declared in express terms in the will, but that it is sufficient if the intention can be clearly inferred from particular provisions of the will, and from its general scope and import. The decisions give no sanction to the doctrine that such intention can be shown by evidence other than that derived from the will itself. The statute in England on the subject is as follows: "And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executors or administrators, or the person entitled as his or her next of kin, under the statute of distributions)." 1 Vict. chap. 26, § 18. There it is held that no intention of the testator, even though expressed in the will itself, can prevent the revocation of the will by a subsequent marriage. *Otway v. Sadleir*, 33 L. T. 46; *Goods of Cadywood*, 1 Swab. & T. 34; 1 Jarman, Wills, 6th ed. *110 *et seq.* Our statute follows closely the English statute, inserting only the exception, "unless it shall appear from the will itself that the will was made in contemplation of such marriage." The intention of our legislature apparently was not to follow the English statute as interpreted by the English courts, when it appeared from the will itself that it was made in contemplation of a marriage which subsequently took place, but to follow it in other respects, and to exclude from consideration any evidence not derived from the will itself. The statute of Georgia more nearly resembles ours, and it is there held that parol evidence cannot be received to show that the will was made "in contemplation of the event" of marriage or the birth of a child. *Ellis v. Darden*, 86 Ga. 368, 11 L. R. A. 51. In the opinion of a majority of the court, Stat. 1892, chap. 118, means that when the will is not made in the exercise of a power of appointment it must be apparent on the face of the will itself that the will was made in contemplation of "such marriage," either by an express declaration in the will to that effect, or by language in the will from which such contemplation may fairly be inferred; otherwise a subsequent marriage "shall act as a revocation."

A decree should be entered that the decree of the Probate Court allowing the will is reversed, and that the will is disallowed, and the case remanded to the probate court for further proceedings. Decree accordingly.

OREGON SUPREME COURT.

In the Matter of C. C. THOMPSON.

(.....Or.....)

The resignation of an attorney without consent or privilege of the court is ineffectual to preclude his disbarment, when proceedings therefor were pending at the time of his resignation.

(March 21, 1898.)

PROCEEDINGS to disbar an attorney.*Judgment of disbarment entered.*

The facts are stated in the opinion.

Mr. S. B. Linthicum for plaintiff.**Per Curiam:**

This is a proceeding to disbar an attorney, instituted upon the relation of the members of the grievance committee of the Oregon State Bar Association. The information charges that C. C. Thompson, a licensed attorney, was indicted, tried, and convicted of a felony, *viz.*: the crime of larceny by baillee, and thereupon sentenced to imprisonment in the penitentiary, and prays that he may be required to answer the accusation, and upon proof thereof that he be disbarred from practising his profession in this state. An order requiring the accused to answer the charges on or before a day therein stated was made by the court, and personally served upon him in Multnomah county, by the sheriff thereof, who also delivered to him a copy of the information, but, instead of answering the latter, he filed in this court, before the day so appointed, a written resignation as an attorney. An attorney is permitted, at any time, to file in the office of the county clerk of the county in which he resides a written resignation, upon receiving which it is made the duty of such clerk immediately to forward a certified copy thereof to the clerk of this court, who shall file the same in his office. After filing such resignation, the attorney is not entitled to the rights nor subject to the disabilities or prohibitions incident to that relation, except that he is still subject to the power of the court in respect to matters arising while he was an attorney. Hill's Anno. Laws (Or.) §§ 1045, 1046. The courts of England, at the beginning of the nineteenth century, adopted a rule which provided that the name of an attorney would not be stricken from the rolls at his own request, without an affidavit that he did not apply therefor under an apprehension that charges would be preferred against him. *Ex parte Owen*, 6 Ves. Jr. 11; *Ex parte Foley*, 8 Ves. Jr. 33. In New York it was held that, notwithstanding an attorney may have quit the practice of his profession, he

was nevertheless amenable to the orders and process of the court as long as his name remained upon the roll of attorneys. *Scott v. Van Alstyne*, 9 Johns. 216. Undoubtedly § 1045, *supra*, was enacted in view of these rules, from which it would appear that, while an attorney may voluntarily resign his office, and thus relinquish the rights conferred by his admission to the bar, and escape the disabilities incident thereto, Thompson's resignation, not having been made with the consent or approval of this court, cannot have the effect of striking his name from the roll of attorneys, and, as long as his name remains thereon, he must be subject to its summary jurisdiction, and amenable to its orders and judgments. In so far as they relate to acts committed by him prior to his resignation. The accused, having been convicted of a felony while he sustained the relation of an attorney, ought not to be permitted, by his voluntary act, to have his name stricken from the roll of attorneys while charges are pending against him. He had notice of the pendency of this proceeding, and was thereby afforded an opportunity of being heard, but failed to answer the accusation, thus tacitly confessing the truth of the charges, which is apparent from an inspection of the records of this court, to which our attention is particularly called. *State v. Thompson*, 28 Or. 296.

The statute authorizes the removal or suspension of an attorney upon his being convicted of any felony (Hill's Anno. Laws (Or.) § 1047), thus leaving the penalty, to some extent, to the discretion of the court (*Ex parte Mason*, 29 Or. 18). The citizen is frequently compelled to intrust the management of some of his business to an attorney, who, as agent of his principal, has authority to act for and bind the latter; and, while the law clothes the agent with this measure of power, it requires of him the utmost good faith in the performance of the duty intrusted to him in consequence of the position he occupies as an officer of the courts. If an attorney be convicted of a felony, the nature of which is calculated to injure his reputation for the performance of duty which the law enjoins, the punishment should be removal; for, if the court permits such an attorney to escape with a light sentence, it tends to lessen the respect which the public should ever have for the members of this learned profession.

The judgment of this court will therefore be that the name of C. C. Thompson be stricken from the roll of attorneys as a person unfit to belong to the profession; that he be disbarred from practising in any of the courts of this state; and that the state recover of the accused the costs and expenses of this proceeding.

NOTE.—For some authorities on the general question of the disbarment of attorneys, see *Fairfield County Bar, Fessenden, v. Taylor* (Conn.) 13 L. R. A. 767, and *note*.
40 L. R. A.

As to the necessity of a bad or fraudulent motive to justify the disbarment of an attorney, see *State, Fowler, v. Finley* (Fla.) 18 L. R. A. 401.

WYOMING SUPREME COURT.

STATE of Wyoming, *ex rel.* City of
CHEYENNE,

τ.

Daniel S. SWAN, Treasurer of Laramie
County.

(..... Wyo.....)

1. It is the duty of the court to examine legislative journals to determine a disputed fact whether or not a statute as published is in fact that which was passed by the legislature, where the Constitution requires that each house shall keep a journal, and that no bill shall become a law, unless on its final passage; the vote taken by ayes and noes is entered on the journal.

2. Legislative journals constitute a record which is competent to overthrow the presumption that an act properly signed by the presiding officers of the legislature, approved by the governor, and deposited in the secretary's office, was regularly passed.

3. If the amendments proposed by the conference committee and adopted by both houses of the legislature were copied in full upon the journals, an enrolled bill which does not contain them cannot be presumed to have been the one actually passed, although the amendments were not required by law to be spread at length upon the journal.

4. The invalidity of one section of a statute which is in material relation to other portions of the act, so as to modify, restrict, or extend its application, will cause the failure of the other portions also.

(December 15, 1897.)

QUESTIONS reserved by the District Court for Laramie County for the opinion of the Supreme Court which arose in a mandamus proceeding to compel defendant to proceed to sell certain property for delinquent taxes under the provisions of a statute. *Answers in respondent's favor returned.*

The facts are stated in the opinion.

Mr. E. W. Mann, for relator:

The journals of the two houses of the legislature cannot be used as evidence to impeach the validity of an enrolled act, and hence they are not competent evidence to show that § 1 of the law is not an exact copy of § 1 of the act which passed both houses of the legislature.

23 Am. & Eng. Enc. Law, p. 202; *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294.

Mr. R. W. Breckons, for respondent:

Section 1 of the act in question never passed the legislature of the state of Wyoming; it was never placed on its final passage before both branches of the legislature; there was no vote taken by the ayes and noes upon the final passage of said act; and the names of those voting upon the final passage of said act were not entered upon the journal of the legislature.

When the framers of the Constitution pro-

vided for the keeping of a journal they surely intended that certain proceedings of the legislature should be entered thereon, and when the various state legislatures of the state of Wyoming provided for the making of certified copies of such journals to be deposited in the office of the secretary of state, and to be sent also to printers for publication, they surely intended that these provisions should mean something.

The courts of last resort in the following states have decided that in determining the validity of a statute, and in determining whether it has been enacted according to constitutional provisions, it is competent to look into the legislative journals, and that in the event that the legislative journals show that the constitutional requirements have not been fulfilled, then the enrolled act must fall: Alabama, Missouri, South Carolina, Wisconsin, Arkansas, Nebraska, Tennessee, Wyoming, California, New Hampshire, Utah, Minnesota, Colorado, Ohio, Virginia, Maryland, Florida, Oregon, West Virginia, Illinois, Kansas, Michigan.

Sayre v. Pollard, 77 Ala. 608; *Smithee v. Garth*, 33 Ark. 17; *Stevenson v. Colgan*, 91 Cal. 653, 14 L. R. A. 459; *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. Rep. 145; *Re Roberts*, 5 Colo. 530; *State, Markens, v. Brown*, 20 Fla. 407; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Division of Howard County*, 15 Kan. 194; *Legg v. Annapolis*, 42 Md. 203; *Rode v. Phelps*, 80 Mich. 598; *State, Atty. Gen., v. Mead*, 71 Mo. 266; *Lincoln v. Haugan*, 45 Minn. 451; *State, Huff, v. McLelland*, 18 Neb. 236, 53 Am. Rep. 814; *Opinion of the Justices*, 52 N. H. 622; *Miller v. State*, 3 Ohio St. 475; *Currie v. Southern P. Co.* 21 Or. 566; *State, Atty. Gen., v. Hagood*, 18 S. C. 46; *Brewer v. Huntington*, 86 Tenn. 732; *Wise v. Bigger*, 79 Va. 269; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *Meracle v. Down*, 64 Wis. 923; *Brown v. Nash*, 1 Wyo. 85; *Ritchie v. Richards*, 14 Utah, 345.

In *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294, it was held that it was not competent to show from the journals of either house, or from the reports of committees, or from other documents printed by authority of Congress, that an enrolled bill, as finally passed, contained a section that does not appear in the enrolled act in the custody of the state department.

Harwood v. Wentworth, 162 U. S. 547, 40 L. ed. 1069.

In *United States v. Bullin*, 144 U. S. 1, 36 L. ed. 321, the court looked to the journal to uphold the validity of an enrolled act.

In *Eld v. Gorham*, 20 Conn. 8, the question before the court was one of difference between the journal and the law, and no constitutional question whatever was involved.

In Indiana at first the journals were consulted for the purpose of impeaching the enrolled act. Subsequently a different rule prevailed.

Evans v. Browne, 30 Ind. 514, 95 Am. Dec. 710; *Edger v. Randolph County Comrs.* 70 Ind. 331.

Iowa has not decided this question.

Keohler v. Hill, 60 Iowa, 543.

NOTE.—As to conclusiveness of enrolled bill, see note to *State, Reed, v. Jones* (Wash.) 23 L. R. A. 340; *Lafferty v. Huffman* (Ky.) 32 L. R. A. 208; *Union Bank v. Oxford Comrs.* (N. C.) 84 L. R. A. 487; and *Cohn v. Kingsley* (Idaho) 38 L. R. A. 74. 40 L. R. A.

In *Weeks v. Smith*, 81 Me. 538, it did not appear that the Constitution required any particular matter to be set out in the journal but the question was as between the enrolled act and parol testimony.

Louisiana may be placed among the states which declare that where the Constitution requires a particular matter to appear in the journal the provision is mandatory, and that the failure to observe such provision renders the act void.

Hollingsworth v. Thompson, 45 La. Ann. 222.

The state of Nevada can probably be classed with those states which hold the enrolled act conclusive.

State. George, v. Swift, 10 Nev. 187, 21 Am. Rep. 721; *State, Sutherland, v. Nye* (Nev.) 42 Pac. 866.

Re Tipton, 28 Tex. App. 438, 8 L. R. A. 326, supports the contention of the respondent.

In *Buller v. State*, 89 Ga. 821, the journal was consulted under circumstances which would lead us to believe that the supreme court of that state would hold that the affirmative showing in the journal that certain constitutional requirements had not been complied with, would render the enrolled act void.

In *State, Reed, v. Jones*, 6 Wash. 452, 23 L. R. A. 340, the opinion is a most vigorous one, and all that we can say regarding it is, that the doctrine laid down has not been followed in any state in the Union, with the possible exception of New Jersey, where the Constitution differed materially from that of Washington.

In *Blaine County v. Heard* (Idaho) 45 Pac. 890, it is intimated that the journal may be consulted to overthrow the presumption arising from the enrolled act.

In *Rumsey v. New York & N. E. R. Co.* 180 N. Y. 88, and *New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, the court expresses doubt as to what the authorities had decided. In both of these cases the journal was consulted to uphold the appeal.

Union Bank v. Oxford Comrs. 119 N. C. 214, 84 L. R. A. 487, shows very clearly the distinction between the many cases upholding the doctrine that the enrolled act is conclusive and the case at bar.

The only states opposed to the doctrine contended for by respondent in this case are Indiana, Mississippi, New Jersey, Nevada, and Washington. Of these, in Indiana, Mississippi, and New Jersey it appears that the question as to what is the effect of the failure of the journal to show such matters as the Constitution requires shall be shown, have never been discussed, and therefore the states of Nevada and Washington are the only states directly opposed to our contention.

Such text-writers as have discussed the proposition agree that the journals may be resorted to.

Cooley, Const. Lim. pp. 164, 165; Sutherland, Stat. Constr. pp. 43-45, §§ 41, 42.

Potter, Ch. J., delivered the opinion of the court:

¶ In this case the relator, the city of Cheyenne, filed its petition in the district court for the county of Laramie, alleging its character as a municipal corporation, and that prior to the 1st 40 L. R. A.

day of March, 1897, it was allowed by the laws of the state of Wyoming to collect the taxes due to itself for municipal purposes, and, among other things, to sell real estate within its corporate limits, upon which such taxes had become delinquent, in the manner provided by the laws of the state of Wyoming and by its own ordinances, but on the 1st day of March, A. D. 1897, there was approved by the governor an act passed by the fourth state legislature, entitled "An Act Relating to the Sale of Real Estate for Delinquent Taxes, and Fixing the Fees to be Charged Therefor," which said act appears in the published session laws of the said fourth legislature as chapter 56 thereof; that, according to the provisions of said act, it was made the duty of the county treasurer, on the 1st Monday in November in each year, at his office, to offer at public sale all lands on which the taxes levied for state, county, village, city, school district, or other purpose for the previous year should still remain unpaid; and that said act repealed all other acts inconsistent therewith. It is then alleged that a demand had been duly made upon the defendant by the relator that he should advertise for sale in the manner provided by law, and that at the time provided by law he should offer for sale, all lands within the corporate limits of relator upon which the taxes for the year 1896 and previous years remained unpaid, and that the defendant, the county treasurer of Laramie county, refused to advertise the said lands for sale for said taxes. The prayer of the petition is for a writ of mandamus, commanding the said county treasurer to comply with the provisions of the act aforesaid, as the same appears in the published laws of the fourth legislature, so far as the taxes due to the city of Cheyenne for the year 1896 and previous years are concerned. The respondent resists the application for mandamus on the grounds, as set forth in the answer, that the act under which it is made his duty to sell lands for delinquent city taxes did not receive the vote of a majority of all the members elected to each house of the fourth legislature, that it was never placed upon its final passage in both houses, that there was no vote taken by ayes and noes upon the final passage of such act, and because the names of those voting thereon in the fourth legislature were not entered upon the journals of said legislature. An agreed statement of facts was filed, upon which the case was submitted; and thereupon the district court reserved to this court, for its opinion, certain questions, found to be important and difficult, as follows: "First. In the state of Wyoming, can the journals of the house and the senate of the state legislature be resorted to for the purpose of declaring invalid an act of the legislature signed by the presiding officers of both houses, and approved by the governor; and, if so, to what extent? Second. Is § 1 of chapter 56 of the Laws of the year 1897, as the same appears in the bound volume of the laws of said year, valid? Third. Is any part of § 1 of chapter 56 of the Laws of the year 1897, as the same appears in the printed volume of said act, valid; and, if so, what part or parts? Fourth. Are §§ 2 and 3 of said act valid? Fifth. Is it the duty of a county treasurer in the state of Wyoming to sell all lands on which the taxes

levied for state, county, or city purposes remain unpaid? Sixth. When is the treasurer of a county in the state of Wyoming compelled to sell property for delinquent taxes? Seventh. In selling property for taxes due the county or city, has the treasurer of a county in the state of Wyoming the right to sell property for taxes due for previous years?"

The questions reserved, and the matters at issue in the action, involve, in the first place, an inquiry into the validity of § 1 of the act aforesaid, as published in the session laws, and known as "§ 1 of chapter 56" of said published laws. In the agreed statement of facts, which we find to conform to the showing made by the journals, the action of the legislature which finally resulted in the enrolled bill which was approved by the governor, thus creating the purported act aforesaid, is shown to have been as follows: On the 23d day of January, 1897, there was introduced into the house of representatives "A Bill for an Act Relating to the Sale of Real Estate for Delinquent Taxes, and Fixing the Fees to be Charged Therefor," which title, it will be observed, corresponds exactly with the title of chapter 56 aforesaid. Said bill was designated as "House Bill Number Forty." On January 29, § 1 of said bill was amended in the house of representatives. On February 2, the said bill passed the house of representatives as amended; the voting being taken by ayes and noes, and the names of those voting thereon being entered on the journal, showing that thirty of the members of the house had voted in favor of the passage of the bill, that three had voted against it, and that five members were absent. The journal therefore shows that the bill had regularly passed the house, receiving a vote of a majority of all the members elected thereto, and that the vote taken upon its passage was by the ayes and noes, and the names of those voting thereon were entered upon the journal. The bill was then transmitted to the senate, and in that body on February 9, § 1 of the bill as it had passed the house was amended by striking out all of the section, and inserting in lieu thereof an entirely different section, making several material alterations; the main difference being that, in the section as amended by the senate, it was made the duty of the county treasurer to sell lands upon which there were unpaid and delinquent taxes due to any city within the county, as well as to sell lands for delinquent taxes of state and county. On February 11 the bill, as thus amended, passed the senate by a majority vote of all the members elected thereto; the vote being taken by the ayes and noes, and the names of those voting thereon being entered upon the journal, showing nineteen votes for the passage of the bill as amended—being all the members of the senate. The bill, so amended, was then returned to the house; and on February 11, 1897, the house by a vote taken by ayes and noes, which was entered upon the journal, refused to concur in the senate amendment, and requested the senate to recede therefrom; twenty-six members of the house voting not to concur, three in favor of concurrence, and nine absent. On February 11, the senate, by a vote, refused to recede from its amendment, and a conference committee was ap-

pointed by both senate and house to confer over the differences between the two bodies with reference to § 1 of said bill. On February 17, the conference committee presented to both the senate and the house the following report, which is copied in the journals of both the senate and the house, to wit:

Cheyenne, Wyo., February 16, 1897.

Mr. Speaker: Your joint conference committee, to whom was referred H. B. No. 40, beg leave to report as follows: We recommend that the senate recede from its amendments to said bill; and we further recommend that the following section, as § 1 of said bill, be adopted and said bill be amended by striking out all of § 1 of said original bill, and inserting in lieu thereof the proposed section, to wit: "Section 1. The sales of real estate by all county treasurers in the state of Wyoming for non-payment of taxes shall be held at the front door of the court-house (or county building), beginning on the 1st Monday in October of each year, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon, and may adjourn from day to day (Sundays excepted), until all the lands are offered. After the tax sale as herein provided shall have closed, any real estate remaining unsold for the want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale to any person who offers to pay the amount of taxes, penalties, interest, and costs thereon, and to make to such person such certificate as shall be required by law to be made and delivered as in the case of the sale of any such lands at public sale, with the additional statement inserted therein that such lands have been offered at public sale for taxes, but not sold for want of bidders, and sold for taxes by private sale, and the treasurer is further authorized and required to sell as aforesaid all real estate in his county on which taxes remain unpaid and delinquent for any previous year or years. Provided, that all sales of real estate for the unpaid taxes due thereon to any such city, town, or village in the state of Wyoming by the treasurer of any such city, town, or village shall be governed by the provisions of this act."

Isaac Bergman,
L. C. Tidball,
Thomas Cottle,
House Committee.
A. M. Appleget,
George W. Fox,
Senate Committee.

The above is taken from the house journal. In the printed journal of the senate the report of the conference committee is shown to be precisely the same as the above, with the exception that the word "such," preceding the word "city," where it is first used, towards the close of the provision of § 1, as recommended by the committee, is omitted. On February 17, upon the coming in of said report, a motion was made in the house to adopt the report of the joint conference committee, and that the amendments recommended by such committee be concurred in. Thereupon the vote was taken by ayes and noes, with the result that thirty-four voted in favor of the mo-

tion to concur in such amendment of the conference committee, three opposed thereto, and one was absent. The names of those voting thereon were entered on the journal of the house, and the speaker thereupon announced that the amendment of the conference committee had been concurred in by the house. On the same day in the senate a like motion was made, and upon a vote of the members of the senate, taken by ayes and noes, it appears that sixteen voted in favor of the motion to adopt the report of such committee and concur in such amendment, and three were absent; there being no votes in the negative. The names of those voting upon such motion in the senate were entered upon the senate journal. On February 19, the act was enrolled; but § 1 of the act, as enrolled, was not the section which was recommended by the conference committee, and which was adopted and concurred in by both house and senate on February 17, but was the amendment first made by the senate, which was rejected by the house. The enrolled act was signed by the speaker of the house and the president of the senate, and sent to the governor; and the same was approved by him, and became chapter 56 of the printed volume of the Laws of 1897.

The question before us, therefore, is whether or not the courts may go behind the enrolled act, which is authenticated by the signature of the presiding officers of the two legislative bodies, and approved by the governor, to determine whether or not such enrolled act is in fact the act which was passed by the legislature. There is some conflict among the authorities upon this proposition,—some courts going to the extent of holding that the courts are at liberty to resort to the legislative journals to discover whether or not, in any instance the constitutional requirement has been complied with in the passage of an act which is found in the office of the custodian of the laws, purporting to be an act of the legislature, and approved by the governor; others, only that such journals are competent evidence for the purpose of determining whether or not a constitutional requirement has been observed in the passage of an act of the legislature, where such action of the legislature is required to be entered upon the journal. Other courts, however, have held directly to the contrary, and maintained the conclusiveness of the enrolled act, authenticated by the signatures of the presiding officers of the two legislative bodies and the approval of the governor. When the keeping of the legislative journals is enjoined by the Constitution, and that instrument also attaches certain conditions to the enactment of a valid law, and the facts showing a compliance therewith are required to be entered upon the journals, the decided weight of authority in this country favors the resort to such journals to determine whether the law has been enacted in a constitutional manner. The provisions which perhaps more than any other have caused an adherence to that doctrine are those which relate to the number of votes necessary to the passage of a bill, the taking of such vote by ayes and noes, and the entry upon the journal of the names of those members voting thereon. The states in which it is held competent to resort to the journals to as-

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certain whether, in the enactment of a law, the constitutional requirements have been complied with, are: Alabama: *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Sayre v. Pollard*, 77 Ala. 608; *Moog v. Randolph*, 77 Ala. 597. Arkansas: *Worthen v. Badgett*, 32 Ark. 496; *Smithee v. Garth*, 33 Ark. 17. Colorado: *Re Roberts*, 5 Colo. 530. Florida: *State, Markens v. Brown*, 20 Fla. 407. Illinois: *People, Barnes, v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *Larrison v. Peoria, A. & D. R. Co.* 77 Ill. 11. Missouri: *State, Atty. Gen., v. Mead*, 71 Mo. 266. Nebraska: *State, Marlay, v. Liedtke*, 9 Neb. 462; *State, Huff, v. McLelland*, 18 Neb. 286, 58 Am. Rep. 814. New Hampshire: *Opinion of the Justices*, 52 N. H. 622. Ohio: *Miller v. State*, 3 Ohio St. 475. Oregon: *Currie v. Southern P. Co.* 21 Or. 566. Kansas: *Re Division of Howard County*, 15 Kan. 194. South Carolina: *State, Atty. Gen. v. Hagood*, 13 S. C. 46. Tennessee: *Brewer v. Huntington*, 86 Tenn. 732. Utah: *Ritchie v. Richards*, 14 Utah, 345. Virginia: *Wise v. Bigger*, 79 Va. 269. West Virginia: *Osburn v. Staley*, 5 W. Va. 85, 18 Am. Rep. 640. Wisconsin: *Meracle v. Down*, 64 Wis. 323. Michigan: *Rhode v. Phelps*, 80 Mich. 598. Maryland: *Legg v. Annapolis*, 42 Md. 203. Minnesota: *Lincoln v. Haugan*, 45 Minn. 451. California: *Weill v. Kenfield*, 54 Cal. 111. *Oakland Parking Co. v. Hilton*, 69 Cal. 479; *Stevenson v. Colgan*, 91 Cal. 653, 14 L. R. A. 459.

The same rule was adopted by the supreme court of Wyoming when a territory. *Brown v. Nash*, 1 Wyo. 85; *Union P. R. Co. v. Carr*, 1 Wyo. 96. In Idaho, in the case of *Blaine County v. Heard*, 45 Pac. 890, there is an intimation to the same effect. The contrary doctrine is held in the following states: Indiana, Louisiana, Maine, Mississippi, Nevada, New Jersey, North Carolina, Texas, and Washington. The state of Connecticut is usually included in this class upon the authority of the case of *Eld v. Gorham*, 20 Conn. 8. In that case, however, we do not understand that the precise question was involved. The question there under consideration was whether the volume termed "The Revised Statutes of the State of Connecticut" was to be decreed to contain all the public statute laws of the state, or whether the court could go behind it, and examine the proceedings of the revision committee to ascertain if they had exceeded their powers. The leading case in Nevada (*State, George, v. Swift*, 10 Nev. 176, 21 Am. Rep. 721) was decided in 1875. The opinion is expressed in that case that the weight of authority favors the conclusiveness of the enrolled act, and the states of Maryland, Missouri, and California are referred to as upholding that doctrine. Since then, however, in each of those states a different rule has been announced and a resort to the journals is permitted to impeach an enrolled act. The courts of California and Missouri changed front upon the question, on account of changes in their respective Constitutions; but, as amended neither of them differed essentially from the provisions of the Nevada Constitution under which *State, George, v. Swift*, 10 Nev. 176, 21 Am. Rep. 721, was decided. The case of *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294, as to acts of Congress, denied the right to consider the journals as evi-

dence to impeach the correctness of the enrolled act; the contention being made that a section had been omitted therefrom. Article 1, § 5, of the Federal Constitution contained the provision which it was claimed constituted the journals the best evidence upon an issue whether in fact a bill was passed by Congress. That provision requires only that "each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered upon the journal." And the court said: "In regard to certain matters, the Constitution expressly requires that they shall be entered upon the journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered upon the journal, we need not inquire. No such question is presented for determination." Although Iowa is sometimes mentioned among the states upholding the incompetency of the journals, the courts of that state cannot be said to have expressly so decided. Indeed, in one case where the question was whether an amendment to the Constitution had been previously agreed to by the general assembly the court examined the journals; and, in regard to the question at issue in this case, the court said that whether a bill which had been duly enrolled can be impeached, when the journals affirmatively show that it never was passed, was a question not before them, and indicated that it would be a proposition not readily solved. *Kochler v. Hill*, 60 Iowa, 543, 554. We cannot but regard the clear weight of authority in this country as sustaining the propriety of consulting the journals in reference to a matter which the Constitution expressly requires to be recorded therein, concerning the constitutional procedure for the passage of an act; and in case, upon such an examination, it affirmatively appears, in respect to the requirements aforesaid, that the bill did not in fact pass the legislature, or did not receive the constitutional majority, and therefore did not constitutionally become a law, they may be used to impeach the enrolled act, although the latter is signed by the presiding officers of both houses, and carries the approval of the governor. That such is the weight of authority is recognized by the text-writers. In *Cooley on Constitutional Limitations* it is said: "If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirements of the Constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence, and adjudge the statute void." And again: "It will not be presumed in any case, from a mere silence of the journals, that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the Constitution has expressly required the journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered." *Cooley, Const. Lim.* 3d ed. pp. 135, 136. See also *Id.* p. 141; *Sutherland, Stat. Constr.* §§ 41-44.

The provisions of our Constitution affecting
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the question before us are as follows: "Each house shall keep a journal of its proceedings, and may in its discretion from time to time publish the same, except such parts as require secrecy; and yeas and noes on any question shall at the request of two members be entered upon the journal." Article 3, § 13. "No bill shall become a law except by a vote of a majority of all the members elected to each house, nor unless on its final passage the vote taken by the yeas and noes and the names of those voting being entered upon the journal." *Id.* § 25. "The presiding officer of each house shall in the presence of the house over which he presides sign all bills and joint resolutions passed by the legislature immediately after their titles have been read, and the fact of signing shall be at once entered upon the journal." *Id.* § 28. It will be observed that the Constitution provides, in a very positive and mandatory manner, that no bill shall become a law, except by a vote of a majority of all the members elected to each house, and that no bill shall become a law unless on its final passage the vote be taken by yeas and noes, and the names of those voting be entered upon the journal. The journal record therefore will disclose whether or not any measure, upon its final passage, has received the constitutional number of votes. The presumption unquestionably is that an act found properly signed by the presiding officers, approved by the governor, and deposited in the secretary's office with the other acts of the session, was regularly passed, which is only to be overcome by evidence, of which the courts take judicial notice, showing the contrary. It is well settled that, whenever the existence of an act of the legislature is called in question, the court may resort to any source of information capable of conveying to the judicial mind a clear and satisfactory answer to such question. Not only by the weight of authority, but upon principle as well, we are convinced the constitutional provisions aforesaid constitute the journals concerning the action of the legislature upon the final passage of an act a record, which, by an affirmative showing to the contrary, is competent to overthrow the presumption arising from the certificates of the presiding officers, and the lodgment of the enrolled act with the secretary. The Constitution makes no distinction between the force to be given to the authentication by the presiding officers, and the journal account of the legislative procedure, in the respect mentioned. Both requirements proceed from the same source, and it is difficult to perceive any sound reason why the final authentication by the officers should be conclusive of the action of the legislature, when such action is also required to be made a matter of journal entry. The provision that the names of those voting shall be entered upon the journal, in connection with the requirement that the vote shall be taken by yeas and noes, and in the same section with the limitation upon legislative power to pass any law, must be considered as intending to subserve a more important purpose than that of simply indicating how any particular member voted. The design was, clearly, to perpetuate a record or evidence of the fact that the act was passed in strict accordance with the fundamental law. No court disputes the prop-

osition that the legislature is powerless to enact a law in violation of the constitutional requirements, and that no bill becomes a law if in fact it was not passed by the legislature. *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294. The divergence of views arises concerning the character of the evidence which may be accepted in the determination of that question. The English decisions, and those of some of the states, denying any right to consult the journals, are not in point, owing to a radical difference between the record authority of the journals of Parliament and of the legislatures of such states, and legislative journals under a Constitution like our own. Here the journals are not kept merely in the interest of orderly procedure, but they exist in obedience to a constitutional command; and the nature of their contents is, to some extent, prescribed. As it is the peculiar province of the courts to pronounce upon the validity of legislative enactments, they should possess authority to have recourse to the constitutional record of legislative procedure, in so far, at least, as that record is constitutionally required to make disclosure, and, within that limit, to the extent of giving effect to an affirmative showing.

As to the act in question, the journal shows that it passed the house regularly, and with the constitutional number of votes, in the first instance. There were four sections to the bill; the last two, however, respectively merely repealing inconsistent acts, and providing the time for its taking effect. The merits of the act were contained in the first two sections, and the second largely depended upon the first, as to its effect and application. When the bill reached the senate, that body proceeded to strike out all of § 1 as it had passed the house, and inserted new provisions in its place, and then passed the bill in regular form. Upon its transmission to the house, the senate amendment was not concurred in. These facts affirmatively appear, and thus, up to that point, it is clear that the same bill had not passed both houses. The house had agreed to one measure, and the senate to another. Thereupon, a conference committee having been duly appointed, a report was submitted by it, proposing other provisions for § 1. Both journals contained a copy of that report, with the amendment proposed, and in both houses said amendment was adopted; the vote thereon being taken by ayes and noes, and the names of those voting thereon being entered upon the journals of the senate and house respectively. It thus, by affirmative showing, appears that the senate receded from its former amendment, and passed the bill with the amendment reported by the committee. The house adopted that amendment, and thus both houses ultimately agreed upon, and by the constitutional number of votes, as disclosed by the journals, passed, the same measure. The final action of both houses is recorded in the journals. We need not decide whether the final action on the amendment is, within the sense of the Constitution, the final passage, so as to require the vote thereon to be taken by ayes and noes, and the names of those voting to be entered upon the journal. In this case, at least, that was done, and indicates that such was the legislative understanding. It is sufficient that,

with regard to the act under consideration, there appears an affirmative showing that the senate amendment, which was enrolled as § 1, did not ultimately pass either house, and did not at any time receive the sanction of the house of representatives. The act which secured executive approval was not the act which passed the legislature, and the latter was not approved by the governor, nor was it presented to him for such approval. The contents of a pending bill, or an amendment thereto, need not be recorded at length in the journal; and it is entirely probable that had the amendment reported by the committee, upon which the final action was taken, been omitted, the presumption would be indulged in that the enrolled act correctly represented it, but in this instance it was copied in the record in full, and thus explains the vote in each house. It is inseparably connected with the final action of both bodies, and the court is not at liberty to presume that, as its entry is not required, the vote adopted the section as it is found in the enrolled act. The journals positively, and with distinctness, inform us that the two houses, respectively, by the vote of their members, adopted as section 1 of the act the provisions reported therefor by the committee, which report appears in the journal immediately preceding the record of the motions to adopt, and the vote thereon. Our conclusions on this branch of the case are, therefore, that we have the authority, and it is our duty, to examine the journals, to determine whether or not the act in question was passed by a majority of the members elected to each house, that being a matter which the Constitution requires to be shown by the journals; that it is affirmatively disclosed by the journals that § 1 of the act, as enrolled and published, did not finally pass either branch of the legislature; that, by the affirmative showing of said journals, it was not passed by a majority of the members elected to each house, and is therefore not a law, and must be adjudged void. Section 1, as passed by the legislature, was not copied into the enrolment, and did not receive executive approval. Therefore that did not become a law. In this case there is no question as to the silence of the journals involved. It is a common holding that, as to matters not positively required by constitutional mandate to be entered upon the journals, their silence would not vitiate the law. It is, however, also held that, even as to those matters, an affirmative showing that some essential constitutional provision had not been complied with would be sufficient to authorize the courts to declare the law void.

The question next arises, What effect does the invalidity of § 1 have upon § 2, and the subsequent sections of the act? The act is composed of four sections. Section 2 regulates the fees to be collected upon sales of real estate, for the nonpayment of taxes, by the county treasurer, and provides that such fees shall be paid into the county treasury. It also prescribes what shall be stated in the advertisement preceding such sales. Section 3 repeals all acts and parts of acts inconsistent with that act, and § 4 provides that the act shall take effect and be in force from and after its passage. In the view we take of this case, it is unnecessary to decide the question whether upon the

failure of any portion of an enrolled act, by reason of a noncompliance with some constitutional requirement in the passage of the bill, the entire act would in every such case be void. We are entirely clear, however, that if the portion of the act which actually passed the legislature, and is not included in the enrolled and published statute, has any material relation to other portions of the act, so as to modify, restrict, or extend its application, then such other portions must also fall. With reference to the act in question, we are of the opinion that, standing alone, § 2 would have to be construed as regulating only sales of real estate for taxes, such as the county treasurer, under other laws, would have authority to make; and in the absence of such provision as appears in § 1, which we hold to be void, that officer sells only for delinquent state, county, and school-district taxes, and also that the reference to the advertisement, in § 2, would be held to apply to only such sales by the county treasurer, and not to sales by municipal corporations, or officers thereof, for the nonpayment of taxes. In § 1, however, as reported by the conference committee and adopted by both houses, there was a proviso that all sales of real estate for the unpaid taxes due thereon to any city, town, or village, by the treasurer of any such city, town, or village, should be governed by the provisions of that act; so that if § 1, as actually passed by the legislature, had been copied in the enrolled act, and approved by the governor, the advertisement, at least, provided for in § 2, and possibly the fees, would have applied to sales made by such municipal treasurers. Indeed, under the provisions of § 1, as it appears in the enrolled act and printed laws, the method of advertising, and possibly the fees prescribed by § 2, would apply to sales of lands for delinquent city taxes. It will thus be observed that, by eliminating § 1 as it actually passed the legislature, and also eliminating § 1 as found in the enrolled act and printed laws, the application of § 2 is

made much narrower than would have been the case had the act, as actually passed, been correctly enrolled, and approved by the governor. We are of the opinion, therefore, that § 2 is so inseparably connected with the preceding section that without such preceding section it cannot be allowed to stand. Section 3, which merely repeals all inconsistent and conflicting acts, has no effect whatever, without the two previous sections, and the same observation applies to § 4, so that practically there is nothing in the act to take effect. Our conclusion, therefore, is that the entire act must be held to be void.

Answering the questions reserved for our opinion by the district court, we say to the first question: Yes, to the extent to which the journals are required by the Constitution to show the procedure of the legislature respecting its action upon a bill. To the second question: Section 1 of chapter 56 of the Laws of the year 1897, as the same appears in the bound volume of the laws for said year, is not valid. To the third question: No part of said § 1 is valid. To the fourth question: Section 2 of said act is not valid, and § 8 is of no effect. In respect to questions 5, 6, and 7, we say that, in view of the decision respecting chapter 56 of the Laws of 1897, the matters involved in each question are not pertinent to the issues in this case, and it is unnecessary to answer them. The duty with reference to the sales of real estate for unpaid taxes must be determined by the laws as they exist, irrespective of the act designated as chapter 56 of the Laws of 1897. Owing to the exigencies of the case, our conclusions were orally announced on the 1st day of October, with the understanding that the opinion would be written, and the order thereon entered, at a subsequent time.

Corn, J., concurs. The late Mr. Chief Justice **Conaway** concurred in the conclusions as announced by the court.

TEXAS COURT OF CRIMINAL APPEALS.

H. B. DORSEY, *Appt.*,

v.

STATE of Texas.

(.....Tex.....)

1. The mixing or mingling of articles of food which are wholesome and nutritious, and the sale thereof, cannot be made criminal by the legislature.

2. A statute making the mixture of any articles of food without labeling the product an offense is too general, but the act to be enforced should name the particular articles of food the adulteration of which is prohibited and which is required to be labeled.

(February 16, 1898.)

NOTE.—For constitutional right to deal in wholesome food, see also *State v. Myers* (W. Va.) 35 L. R. A. 844; and *Helena v. Dwyer* (Ark.) 39 L. R. A. 236, 40 L. R. A.

A PPEAL by defendant from a judgment of the Parker County Court convicting him of knowingly and fraudulently adulterating flour contrary to the provisions of a statute. *Reversed.*

The facts are stated in the opinion.

Messrs. Martin & Flanary and G. A. McCall, for appellant:

The information fails to charge an offense against the laws of the state in this, that the information fails to allege that the alleged adulteration was injurious to health.

Willson, Criminal Forms; White, *Crim. Stat.*; Rev. Stat. 1895; *Crim. Code*, p. 79, arts. 480-482.

The said information fails to allege with what the said flour was mixed, and there are seven different clauses in this statute, and the information fails to allege under which clause of the statute the same was charged, or the facts under either clause.

Walton v. State, 12 Tex. App. 117; *Hunt v. State*, 9 Tex. App. 404.

Where the article defining the offense contains an exception, the information should negative such exception, or else it charges no offense against the law.

State v. Duke, 42 Tex. 455; *Smith v. State*, 42 Tex. 464; *State v. Clayton*, 43 Tex. 410; *Woodward v. State*, 5 Tex. App. 296.

The mere mixing of two kinds of flour of the same consistency and quality, the one being cheaper than the other, and selling the same, cannot under any phase of the statute constitute adulteration of food.

Com. v. Hartman, 6 Pa. Dist. R. 136; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *Re Jacob*, 98 N. Y. 98, 50 Am. Rep. 636.

Mr. Mann Trice for the State.

Henderson, J., delivered the opinion of the court:

Appellant was convicted of knowingly and fraudulently adulterating an article of food, and his punishment assessed at a fine of \$100; hence this appeal.

As appellant made a motion to quash the information, and assigns the refusal of the court to quash the same as error, we will set out the charging part of the information, to wit: "That H. B. Dorsey did then and there knowingly and fraudulently manufacture, offer for sale, and sell a certain article of food, to wit: flour, which was then and there known by him, the said H. B. Dorsey, to be adulterated, contrary," etc. There are two statutes pertaining to this subject, under either of which the indictment may have been drawn. The first is article 427, Penal Code 1895, which provides: "If any person shall fraudulently adulterate, for the purpose of sale, any substance intended for food . . . with any substance injurious to health, he shall be punished by fine not less than \$50 nor more than \$500." Article 430 provides: "No person shall within this state manufacture, offer for sale, or sell any article of food, . . . which is by him known to be adulterated, within the meaning of this law," and the punishment assessed is a fine not exceeding \$100. Article 432 of the Penal Code undertakes to more specifically define the meaning of the term "adulteration," and in what it consists. As to foods or drinks, the following are the provisions necessary to be quoted, so far as applicable to this case: "(1) If any substance or substances has or have been mixed with it so as to reduce or lower, or injuriously affect its quality or strength. (2) If any inferior or cheaper substance or substances have been substituted, wholly or in part, for the article." "(6) If it be colored or coated or polished, or powdered, whereby damage is concealed, or it is made to appear better than it really is, or of greater value." Appended to this article is the following: "Provided, that the state health officer may, with the approval of the governor, from time to time declare certain articles or preparations to be exempt from the provisions of this law; and provided further, that the provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles of food, provided, that the same are not injurious to health, and that the articles are distinctly labeled as

a mixture, stating the components of the mixture." The proof in this case shows (which was admitted by appellant) that the adulteration was of flour; that is, flour and meal were mixed or mingled together by a bolting process which was in operation in defendant's flouring mill. The mixture or compound contained 90 per cent of flour and 10 per cent of corn meal. The contention of the defendant as to the indictment is that it should have stated how the adulteration was made; that is, the contention is that it was necessary to prove an admixture or adulteration of the flour, and to show how the same was adulterated, by evidence, and that the indictment should have contained the allegations, so as to put appellant on notice of what he was charged to answer. For instance, in this case it is insisted that the indictment should have alleged that the flour was adulterated with a certain portion of corn meal, and that said meal was a substance such as to reduce or lower or injuriously affect the quality of the flour, or that said flour was adulterated with meal, which was an inferior or cheaper substance than the flour with which it was mixed. It occurs to us that this contention is sound. There are a number of articles or substances which might be intermingled with flour so as to reduce or lower or injuriously affect its quality or strength, or which are of an inferior or cheaper character; and under our system of criminal pleading the appellant should have been charged with the particular substance with which the article in question was adulterated, so that he might be prepared to meet the state's case. We take it that the indictment in question was brought under article 430, and not under article 427, inasmuch as there is no allegation, nor does the proof indicate, that the meal shown to have been mixed with the flour was injurious to health. In fact, the contrary appears. It further appears from the evidence in the case that both compounds which are claimed to constitute the adulteration are recognized as ordinary articles of food, and are not injurious to health. In such case, under the provisions of the law, if such articles are mixed together, and are distinctly labeled as a mixture, the person manufacturing such article is not indictable. It would therefore seem to follow that the indictment, to be good under this article, should negative the fact that such substances or articles of food, when combined so as to produce a wholesome article of food, were properly labeled. Of course, it is competent, under the police power of the state, for the legislature to pass an act stating in distinct terms, as to any article of food or drink, that if any person, etc., shall adulterate such article (naming it, with any other substance, without labeling same, such person shall be guilty of an offense. We understand this to be the rule laid down by the authorities. Some of the legislation is based on the adulteration of articles of food or drink which are unwholesome or injurious, and this appears to be provided against in article 427 of our statute. Other legislation is aimed at the prevention of frauds on the public, to prevent palming off on them an article of food other or different from that which they are led to believe they are pur-

chasing; and, as to the latter, the authorities appear to hold that it is competent for the legislature to prohibit the mixture or compound altogether, though it may not be injurious or unwholesome. See *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, and authorities there cited; *State, Waterbury, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 68; *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429.

We would not be understood as indorsing the doctrine laid down in the above authorities. The courts have gone to great length in upholding legislation under the police power. In some decisions it has been so magnified as to be regarded as almost omnipotent. We do not agree to the doctrine that under this power, or any other, the legislature can make criminal the mixture or mingling of articles of food which are wholesome and nutritious, and prohibit the sale thereof. We can add nothing to the dissenting opinion of Judge Gordon in the case of *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350. We do agree to this proposition, that the legislature, when such articles (namely, articles of wholesome and nutritious food are mixed and intermingled, can require that the product be labeled, showing the component elements thereof, and punish a failure to so label. We further hold that the present act of the legislature on the subject is too general in its terms. It simply embraces all articles of food or drink, without naming any, and makes the mixture of any articles of food,

however nutritious, without labeling the product, an offense. A great many articles of food are mixed and combined together, and such combinations are not only harmless, but are healthy as articles of food; and to require all such articles to be labeled, so as to show the constituent elements composing the same, it occurs to us, is extremely onerous legislation. We hold that an act on this subject, to be enforced, should name the particular article of food, the adulteration of which is prohibited by the legislature, and which is required to be labeled. In all cases on this subject which have come to our notice, the legislature appears to have directed the law to some particular article of food or drink. For instance, in the *Powell Case*, 114 Pa. 265, 60 Am. Rep. 350, the act was for the purpose of prohibiting the manufacture of oleomargarine. Now, as bearing on the subject before us, we hold that it would be entirely competent for the legislature, by an act, to prohibit the sale, etc., of flour mixed with meal, or any other wholesome article, without properly labeling the product of such combination. They have not done this. The prosecution is attempted to be maintained under the general act to prohibit the intermixing of all foods. We do not believe that it was competent for the legislature to do this.

The judgment is reversed, and the prosecution ordered dismissed.

TEXAS SUPREME COURT.

PALESTINE WATER & POWER COMPANY, *Plff. in Err.*,

v.

City of PALESTINE.

(.....Tex.....)

1. **A corporation cannot complain** that its receiver appointed in another court is not made a party to a suit to revoke its contract to supply water to a city and its right to occupy streets.
2. **The state is not a necessary party** to a suit by a city which has the exclusive control of streets, to revoke the right of a water company to use them.
3. **Specifying as a ground for forfeiting the franchise** of a water company its suspension of the supply for a certain period is not a waiver of the right, independently of the terms of the contract, to forfeit the franchise for gross misuse.
4. **The right of a water company to occupy the streets of a city**, under Rev. Stat. 1895, art. 705, is derived from the consent of the city, and not from the state, so that the city can revoke it for sufficient cause.
5. **Flagrant disregard by a water company** of its obligation to furnish clear and wholesome water, and the furnishing of water

which endangers the health and lives of the people, ignoring remonstrances, are sufficient grounds for forfeiting its franchise.

6. **An offer to perform its contract** to furnish wholesome water, made by a water company after suit has been brought to forfeit its franchise, does not entitle it to relief from the forfeiture and an extension of time for the performance.
7. **Bondholders of a corporation** take their bonds with knowledge that the continuance of the charter rights and other franchises of the company depends upon the faithful performance of its duties to the public.

(March 7, 1898.)

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment affirming a judgment of the District Court for Anderson County in favor of plaintiff in an action brought to forfeit defendant's franchises. *Affirmed.*

The facts are stated in the opinion.

Messrs. John Young Gooch, B. H. Gardner, and A. W. Gregg, for plaintiff in error:

Where a receiver of a quasi-public corporation has been appointed by a United States circuit court, and its franchise, property, contracts and income are in the official custody of the receiver, and the public and creditors are interested in the proper use and preservation of the property, its assets and income, the receiver is a proper party, and a necessary party, to a suit by a city which granted the corporation a franchise to construct, maintain, and

NOTE.—For forfeiture of the charter of a water-works company for failure to supply good water, see also *Capital City Water Co. v. State*, Macdonald (Ala.) 29 L. R. A. 743; *State, Mylrea, v. Janesville Water Power Co.* (Wis.) 32 L. R. A. 391.

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operate waterworks in the streets and public ways of such city, and collect rents for the use of the water for general and fire purposes, to forfeit the franchise and contract, and destroy it as a "going concern," and destroy or impair the value of the capital investment and income, and its public use.

5 *Thomp. Corp.* §§ 6894, 7185; *Wilson v. Wilson*, 1 Barb. Ch. 592.

The judgment is erroneous because it attempts to deprive the appellant of the use of its water mains, pipes, and plant, and of the water mains, pipes, and plant themselves, which are immovable fixtures, without compensation, and said judgment makes no provision for their use, removal, or sale after sixty days' notice.

Const. 1875, art. 1, § 17.

The court erred in its conclusions of law in holding that upon a failure of defendant to comply with the contract as to quality or quantity of the water, the city had the right to invoke the aid of a court of equity to rescind the contract, because by the terms of the contract, the said ordinances and contract were made the measure of the right and liabilities of the parties.

State, Gussett, v. Morris, 73 Tex. 435, 65 Tex. 53, and 82 Tex. 742; *State v. Southern P. R. Co.* 24 Tex. 181.

Courts are reluctant to adjudge forfeitures of corporate franchises, when they are organized to promote public works or utilities which it is public policy to foster.

On petition for rehearing.

Whether a franchise shall be forfeited depends on the will of the same body that has power to confer it in the first instance; and if by that the harsher remedy is waived and a milder one adopted to compel the performance of the duty undertaken and on account of which the franchise is given, it is not for the courts to declare whether the legislature acted wisely or unwisely, but it is their duty to give effect to what seems to them the will of the legislature.

State, Gussett, v. Morris, 73 Tex. 435.

Its waiver of the right of forfeiture for non-user or misuser need not be direct, but may arise through plain implication.

Logan v. Vernon, G. & R. R. Co. (Ind.) note to 14 Am. & Eng. R. Cas. 47; *State v. Fourth N. H. Turnp. Road*, 15 N. H. 162, 41 Am. Dec. 690; *Boone, Corp.* § 203.

A breach of condition may be waived.

Goodright, Walter, v. Davids, 2 Cowp. 803.

The resolution of the city council instructing the city attorney in effect to enforce specific performance, showed its desire and wish that the company should continue to use the streets.

Milford & C. Turnp. Co. v. Brush, 10 Ohio, 111, 36 Am. Dec. 78; *State v. Bank of Charleston*, 2 McMull. L. 439, 39 Am. Dec. 135.

The right of entry for forfeiture of a lease is governed by the general law that, where a man has got a right to elect to do a thing to the injury of another, his election, when once made, is final and conclusive, and he cannot afterwards alter his determination.

2 Addison, Contr. § 720.

The remedy of the city, after having passed said resolution, if not by suit for specific performance, was mandamus or injunction, or both. 40 L. R. A.

Galveston & W. R. Co. v. Galveston, 90 Tex. 399, 36 L. R. A. 33.

When the city council passed the ordinance consenting to the use of the streets, and when it passed the resolution of April 9, said ordinance and resolution had the force and effect of statutes and became a part of the charter of the company, and this being a suit to forfeit such part of the charter the state was a necessary party.

State, Atty. Gen., v. Madison Street R. Co. 72 Wis. 612, 1 L. R. A. 771.

Mr. J. A. Read also for plaintiff in error.

Messrs. Campbell & McMeans, with *Mr. P. W. Brown*, for defendant in error:

The appointment of a receiver does not invest him with title to the company's property, franchises, etc., and the fact of the receiver being or not being a party does not affect the defendant's rights in this suit; the defendant can defend its rights as well with the receiver out as it can with him in, for under no phase of the case can the defendant's rights be affected by the receiver; therefore, the defendant can certainly not be heard to complain that the receiver is not a party.

Abbey v. International & G. N. R. Co. 5 Tex. Civ. App. 261; *Hugh, Receivers*, § 302; *Thomas v. Quarles*, 64 Tex. 491.

The facts showed that the appellee was entitled to a judgment forfeiting the franchise of appellant. The evidence clearly shows that the water furnished by the company in the summer of 1893, and since the summer of 1895 and up to three or four weeks ago, was neither clear nor wholesome, but was unfit for domestic purposes, and that the supply of even bad water was inadequate.

Capital City Water Co. v. State, Macdonald, 105 Ala. 406, 29 L. R. A. 743.

All franchises that were granted to appellant by appellee were exclusive franchises; and, in case of a forfeiture as prescribed by the terms of the contract, to hold that only the exclusiveness of the franchise and not the franchise itself is forfeited, is against all reason.

Brenham v. Brenham Water Co. 67 Tex. 544.

The city attorney being the duly elected legal adviser and attorney for the city of Palestine, his acts in filing and prosecuting this suit are presumed to be within the scope of his authority, and with the knowledge and consent of, and binding upon, appellee, in the absence of proof to the contrary.

28 Am. & Eng. Enc. Law, p. 531, and note; *Merchants' Mut. Ins. Co. v. Lacroix*, 45 Tex. 168; *Texas Bkg. & Ins. Co. v. Hutchins*, 53 Tex. 68, 37 Am. Rep. 750.

When it clearly appears, as it does in this case, that the only judgment which can be rendered and enforced is one of forfeiture, it is the duty of the court to render that judgment.

Farmers' Loan & T. Co. v. Gatesburg, 133 U. S. 156, 33 L. ed. 573; *Gatesburg v. Gatesburg Water Co.* 34 Fed. Rep. 675.

The obligation of the company was a continuing one, and its ability to furnish water according to the contract was a condition precedent to its continuing right to use the streets and to carry on its business; and on failure to comply with the contract as to the quality or quantity of the water, the city had the right to

invoke the aid of a court of equity to rescind the contract.

Farmers' Loan & T. Co. v. Galesburg, 138 U. S. 156, 33 L. ed. 573; *Arcata v. Arcata & M. River R. Co.* 92 Cal. 639.

The only material difference, so far as the rights of the city are concerned, between those grants of franchises to use the streets, where, by the terms of the grant, a forfeiture is specifically provided for on noncompliance with the conditions of the grant, and those that are granted upon continuing conditions precedent is, that in the former the city can revoke the grant without the aid of a court of equity, while in the latter the rescission must be by a decree of such court.

Arcata v. Arcata & M. River R. Co. 92 Cal. 639; *Pacific R. Co. v. Leavenworth*, 1 Dill. 393; 2 Morawetz, Priv. Corp. § 1006; *Myrick v. Brawley*, 33 Minn. 377.

A grant of an exclusive privilege to the water company by the city of Brenham to occupy its streets to lay down mains, etc., for a period of twenty-five years created a monopoly, and was therefore void.

Brenham v. Brenham Water Co. 67 Tex. 542.

The contract was entire and conferred no privilege except that specifically mentioned.

Manhattan Trust Co. v. Dayton, 16 U. S. App. 588, 59 Fed. Rep. 327, 8 C. C. A. 140.

In this case a suit for specific performance or for damages would accomplish a result just about as satisfactory as would a judgment forfeiting the exclusive franchise, and it is clear that such forfeiture would visit no punishment upon the water company, and the city would be without adequate remedy while the water company continued its violation of every condition under which it secured this valuable franchise, and without let or hindrance perpetuate its menace to the health and lives of the people of the city.

Commercial Bank v. State, 6 Smedes & M. 599, 45 Am. Dec. 290; *Washington & B. Turnp. Road v. State*, 19 Md. 289; *People, M'Kinch, v. Bristol & R. Turnp. Road*, 23 Wend. 222; *People v. Hillsdale & C. Turnp. Road*, 23 Wend. 254; *Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 284.

Brown, J., delivered the opinion of the court:

The city of Palestine instituted suit in the district court of Anderson county to forfeit the franchises granted by it to one Gray and his assigns, which afterwards became vested in the defendant the Palestine Water & Power Company. The case was tried before the judge, a jury being waived, and he filed very elaborate findings of fact, from which we make the following condensed statement as applicable to the question presented by the application for writ of error: On June 7, 1881, the city of Palestine, a municipal corporation duly organized under the general laws of the state of Texas, passed an ordinance by which it granted to Carroll E. Gray and his assigns the exclusive right for fifty years "to establish, maintain, and operate waterworks and buildings, and to lay mains, pipes, etc., in and along the streets, alleys, and public grounds of the city, for supplying clear and wholesome water for all domestic and other purposes."

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Section 11 of that ordinance reads as follows: "In the event that said grantee or his assigns, after said waterworks have been in successful operation, shall suffer a suspension of the supply of the water, thereby causing an insufficient supply of clear, wholesome water for domestic and other purposes, for a period exceeding sixty days, then and in that event the said grantee and his assigns shall forfeit all franchises hereby granted, and during any suspension all water rentals shall be suspended." This section was amended by ordinance passed June 21, 1881, so as to read as follows: "In the event that said grantee or his assigns, after said waterworks shall have been in successful operation, shall suffer a suspension of the supply of water, thereby causing an insufficient supply of clear wholesome water for domestic and other purposes, for a period exceeding sixty days, then and in that event said grantee and his assigns shall forfeit all exclusive franchise herein granted, unless such suspension shall have been caused by the act of God or unavoidable accident, and during such suspension all water rentals shall be suspended." On June 21, 1881, the city and Carroll E. Gray entered into a contract in writing, which embodied the substance of the ordinances before referred to and copied above, which ordinances were made part of the contract. The work was begun within the time specified, and completed in accordance with the contract between the parties. The Palestine Water & Power Company was organized as a corporation under the general laws of the state of Texas, and succeeded to all the obligations of Carroll E. Gray. "The evidence clearly shows that the water furnished by the company in the summer of 1893, and since the summer of 1895, and up to three or four weeks ago, was neither clear nor wholesome, but was unfit for domestic purposes, and that the supply of even bad water was inadequate. The source of water supply consists of ponds fed by surface water and some springs. The ponds have never been cleaned out, and are filled for at least 5 or 6 feet with decayed vegetable matter and mud and accumulations of filth which flowed in from the natural water-sheds constituting the principal source of supply, and cover about 800 acres of land, on which are situated several small farms, and from 150 to 300 residences. The company owned about 162 acres, part of the watershed, and this is inclosed, the ponds being in the inclosure, and the company had put part of the land in cultivation and wilfully permitted cattle and horses to pasture in the inclosure, and negligently permitted dead fish and reptiles to remain in the ponds, and dead animals to remain within the area of the water supply. In the summer, by reason of insufficient storage capacity, the ponds became low, and the water stagnant and impure, and nearly the whole year the water is more or less muddy, and offensive in odor. The evidence shows that an abundant supply of clear, wholesome water from artesian wells could be had in the city, and utilized by the company, and that no effort was made by defendant before the institution of this suit to obtain water supply, and the material allegations of plaintiff's petition have been proved substantially." The city

made frequent complaints to the defendant corporation as to the failure to comply with the provisions of the contract and the ordinances of the city, and there were frequent promises of remedying them, but it was not done. The city council of the city of Palestine, being divided in opinion as to whether the city should establish and operate its own water works, submitted to the qualified voters the question in these forms: "For city ownership," "Against city ownership." The vote when taken, was against the proposition that the city should construct and maintain its waterworks. On the 9th day of April, 1896, after the vote had been taken, the city council passed a resolution instructing the city attorney to at once take the proper legal steps through the court to compel the Palestine Water & Power Company to furnish clear, good, and wholesome water in the city of Palestine, and in ample sufficiency. The city attorney instituted this suit on the same day, and on the 18th day of the same month N. Oscar Gray, vice president of the Palestine Water & Power Company, and trustee for the holders of the bonds for said company, being joined by the bondholders themselves, applied to the Honorable David E. Bryant, judge of the United States circuit court for the eastern district of Texas, for the appointment of a receiver for that corporation, and the judge appointed a receiver, and in the order of appointment directed him to proceed at once to comply with the defendant's franchises requiring it to furnish to the citizens of the city of Palestine and to said city a sufficiency of clear, good, and wholesome water for domestic and manufacturing purposes and for purposes of fire protection. The order authorized the receiver to apply the income and revenue derived from the operation of the waterworks as a "going concern," and "to apply said revenue in payment of expenses of operating the same." Subsequently the United States circuit court authorized the receiver to issue certificates to the amount of \$30,000, with a lien upon the property, to raise money to pay for such repairs and improvements as might be necessary to comply with the franchises and contracts of the corporation with the city of Palestine. The defendant company asked that the receiver be made a party defendant in the suit, which the court refused, and it also pleaded that it was ready to perform specifically its contract if the court should hold that it has incurred a forfeiture, and sets out the improvements contemplated to be made by it in the future. But there was no evidence showing any ability to perform the contract except by use of the money to be derived from the sale of the receiver's certificates. There is no other waterworks plant in the city, and the city depends on the defendant for its water supply and fire protection. The trial court entered judgment forfeiting the franchise granted by the city, and directing that all the pipes, mains, etc., belonging to the said defendant should be removed from the streets of the city of Palestine within sixty days after demand made by the city. The court of civil appeals affirmed the judgment of the district court.

This suit was instituted to revoke and set
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aside the contract between the city of Palestine and the Palestine Water & Power Company, as well as to annul the ordinance which granted to the water and power company the right to occupy its streets, and the state court thereby acquired jurisdiction of the subject-matter before the receiver was appointed by the United States circuit court. *Riesner v. Gulf, C. & S. F. R. Co.* 89 Tex. 656, 33 L. R. A. 171. It was not necessary to make the receiver a party to the suit. If he desired to defend the action, he had the right to make himself a party. *City Water Co. v. State*, 88 Tex. 600; 5 Thomp. Corp. §§ 6898-6896. The corporation, the Palestine Water & Power Company, cannot complain because the receiver was not made a party defendant, because, if he was a necessary party, the judgment will not affect any interest that he has in the subject-matter of litigation, and it would be of no benefit to the defendant to make the receiver a party.

The plaintiff in error complains that the city of Palestine cannot maintain this action because (1) the right to occupy the streets was derived from the state; (2) the city having contracted that a forfeiture should occur upon the happening of a certain event, thereby waived any ground of forfeiture not embraced in the contract, and because the city had elected to enforce the contract, and cannot afterwards rescind it; (3) because the facts do not justify a rescission of the contract made between the city and the plaintiff in error. The case of *Galveston & W. R. Co. v. Galveston*, 90 Tex. 395, 36 L. R. A. 33, is cited by plaintiff in error to support the proposition that the right to occupy the streets of the city of Palestine is derived from the state, and not from the city. There is a marked difference between the law which grants to railroads the right to occupy the streets of a city and that by which the same privilege may be secured by this class of corporations. Besides, there is such a marked difference between the purposes of the two corporations as to make it necessary and proper to place a different construction upon the acts as they affect the one or the other. The case of *Galveston & W. R. Co. v. Galveston* does not sustain the contention of the plaintiff in error upon this point. The right of the city to maintain the action was not involved in that case, but the decision was placed upon the ground that the city could not prescribe the condition of forfeiture which it was attempting to enforce in that proceeding. By art. 333, Rev. Stat. 1895, a city organized under the general laws of the state is declared to be "capable of contracting and being contracted with, suing and being sued, impleading and being impleaded, answering and being answered unto, in all courts and places, and in all matters whatever;" and art. 419 of the Revised Statutes of 1895 provides that such city shall "have the exclusive control and power over the streets, alleys, and public grounds and highways of the city." From these provisions it will be seen that our cities are given large powers in the control of their streets, and are fully authorized and empowered to maintain suits in all instances in which their rights are involved. We think there can be

no doubt that the city of Palestine had the right to maintain this suit, and that the state of Texas was not a necessary party to it.

The language of the contract and of the ordinance of the city is not such as to operate as a waiver of any right of action which the city might have independent of the terms of that contract. Neither were the acts of the city in taking the sense of the qualified voters upon the question presented such as to stop it from asserting any right that the city had. Indeed, we believe that a city council has no authority to waive the right of the public to revoke a franchise which has been abused by the grantee. *Morris v. State, Guesett*, 65 Tex. 59. The water and power company was organized as a corporation to carry out the contract between Gray and the city. Its charter must have specified the purpose of its organization to be "to supply water to the public in the city of Palestine, Texas." It could do no other business, nor could it do that at another place. While its charter was issued under the general law of the state, it was as much a corporation of that locality as was the city itself, and derived its right to occupy the streets of that city from art. 705 of the Revised Statutes of 1895, which reads thus: "Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of water or gas as may be required by the city, town, or village where located, for public or private buildings, or for other purposes, and such corporation shall have power to lay pipes, mains, and conductors for conducting gas or water through the streets, alleys, lanes, and squares in such city, town, or village, with the consent of the municipal authorities hereof, and under such regulations as they may prescribe." Considering the foregoing article with reference to the subject upon which the legislature was acting, and the purpose to be accomplished, we think the use of the language, "under such regulations as they may prescribe," had the effect to commit that class of corporations to the control and government of the cities in which they are located. It was not intended to restrict the city to giving or refusing consent, but that consent might be accompanied with such regulation as the city might prescribe within its powers of government and control over such corporations, as well as those found necessary after the waterworks had been constructed. The corporation was created solely to operate within the limits of the city of Palestine, and for the purpose of dealing with it and its citizens alone, and it did not affect the citizens of any other portion of the state. The public policy of the state in the case of railroad companies would necessarily preserve the road against the action of any local authority, while, on the other hand, the same public policy might well commit the corporation created alone for local purposes to exclusive local government, as was done in this class of cases. We conclude that the right to occupy the streets of Palestine was derived from the consent of the city, which, for sufficient cause, might be revoked upon application of the city.

In the view we take of the case, it becomes unnecessary to determine whether, under the terms of the ordinance and contract, a forfeit-

ure of all franchises granted would occur, or only a forfeiture of the exclusive character of such franchises, because, in our opinion, the judgment of the district court is sustained by the law independent of the terms of forfeiture which were prescribed in the ordinance and the contract. Section 52 of Booth on Street Railways states the law in this language: "The failure to construct and operate a street railway according to the terms and conditions of the charter under which the right of way is granted may be a sufficient ground for the forfeiture of its franchise in the streets. A slight failure in those respects will not be an adequate cause for such proceedings, nor can the forfeiture be based upon a gross failure which is but temporary. In the nature of things, each case must depend upon its own particular facts. But, as a general rule, it may be stated that, if the company grossly fails in the performance of vital duties essential to the efficiency of the service which it is bound to give, such conduct will constitute a misuser of its franchise on account of which it may be forfeited to the state. The right exists at common law, and may be asserted, not only for the violation of express charter duties, but also for a wanton disregard of regulations imposed by the state or municipality in the exercise of their reserved powers." *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573; *Detroit v. Detroit City R. Co.* 37 Mich. 558; *People v. Hillsdale & C. Turnp. Road*, 28 Wend. 254; *State, Atty. Gen., v. Madison Street R. Co.* 72 Wis. 612, 1 L. R. A. 771; *Ang. & A. Corp.* §§ 775, 776; *Morris v. State, Guesett*, 65 Tex. 59.

The case of *Farmers' Loan & T. Co. v. Galesburg*, above cited, in its facts is very much like the case under examination. The city of Galesburg, by an ordinance which, in its language, is remarkably similar to that under which the plaintiff in error claims, and by a contract, granted to Nathan Shelton and to his assigns the right to use the streets of the city. The water company was formed under the laws of the state of Illinois, and he assumed the obligation of the grantee in the said ordinance and contract. The object of granting the franchise in that case was expressed to be "for supplying the said city and the inhabitants thereof and of the adjacent territory with water for public and private uses," and, again, it was provided that "the water supplied by said works shall be good, clear water, and the source of supply shall not be contaminated by the sewerage of said city." The water company failed to perform its part of the contract in furnishing either the quantity or quality of water which was required, and the city of Galesburg filed a suit to annul and cancel the ordinance by which its consent was given to the use of its streets, and to rescind the contract entered into by it with Shelton. Justice Blatchford, for the court, said: "The principal contention on the part of the appellants is that, on the acceptance of the ordinance by Shelton, a right in the franchise vested in him, which could not be defeated even though he afterwards failed to comply with its terms; that the failure of the water company to furnish water in the quantity and of the quality called for by the ordinance was only a breach

of a condition subsequent; and that a court of equity will not lend its aid to divest an estate for such a breach. But it seems to us that in respect to a contract of the character of the present one, the ability of the water company to continue to furnish water according to the terms of the ordinance was a condition precedent to the continuing right of Shelton and his assigns to use the streets of the city and to furnish water for a period of thirty years; and that when, after a reasonable time, Shelton and his assigns had failed to comply with the condition as to the quantity and quality of the water, the city had a right to treat the contract as terminated, and to invoke the aid of a court of equity to enforce its rescission. A suit for a specific performance of the contract, or a suit to recover damages for its nonperformance, would be a wholly inadequate remedy in a case like the present. The danger to the health and lives of the inhabitants of the city from impure water, and the continued exposure of the property in the city to destruction by fire from an inadequate supply of water, were public questions peculiarly under the care of the municipality; and it was entitled and bound to act with the highest regard for the public interests, and at the same time, as it did, with due consideration for the rights of the other parties to the contract." The language of the learned judge as quoted above is so applicable to the facts of the case now under consideration that it leaves little to be said in the further discussion of the question.

The Palestine Water & Power Company adopted and acted upon the ordinance which granted the franchise enjoyed by it in the following language: "To establish, maintain, and operate waterworks and buildings and to lay mains, pipes, *et cetera*, in and along the streets, alleys, and public grounds of the city, for supplying clear and wholesome water for all domestic and other purposes." The execution of the purpose for which the corporation was organized is here expressed as the condition upon which the franchise was granted, accepted by the water company, and relied upon by the city. The facts found by the trial judge show that the water company was guilty of a most flagrant disregard of its obligation to the city, and, instead of furnishing clear and wholesome water, as it was obliged to do, it furnished to the inhabitants of that city water which endangered the health and lives of the people, if, in fact, it did not cause sickness and death to prevail among them. The city remonstrated with the officers of the water company from time to time against their disregard of the agreement to furnish good and wholesome water, which remonstrances were utterly ignored by the water company, but repeated by the city until forbearance ceased to be a virtue, and became on the part of the officers of that city little less than a reprehensible neglect of the highest interests of the people. Failing to get any redress at the hands

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of the water corporation, the city instituted this suit, and then for the first time the water company came forward, and offered to perform its contract, without showing the ability to do so. It is claimed in this case that the trial court should, in the exercise of a just and wise discretion, have permitted the water company to perform its contract after judgment had been entered against it, instead of forfeiting the franchise granted. We quote the language of Judge Cowan, used in the case of *People v. Hillsdale & C. Turnp. Road*, in which a similar contention was answered as follows: "When a cause of forfeiture has arisen, whether from nonfeasance or otherwise, no case nor *dictum* can be found that it shall be legally atoned for by subsequent good behavior.

... The argument goes to prove that a corporation may practise all manner of abuse by commission or omission if it be careful to stop before the attorney general can be informed and institute a prosecution." In this case the water company did not mend its ways nor offer to do so until after the suit had been brought, and we think that, under the circumstances, the trial court did not abuse its discretion, if, indeed, it had any discretion in the matter, by refusing to extend the time of performance. As said in *Farmers Loan & T. Co. v. Galesburg*, cited above, a suit for specific performance or for damages would not have afforded adequate protection or redress to the city. The property of the corporation was encumbered with bonds to a large amount, doubtless equal to, if not greater than, its value; and a judgment for damages could not have been satisfied out of the property. Besides, no money compensation could correct the evils which were suffered by the city in its deprivation of wholesome water. In a suit for specific performance no court could have adequately enforced the rights and given sufficient protection to the people of that city. A decree that the company should furnish "clear and wholesome water" could have been enforced only by placing an officer of the court in charge, and operating the works. To revoke the franchise which the water company had so flagrantly abused is a harsh remedy, and may cause loss to fall upon those who hold the bonds, but it is the only adequate means by which a city can surely protect itself against such wrongs as were practised in this case. Bondholders of such corporations are entitled to protection to the extent that the corporations perform their duties under the law, but they take such bonds with the knowledge that the continuance of the charter rights and other franchises granted to corporations depends upon their faithful performance of the duties to the public for which they were created.

We find no error in the judgments of the District Court and Court of Civil Appeals, and both judgments are therefore affirmed.

Rehearing denied April 16, 1898.

WESTERN UNION TELEGRAPH COMPANY, *Appt.*,
v.
W. F. MITCHELL.

(.....Tex.....)

1. **An allegation that the plaintiff could have made arrangements to get water** for his cattle if a telegram had been delivered to him promptly, without alleging where and in what manner he could have done so, is insufficient as against a special exception in an action for damages because of failure to deliver a telegram.
2. **What a party would do** under a given state of facts which call upon him or her to perform a duty to some other person is a fact to which such person can testify, and not a matter of opinion merely.
3. **Whether a telegraph messenger who fails** to deliver the message at the residence or place of business of the addressee has used ordinary diligence such as the law requires is a question of fact for the jury.
4. **The delivery of a telegram to the wife of the addressee**, when he is absent from the town, is not, as matter of law, necessary or sufficient to satisfy the obligation of the telegraph company, but its duty in this respect is a question of fact under the circumstances of the case.

(February 14, 1898.)

QUESTIONS CERTIFIED by the Court of Civil Appeals for the Third Supreme Judicial District for the opinion of the Supreme Court which arose upon an appeal by defendant from a judgment in favor of plaintiff in an action brought to recover damages for failure to promptly deliver a telegram. *Answers favorable to appellant.*

The facts are stated in the opinion.

Messrs. John A. Green, Sr., John A. Green, Jr., and Hutchinson & Franklin, for appellant:

A pleader must state the facts on which he intends to rely, as constituting his cause of action or ground of defense.

Wells v. Fairbank, 5 Tex. 582.

This doctrine has not been carried to such a length as to require the statement of those minute circumstances which are but evidence of the right.

Oliver v. Chapman, 15 Tex. 400; *Van Alstyne v. Bertrand*, 15 Tex. 177.

But our demurrers do not seek to compel the plaintiff to allege the evidence of the facts on which he relied as constituting his right.

We sought to get from plaintiff what special arrangements he could make; we knew the face of the country; we knew the ranchmen surrounding the ranch of plaintiff; and we could and did take their depositions, and showed conclusively that he did not make any arrangement with them or his neighbors.

Wood's Mayne, Damages, § 752.

The testimony of the witnesses, G. G. Johnston and Mrs. Mary Mitchell, were both the speculative opinions of the witnesses given

NOTE.—As to the duty of a telegraph company to find the person addressed, see *Western U. Teleg. Co. v. Houghton* (Tex.) 15 L. R. A. 129.

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seven years after the time about which the inquiry was made.

There is one standard of man in law when you judge him according to the rules of law. That is the man of ordinary prudence under the circumstances.

The jury were as capable of judging of what a person of ordinary prudence would have done under those facts as anybody.

Elkhart W. R. Co. v. Waldorf (Ind.) 46 N. E. 88; *Sonnensfeld v. Mayton* (Tex. Civ. App.) 39 S. W. 167; *Western U. Teleg. Co. v. May*, 8 Tex. Civ. App. 180.

Messrs. L. H. Browne and Brown & Pritchett for appellee.

Brown, J., delivered the opinion of the court:

The court of civil appeals for the third supreme judicial district has certified for our consideration the questions hereinafter stated, which are accompanied by a statement, from which we make the following substantial statement of the facts necessary to the consideration of the question submitted: W. F. Mitchell filed a suit in the district court of Hays county against the Western Union Telegraph Company, alleging in substance that on the 24th day of March, 1890, the plaintiff resided in San Marcos, Texas, and owned a cattle ranch in Presidio county, Texas, on which he had 10,000 head of cattle; that plaintiff at that time was in San Marcos, but the ranch and the cattle were under the control and management of his son, F. A. Mitchell, who was then on the ranch, and in the active management of the same. It is alleged that the supply of water on the said ranch was amply sufficient for the support of the cattle held on it up to the 23d day of March, 1890, when the supply of water was suddenly greatly diminished, so that on the 24th of that month the cattle were in great danger of famishing for water, unless speedily relieved, which F. A. Mitchell was not able to do, in the absence of the plaintiff, nor could anyone else procure water for the said cattle, because it required that special negotiations should be made on behalf of the plaintiff with third parties, which negotiations neither F. A. Mitchell nor any other person could effect; that, if plaintiff had been present, he could have made such arrangements in time to have saved his cattle from the damages which they afterwards sustained. The petition alleged that on the 24th day of March, 1890, F. A. Mitchell, as agent for the plaintiff, caused to be delivered to the agent of the defendant at the town of Marfa, Texas, the following message:

Marfa, Tex., 3-24-90.

To W. F. Mitchell, San Marcos:

Water is getting low. Come out.

[Signed]

F. A. Mitchell.

It is averred: That at the time this message was delivered to the defendant's agent the latter was informed of the dangerous situation of the cattle; that they were upon the ranch, and the supply of water had become insufficient, and the cattle were in present danger of starving for water; and of the necessity for the presence of the plaintiff to provide water; also, that the message was being sent to the

plaintiff that he might come with all possible speed to make necessary arrangements for water. That plaintiff was ignorant of the failure of the water, and of the dangerous situation of his cattle, and remained absent from the ranch three days longer than he would if he had received the message in due time. It is alleged that, if the message had been delivered in a reasonable time, the plaintiff would have gone to his ranch at once, and could and would have made arrangements for water for his cattle, which would have prevented the losses that occurred thereafter. It was not averred that he could have made any particular arrangements with any particular person in order to have procured the water, nor what kind of arrangements could have been made. The petition charged that the defendant negligently failed to deliver the message to the plaintiff, whereby he was prevented from repairing to his ranch and making arrangements for water for his cattle, and in consequence of which he suffered the damages which were particularly set out. The defendant filed special exceptions to the petition, "because it is not alleged therein when, where, and in what manner he could have arranged to get water for his cattle, and thereby avoid the injuries complained of." The trial court overruled the exception, to which the defendant excepted, and the ruling is assigned for error. Plaintiff was in San Marcos, at his residence, on March 24, 1890, until about 10:50 A. M., when he went to the depot, and took passage on a south-bound passenger train on the International & Great Northern Railroad for Pearsall, which is situated on that road, about 50 miles south of San Antonio, and reached Pearsall at about 2 P. M. the next day, where he remained at a public hotel until 11 A. M. the next day. Mrs. Mary Mitchell, wife of the plaintiff, remained at home, in San Marcos,—a large, two-story house, in the thickly-settled portion of that town. Defendant's agent at San Marcos was not acquainted with Mitchell at that time, but became acquainted with him a few days afterwards. The evidence for the plaintiff tended to show that on the afternoon of March 24 the agent of the defendant at San Marcos telegraphed to the agent of defendant at Marfa that the addressee of the message could not be found in San Marcos, and that the agent at Marfa made inquiry of Gillette, who delivered the message to him, and was by Gillette instructed to have the message delivered to Johnson & Johnson, a firm of merchants in San Marcos. Upon the trial of the case the attorneys for the plaintiff asked G. G. Johnson, a member of the firm of Johnson & Johnson, and Mrs. Mary Mitchell (each separately), in substance, the following question: What he or she could and would have done if the message had been delivered to him or to her on the evening of the 24th of March. To which question each witness answered, in substance, that he or she, as the case might be, would have sent it to the plaintiff at Pearsall. To which question and answers the defendant objected "because it invades the province of the jury, is problematical, and is merely an opinion." The objections were overruled, and exceptions saved. The court charged the jury as follows: "If

you find from the evidence in this case that on the 24th day of March, 1890, the defendant, at Marfa, Texas, received and accepted for transmission and delivery the telegraph message described in plaintiff's petition, and that, when the message arrived at San Marcos, W. F. Mitchell was absent from his place of residence, but that his wife was at his place of residence, then you are further instructed that a delivery of it to her, at his place of residence, in his absence, would have been, in contemplation of law, a delivery of it to him."

The court of civil appeals submitted to this court the following questions: "(1) Did the trial court err in overruling the special exception to the plaintiff's petition, as set out above? (2) Did said court err in overruling the objections interposed to the testimony, as set out above? (3) Is the special charge above quoted subject to any of the objections urged against it; as set out above, and did the trial court commit error in giving said charge?"

The trial court erred in overruling the special exception to the plaintiff's petition mentioned in the first question submitted. The particular arrangement which the plaintiff could have made to secure water for his cattle, if he had received the telegram in time, is a fact, and not the evidence of a fact. It is a material fact in this case, without proof of which no recovery can be had. The object of pleading is to notify the opposite party of the facts which the pleader expects to prove, and the allegation of such fact must be made with that certainty which will enable the adverse party to prepare his evidence to meet the alleged facts. Whatever falls short of doing this is not good pleading, and is subject to demurrer. *Ransome v. Bearden*, 50 Tex. 128. In the case cited this court said: "In the case before us the plaintiff's pleadings nowhere stated what facts came to her knowledge leading her to the discovery that the will was forged. The allegations were not such as to enable the defendant to anticipate the facts on which plaintiff relied, and he could not prepare to rebut or disprove them. The construction which we have given the statute would require the application to this case of the rule of pleading laid down in *Bremond v. McLean*, 45 Tex. 10, and would lead to the conclusion that the plaintiff's petition was defective."

In *Bremond v. McLean*, 50 Tex. 128, the plaintiff, in order to avoid the bar of the statute of limitations, alleged that he could not by due diligence have discovered the fraud which he alleged to have been practised upon him. To this general allegation the defendant excepted specially, which was overruled, and this court said: "The mere statements in the petition that the plaintiff could not have discovered that the alleged representations of defendant were false and fraudulent by the use of reasonable diligence evidently will not relieve him from the bar of the statute. If the want of such knowledge will prevent the running of the statute, it is not sufficient for the plaintiff to assert merely the conclusion that he could not have discerned that the representations made him were false by the use of reasonable diligence, but he must state the facts upon which he relies, that the court may see whether they justify and support such a con-

clusion. The exception to the petition on this ground was well taken, and should have been sustained." The allegation in the plaintiff's petition that he could have made arrangements by which to secure water for the relief of his cattle is but a conclusion drawn from the particular facts of the case, and, if he had attempted to prove by any witness the conclusion as alleged, it would have been objectionable upon the ground that it was a statement of a conclusion, and not of a fact.

There was no error in the action of the trial court in overruling the objections presented to the evidence of Johnson and Mrs. Mitchell. What a party would do under a given state of facts, which call upon him or her to perform a duty to some other person, is not a matter of opinion merely, but a fact which can be testified to by such person; and if the defendant failed to perform a duty which it owed to the plaintiff, in not delivering the message to either witness, the plaintiff was entitled to show that, if the duty had been performed by such delivery, the person to whom it would have thus been delivered would have transmitted it to him, and thereby the injury could have been averted.

There was error in giving the special charge mentioned in the third question. The general rule is expressed by Croswell, in his work on the Law of Electricity (§ 412) thus: "The leading principle as to delivery of a telegram is that the message is to be delivered to the person to whom it is addressed, and the place of address is subordinate to the person; and therefore if the person cannot be found at the street and number or other place to which the telegram is addressed, but can be found by reasonable efforts of the telegraph company in some other place, it may be negligence for the company to leave the telegram at the place of address without making further efforts to find the absent person and make personal delivery." *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728; *Western U. Teleg. Co. v. Houghton*, 82 Tex. 561, 15 L. R. A. 129; *Western U. Teleg. Co. v. Newhouse*, 6 Ind. App. 422; *Pope v. Western U. Teleg. Co.* 9 Ill. App. 288.

If a message be addressed to the care of another, it may be delivered to such person; or if the addressee has taken rooms at an hotel, where it is the custom to deliver mail and such messages, it will be presumed that the clerk is the agent of the guest to receive messages of this character, and a delivery to such clerk will be sufficient. The wife, as such, is not, in law, the general agent of her husband; and we know of no principle of law that would justify the conclusion that it was the duty of the defendant to deliver the message in this case to Mrs. Mitchell, nor that such a delivery to her would have satisfied the obligation of the telegraph company to Mitchell. The duty which the telegraph company owes to the addressee is personal, and cannot be discharged by making inquiry for the person to whose care the message may be sent, nor by applying to the

place of business or residence of the addressee; but inquiry must be made for the person addressed, if the circumstances are such as to show that he may probably be found away from such place of business or residence. The place to which a message is sent is but a guide for the messenger, and does not determine the measure of his diligence. Whether the messenger who is charged with the delivery of the telegram, and fails to present it at the residence or place of business of the addressee, has used ordinary diligence, such as the law requires, is a question of fact for the jury; and it was error for the court, in effect, to charge the jury, as a matter of law, that it was the duty of the telegraph company to deliver the message to the plaintiff's wife. Attorneys for appellee cite the case of *Given v. Western U. Teleg. Co.* 24 Fed. Rep. 119, as supporting the charge of the court above referred to; and upon a careful investigation we have found *Western U. Teleg. Co. v. Woods*, 56 Kan. 787, which we think is more nearly in point. The former case was based upon substantially the following facts: A message was sent to the plaintiff, and the telegraph company inquired at his place of business, ascertaining that he had left the city, and, having exhausted all means of delivering the message to him personally, delivered it to his wife, and notified the sender of the fact of such delivery. The court held that the telegraph company had used due care, and had discharged its duty to the plaintiff, but did not hold that it was the duty of the company to make the delivery to the wife. In the case of *Western U. Teleg. Co. v. Woods*, above cited, the message was sent to the plaintiff in the case, at the town of his residence. He was a merchant, and his store was a short distance from the telegraph office, where his wife was in charge of the business; and he had a clerk employed, also. His residence was also near by. The party addressed was out of the town, and the telegraph company failed to apply at his place of business or residence for information, or for the purpose of delivering his message. The court held as follows: "Being unable to make a personal delivery at that place it was the duty of the company to deliver it to his wife, or to his clerk at the store, or to members of his family at his residence. If delivery had been made at either of these places the agents of Woods would have had time and opportunity to have sent the message to him at Grand Summit, and thus have averted the loss which followed." It will be observed that the court here speaks of the persons to whom the delivery should have been made as the agents of the party addressed, and in so far as they were agents, and authorized to receive the message, this is a correct expression of the law; but that portion which announces that it was the duty of the telegraph company to deliver to members of the family is purely dictum, and without any support whatever.

Denman, J., did not sit.

Ex parte FAGG.

(.....Tex.....)

1. **A proceeding by a municipal corporation to enforce such fines and penalties as are ordinarily and by usage enforced by municipalities is not a prosecution or criminal in its nature, but only quasi criminal, whatever may be the form of the procedure.**
2. **It cannot be made by ordinance an offense against a city to do what a statute makes an offense against the state, triable only in a court of record (e. g., the keeping or exhibiting of a gaming table or bank), where the Constitution of the state provides that all prosecutions shall be conducted in the name and by the authority of the state and shall conclude against the peace and dignity of the state.**

(February 2, 1896.)

PETITION for a writ of habeas corpus to obtain petitioner's release from custody to which he had been committed for violating an ordinance against keeping and exhibiting a gaming table and bank. *Petitioner discharged.*

The facts are stated in the opinion.

Messrs. Oeland & Brown and William P. Ellison for relator.

Messrs. A. P. Wozencraft and T. A. Work for city of Dallas.

Henderson, J., delivered the opinion of the court:

This is a proceeding on an original habeas corpus, granted and made returnable before this court. The petition alleges that applicant is illegally restrained by one J. C. Arnold, chief of police of the city of Dallas, by virtue of a certain judgment of commitment of the city court of Dallas. The agreed statement of facts contains a copy of the judgment and writ of commitment, the complaint on which the applicant was tried, together with a copy of the ordinance under which the prosecution and conviction were had. Said ordinance follows the state law on the subject, and makes it an offense against the city of Dallas for any person to keep or exhibit, for the purpose of gaming, any gaming table or bank of any kind or description whatever, or any table or bank used for gaming, etc.; and the punishment imposed is a fine of not less than \$25, nor more than \$100, and imprisonment in the city jail for not less than ten nor more than ninety days, which is the same in amount and degree as that provided under the state law or statute on the subject, which makes gaming an offense against the state laws. There was no information filed against defendant, but the complaint on which he was tried is as follows:

The State of Texas, }
County of Dallas, }
City of Dallas. }
Personally appeared before the undersigned

NOTE.—On the question how far proceedings for violation of ordinances are to be regarded as prosecutions for crime, see *note to State v. Robitshek* (Minn.) 33 L. R. A. 33.

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authority, E. F. Gates, who, after being duly sworn, deposes and says that Bud Fagg, in the city of Dallas and state of Texas, on the 9th day of October, 1897, and before the filing of this complaint, did unlawfully keep and exhibit, for the purpose of gaming, a gaming table and bank, to wit, a faro bank, contrary to ordinances in such cases made and provided.
[Signed] E. F. Gates.

Sworn to and subscribed before T. L. Lawhon, city secretary. On the trial the relator Fagg was convicted, and his punishment assessed at a fine of \$25 and ten days' imprisonment in the city jail.

The contention of the applicant is that said conviction, being under an ordinance, and in the city court of Dallas, is illegal and void: (1) Because the statutes of the state make the exhibiting of a gaming table for the purpose of gaming an offense against the state, and it is not competent for the legislature to grant to a municipality authority, by ordinances, to supersede the state law on the subject; (2) because the city court of Dallas has no authority to try offenses against the state law; (3) and, granting the city court of Dallas has the power to try state cases, it must proceed as a state court. In the view we take of this question, it is not necessary to discuss the last two propositions, inasmuch as the offense alleged against applicant was prosecuted merely as a violation of the city ordinances; and we are accordingly confronted with two questions: (1) Does the charter of Dallas authorize the city council to pass an ordinance making said offense of keeping and exhibiting a gaming table for the purpose of gaming an offense against the city? (2) If the charter grants this power, did the legislature have the power, under the Constitution and laws of the state, to confer upon the municipality of Dallas authority to make the exhibiting and keeping of a gaming table for the purpose of gaming an offense against the city?

We might observe here that § 24 of the new charter of the city of Dallas, granted by the 25th legislature, gives to the city court of Dallas jurisdiction as follows: "(1) To try, hear, determine, and punish all misdemeanors over which the Dallas city court now has jurisdiction. (2) To try, hear, determine, and punish all misdemeanors arising under the provisions of this charter; to have concurrent jurisdiction with the state courts over all misdemeanors against the state laws, committed within the city limits, except theft and those involving official misconduct, and to have exclusive jurisdiction over disorderly houses and female vagrants." But, as stated, it is not necessary to discuss this provision with reference to the jurisdiction of the city court of state offenses, prosecuted as such; and so it does not become necessary to discuss the bearing of the case of *Harris County v. Stewart* (Tex.) 41 S. W. 650, or to review the case of *Leach v. State*, 36 Tex. Crim. Rep. 248, nor will we do so, further than to suggest that we find nothing in the former case requiring us to change the views expressed in the *Leach Case*. Furthermore, while not necessary, yet the question being insisted on, we will examine the position

of applicant with reference to the caption of the charter of the city of Dallas as passed by the 25th legislature, said caption being entitled "An Act to Incorporate the City of Dallas, and Grant It a New Charter."

Appellant's contention is that if it be conceded that the legislature has the power, in accordance with the view taken by the supreme court in *Harris County v. Stewart* (Tex.) 41 S. W. 650, to confer jurisdiction upon a municipal court, and so create a state court, the legislature has not done so in this instance. Entertaining the view, as we do, that a municipal court is not a state court, except in a limited sense (that is, a state court for municipal purposes only), we would expect to find, under the above caption, not a state court, as a part of the judicial system of the state, but a municipal court, having jurisdiction and cognizance of matters incidental to the corporation. In this regard we hold the views expressed in *Blessing v. Galveston*, 42 Tex. 641. As we understand that case, it was an injunction proceeding brought by Blessing and others to restrain the city of Galveston from proceeding in prosecutions alleged to have been commenced by warrants issued by John S. Rhea, claiming to be acting as recorder, under pretense of authority alleged to have been conferred on him by an act of the legislature, incorporating the city of Galveston. Several of the parties had been arrested, and others threatened with arrest, for breach of an ordinance requiring them to pay a license tax on their respective occupations, trades, and professions, and also to enjoin and restrain appellee from the collection of said license tax. The fourth ground urged by complainants against the enforcement of the tax in the city court was that the recorder's court, created by the charter of the city of Galveston, in which the proceedings were had to enforce the penalties for failure to pay said taxes, is not such a judicial tribunal as is warranted by § 1 of article 5 of the Constitution. On this question Judge Moore uses the following language, which we quote in full: "The objection made to the constitutionality of the recorder's court, created by the charter, has been, in effect, answered by what has been heretofore said. If the legislature may, by reason of its inherent legislative power, create a municipal corporation for purposes of local government, it seems to follow, as a necessary conclusion, that it may invest with such powers as are necessary and essential for the ends and purposes of its creation. Without the grant of general police powers, and the means of enforcing their respect and observance, the act of incorporation of a town or city would be little better than waste paper. Judicial power of a general character, such as is conferred upon constitutional tribunals, or officers clothed with judicial functions for the general administration of the laws, in contradistinction to local or municipal ordinances and regulations, cannot be conferred upon mere corporation courts created to enforce the police powers delegated to such corporations. This seems to be the extent to which we can certainly say, in the absence of the constitutions and statutes applicable to them, that most of the cases cited by appellant clearly go. Some of them, however, 40 L. R. A.

seem to lay down a broader rule. We cannot consent to give the sections of our Constitution, conferring and distributing the judicial power, so limited and technical a construction and application. We think its language, vesting judicial power 'in such inferior courts and magistrates as may be created in this constitution, or by the legislature under its authority,' entirely sufficient to warrant the legislature, when creating municipal corporations, in the absence of any restriction, to create local municipal tribunals as an essential necessity to the well being of such local municipal corporations,"—citing *State v. Young*, 3 Kan. 445; *Hutchings v. Scott*, 9 N. J. L. 274; *Shaffer v. Mumma*, 17 Md. 381, 79 Am. Dec. 656; *Hagerstown v. Dechert*, 32 Md. 369. Here, to our minds, it is very apparent that Judge Moore drew a distinction between state tribunals constituting a part of our judicial system and municipal court as such. The latter he regarded as merely an incident to the corporation, and with limited powers to enforce municipal ordinances only. As stated above, we would not expect, under the caption of an act to charter or incorporate a city or town, to find thereunder an article or clause creating a court for other than purely municipal purposes; much less an act creating a state court, or vesting a municipal court with jurisdiction which pertains to a state court. And, if the prosecution in this case was for a state offense as such, we would be inclined to hold that the title of said act does not embrace the subject of creating a state court of the municipal court of the city of Dallas, or of conferring a jurisdiction which pertains to our state courts on said tribunal. On this subject we refer to *Wulftange v. McCollom*, 83 Ky. 361; *Brown v. State*, 79 Ga. 324; *State, Stuart, v. Kinsella*, 14 Minn. 524 (Gil. 395); *Holmberg v. Hauck*, 16 Neb. 387; *San Antonio v. Gould*, 34 Tex. 49; *Giddings v. San Antonio*, 47 Tex. 556, 26 Am. Rep. 321.

However, as stated before, the question here presented to us is whether or not the charter of Dallas confers authority on the city council to make this an offense against the city, and whether or not the legislature can confer this authority. The charter of the city of Dallas is a special charter, authorized under the Constitution for cities having more than 10,000 population; and by a number of sections, from 48 to 124, inclusive, said charter proposes to confer general powers on the city council to do certain things. Among a number of other things which the city is thus authorized to do, it appears to be authorized by ordinance to make certain acts which are penal offenses under the state laws offenses against the city. See §§ 83, 84, 86, 87, 89, 92, 93, and 103. All of the other enumerated sections appear to be regarding matters incidental to and growing out of the municipal corporation. Section 103, we presume, contains the provision under which it is contended the city council had authority to pass the ordinance against keeping and exhibiting gaming tables, under which the conviction was had in this case. Said section reads as follows: "To license, tax, and regulate billiard tables, pin alleys, and ball alleys; to suppress, restrain, and regulate and control disorderly houses, tippling shops, and grocer-

ies, gambling and gaming houses, and games of every kind, lotteries and all fraudulent devices and practices, bawdy houses of prostitution, and to punish all keepers of said houses and exhibitors or players at said games and other things, with the same penalties, fine, and imprisonment as may be inflicted therefor by the statutes of the state of Texas." It would appear therefrom that the legislature had conferred the power (if it was authorized to do so) on the city council to pass an ordinance making the offense created by the statutes of the state an offense against the state, to wit, the keeping and exhibiting of a gaming table and bank for the purpose of gaming, also an offense against the city; and the only question then is, Did the legislature have the constitutional right, under the Constitution and laws of this state, to confer this power? We would observe here that the general laws of the state (see articles 929-931, Code Crim. Proc. 1895, inclusive) put mayors and recorders of cities on the same plane, as to the administration of laws with reference to criminal prosecutions, as justices of the peace, and vest them with the same power and jurisdiction, and authorize municipal councils, by ordinances, to create acts which are made penal by state laws also offenses against the city, and to make all prosecutions and convictions under city ordinances good in bar of prosecutions for the same act under state laws and *vice versa*. The act here complained of does not come within this category. It is such an offense as a justice of the peace has no jurisdiction to try, but the power to try and punish the same is vested by the Constitution and laws of the state in the county court (see §§ 16 and 19, art. 5, Const.; and see articles 91 and 96, Code Crim. Proc. 1895); that is, imprisonment in the county jail being a part of the punishment under the state law for this offense, it can only be tried in the county court, same being court of record. Some authorities hold that where the state law has acted upon a matter, and made the act an offense against the state, the legislature cannot afterwards delegate authority to municipal governments to create the same act an offense against the city. The state having once occupied the territory, the city is excluded from interfering with it. See *Savannah v. Hussey*, 21 Ga. 80; *Wayne County v. Detroit*, 17 Mich. 390; *Cooley*, Const. Lim. 140, 228; 11 Am. & Eng. Enc. Law, p. 955; 17 Am. & Eng. Enc. Law, p. 237. The decisions of our state, however, appear to be otherwise, and to authorize municipal corporations to take jurisdiction, and by ordinance create an act which is already a state offense an offense against the city. This seems to be the holding of this court with reference to such offenses as justices of the peace have jurisdiction to try; and in such cases it is held that the ordinance must conform to the state laws in creating the offense and imposing the penalty therefor. See *Ex parte Boland*, 11 Tex. App. 159; *Flood v. State*, 19 Tex. App. 584; *Ex parte Freeland* (Tex. Crim. App.) 42 S. W. 295; *Angerhoffer v. State*, 15 Tex. App. 613. There are some decisions of this court which hold that a municipality can, by ordinance, take jurisdiction of offenses which are made such by the laws of this state, and of which

the county court has exclusive jurisdiction; and this notwithstanding § 12 of article 5 of the Constitution, which requires that "all prosecutions shall be carried on in the name and by authority of the state of Texas, and shall conclude against the peace and dignity of the state." See *Ex parte Wilson*, 14 Tex. App. 592. In the *Wilson Case*, 14 Tex. App. 592, the constitutional provision above mentioned was not discussed at all; nor was it discussed in any case we are aware of except in *Leach v. State*, 35 Tex. Crim. Rep. 449.

Of course, a great many matters are incidental to municipal corporations, and are not at all violative of state laws, and no question can arise as to ordinances covering said acts. A number of acts are petty offenses, and are covered by state laws, and would appear also to be peculiarly offenses against the municipal government, and incidental to such government, as well as offenses against the state. Our Criminal Code defines a petty offense as "one which a justice of the peace or the mayor or other officer of a town or city may try and punish." Penal Code 1895, art. 57. And this appears to be in consonance with the authorities defining a petty offense. Some of the cases hold that a petty offense can be made an offense against the municipal corporation by ordinance; and can be punished without violating the above provision of the Constitution with reference to prosecutions, while others hold the contrary. See note to *State v. Robitsek*, 60 Minn. 123, 33 L. R. A. 33, and authorities there cited; *Davenport v. Bird*, 34 Iowa, 524. In the latter case the action was under an ordinance of the city of Davenport prescribing that "every person who shall unlawfully disturb the public quiet of any street, alley, avenue, public square, market place," etc., "by loud or unusual noise, by blowing horns or other instruments," etc., "shall be guilty of a misdemeanor"; and the fine provided was not less than \$3 nor more than \$100, and imprisonment until the fine and costs were paid, provided that the imprisonment should not exceed thirty days. It was claimed in that case that said action was a prosecution; that it was not authorized under the Constitution of Iowa, which is similar in its provisions to ours. We quote from that case as follows: "Is it necessary under the Constitution, that all prosecutions for violations of municipal police ordinances shall be conducted in the name and by the authority of the state of Iowa? Or, in other words, is that clause of the city charter of Davenport, which directs that 'all suits, actions, and prosecutions instituted, commenced, or brought by the corporation shall be instituted, commenced, and prosecuted in the name of the city of Davenport,' in conflict with the constitutional provision before referred to? We are of opinion that it is not. This clause of the Constitution occurs in article 5, which treats of the judicial department of the government. This article vests and defines the judicial power of the state; establishes the tenure of office of the judges and defines the mode of their election; fixes their salary and limits the number of judicial districts; provides for the election of an attorney general, and other

matters pertaining to the judicial arm of the state, among which is the clause under consideration. From all this, it seems manifest that the requirement, that 'all prosecutions shall be conducted in the name and by the authority of the state of Iowa' contemplates such criminal prosecutions as shall be instituted and prosecuted before the tribunals which are provided for in that article of the Constitution, under the statutes of the state. It is fitting and appropriate that prosecutions for violations of the criminal laws of the state should be carried on in the name of the government. But there is no fitness or propriety in requiring the state to be a party to every petty prosecution under the police regulations of a municipal corporation. Such a construction of this article of the Constitution seems to us unwarranted, and not intended by the framers of the Constitution. It was held by the supreme court of Pennsylvania that the word 'process,' in the 28d section of the fifth article of the Constitution of Pennsylvania, which provides that the style of all process shall be 'The Commonwealth of Pennsylvania,' was intended to refer to such writs only as should become necessary to be issued in the course of the exercise of that judicial power which is established and provided for in the article of the Constitution, and forms exclusively the subject-matter of it. 3 Pa. 99. See also *Sprague v. Birchard*, 1 Wis. 457, 60 Am. Dec. 393. On the same principle we are of opinion that the word 'prosecutions,' in the 8th section of article 5 of our Constitution, was intended to refer only to such criminal prosecutions, under state laws, as should be cognizable by the judicial power which is established and provided for in that article, and that it was not intended to include prosecutions under ordinances of municipal corporations, cognizable before local police magistrates. It follows, therefore, that in sustaining the demurrer on the first ground stated, the court below erred." This does not appear to have been a state offense by statute. Treating it as a municipal offense merely, it states the correct doctrine. Under the authorities, we are inclined to the view that, in the face of the constitutional provision before quoted, where an offense has been made such by state law, notwithstanding it is a petty offense, it must be prosecuted by authority of the state, and against its peace and dignity. In this case, however, it is not necessary for us to decide that question, as the offense for which the relator was tried and punished was not a petty offense, but an offense over which the county court, being a court of record, alone had jurisdiction.

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Now, the question which presents itself is: Does the fact that the municipal council of Dallas has, by ordinance, created the exhibiting and keeping of a gaming table for the purpose of gaming, an offense against the municipality, relieve it of being a prosecution? A "prosecution" is defined by our statute to be "the whole and any part of the procedure which the law provides for bringing offenders to justice." See article 26 of the Penal Code of 1895. "It is a criminal proceeding at the suit of the government." *Tennessee v. Davis*, 100 U. S. 269, 25 L. ed. 652. A proceeding by a municipal corporation to enforce such fines and penalties as are ordinarily and by usage enforced by them is not criminal in its nature, whatever may be the form of the procedure. Such proceedings are only quasi criminal, and are not prosecutions. 17 Am. & Eng. Enc. Law. p. 260, and note; 1 Dill. Mun. Corp. § 432; *Sparta v. Lewis*, 91 Tenn. 870.

As heretofore stated, the conviction in this case would not come in the category of petty offenses, nor an offense merely growing out of and incidental to the municipal government; and, in our opinion, no matter what might be the tribunal or what the character of procedure, the prosecution, under the Constitution and laws of this state, must be carried on in the name and by the authority of the state of Texas, and conclude against its peace and dignity. The fact that the prosecution was brought under the city ordinance did not deprive it of the characteristic of a prosecution; nor could the legislature by indirection, as by vesting jurisdiction of the case in some other than a state tribunal, so change the nature of the offense as to take it out of the category which had been affixed to it by state law, of a prosecution for a criminal offense. And we hold that it was not competent for the municipal council of Dallas, by ordinance, to create the keeping and exhibiting of a gaming table or bank (which was by the statute an offense against the state) an offense against the city of Dallas, and the prosecution under such ordinance could not be maintained in the face of our Constitution, which prescribes, as before stated, that all prosecutions shall be conducted in the name and by the authority of the state, and shall conclude against the peace and dignity of the state. And we accordingly hold that *the relator is entitled to be discharged*, and that the costs of this court be taxed against relator; and it is so ordered.

Hurt, P. J., concurs in result, but dissents as to some of the propositions announced in the opinion.

MARYLAND COURT OF APPEALS.

BALTIMORE TRUST & GUARANTEE
COMPANY

T. Edward HAMBLETON *et al.*, *Appts.*
and
Colden RHIND, *Appellee.*

(84 Md. 456.)

1. An additional subscription for a block of bonds by a second syndicate composed in part of members of the first syndicate which bought bonds with an option for an ad-

ditional purchase with "the same rights and privileges" provided with reference to the former is subject to the same provision as to a commission provided for in the original agreement.

2. The first coupon, as well as others, is included in a sale of bonds to a syndicate without any exception or reservation of it from the sale, although there is a provision that two thirds of the first payment of interest shall be paid by a trustee as commission, and any interest in that coupon is therefore derived through the syndicate, and subject to the rule which precludes one member from secretly obtaining a commission in which his associates do not share.

NOTE.—Relations and rights of syndicate members.

I. *Scope and nature of the subject.*

II. *Rights and powers of members.*

III. *Rights, duties, and liabilities in transactions between themselves.*

a. *General rule as to good faith required.*

b. *Sales by member to association.*

c. *Purchases with secret advantages.*

d. *Dealings between associations having common members.*

e. *Contribution to capital, expenses, and losses.*

f. *Interest in property of association.*

g. *Compensation for services.*

IV. *Remedies.*

I. *Scope and nature of the subject.*

Syndicates as a legal consideration have been but recently brought into notice, and the limits of the subject have not been heretofore closely defined by the courts. The principles which would appear to have been applied to their government, however, are not new, and in the preparation of this note the writer has not confined himself to cases designating the body in question as a syndicate, but has sought to include such cases, and such cases only, as treat of associations which fall within the definition of a syndicate given in the principal case of *BALTIMORE TRUST AND GUARANTEE CO. v. HAMBLETON* by whatever name they may have been known. Such associations seem to have been generally regarded, subject to some exceptions, as falling within the rules applicable to partnerships.

Thus, an unincorporated association for the purpose of the purchase and sale of land for profit possesses the legal attributes of a partnership, and is governed by the rules of law applicable to partnerships. *McDowell v. Joice*, 149 Ill. 124.

And where four persons agree among themselves to be jointly interested in lands, and that they will put them into a company at a large price above their cost and divide the profits between themselves and take measures to organize a company for that purpose, they are to be regarded as partners, though the titles to the lands are not in them as such, and though there are no written articles of copartnership; and all that one copartner does and represents while engaged in getting up the company and transferring lands to it binds the others, and all are responsible for false and fraudulent representations made by either therein. *Getty v. Devlin*, 54 N. Y. 403.

So, the principle which obtains among partners that all members of the partnership shall be loyal to the joint concerns extends to all persons who may engage in a common undertaking, and any of the associates are intrusted with the interests of the association. *Delmonico v. Roubush*, 2 McCrary, 23.

And an enterprise to promote a common purchase

and the mutual benefit of the parties to it, whether they be true partners or not, necessarily includes a relation of trust and confidence reposed and accepted by its several members, binding each to the same scrupulous good faith to which they would be bound if standing in the relation of partners. *Bestor v. Barker*, 106 Ala. 240.

A syndicate agreement by which the members were to contribute a sum of money to be placed in the hands of trustees to purchase a tract of land and improve the same, and sell it when improved, and distribute the proceeds among the shareholders, however, if constituting the members partners as to the proceeds and profits does not constitute one that will terminate by the death of one of the shareholders or the assignment of his interest, as it differs from an ordinary trading partnership in that the *delectus personae* is an unimportant consideration. *Horner v. Meyers*, 29 Ohio L. J. 403.

And an association of persons for the purpose of dealing in land contemplating an indefinite series of transactions of the same general character, through all of which the association itself is to maintain its identity, the original associates so far as they shall choose being entitled to take part in each purchase, and such others as should become associated with them being entitled to become parties, is to be regarded, at least in equity, as an ideal entity, through all the mutations of its membership, in determining the individual relations existing between the association and its members. *McDowell v. Joice*, 149 Ill. 124.

And the mere fact that other persons unite with those or a part of those who originally formed the association which fixed no limit to the time for its duration will not change the duties and obligations of the persons intrusted with the management of its affairs. *McDowell v. Joice*, 46 Ill. App. 627, Affirmed 149 Ill. 124.

So, a deed by a trustee for a syndicate, made for the purpose of enabling one of the members thereof to convey to a third person a portion of his interest, becomes a nullity upon the transfer of the entire interest of such member to such third person, who takes the place of the member as one of the syndicate, without taking a deed from the former member as originally contemplated, and the legal title of the whole of the land remains in the trustee. *Johnson v. Elkins*, 1 App. D. C. 430.

And the death of one of several trustees to whom an association of individuals have conveyed property in trust for certain purposes will not affect the transfer, the equitable title so transferred surviving to the surviving members of the trust. *Michenor v. Reinach*, 49 La. Ann. 330. And see *Horner v. Meyers*, 29 Ohio L. J. 403.

And the rule is the same with reference to the assignment of an interest in the association. *Horner v. Meyers*, 29 Ohio L. J. 403.

It has been held, however, that the members of a syndicate for the purchase of land, upon making

3. **A syndicate is an association of individuals**, formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested.
4. **It is the plain and imperative duty of promoters of a syndicate** towards persons who are invited to co-operate in the enterprise, not only to abstain from stating as a fact that which is not a fact, but not to omit to state any circumstance within their knowledge the existence of which might in any way affect the extent or quality of the advantages held out as inducements to the others.
5. **Equity will devise a remedy to meet each new emergency**, and will enforce a restitution if the ends of justice require it, where

such purchase, contract with one another by implication as well as with the seller, and where one refuses to be bound, and another is substituted in his place without the knowledge and consent of the others, the contract is annulled and the associates are discharged. *Crittenden v. Armour*, 80 Iowa, 221.

And the act of a real-estate agent employed to sell land for the owner, who became a member of the syndicate for the purchase of such land, of substituting a stranger in the place of one of the members of the syndicate while they held an option as purchasers, is the act of the vendor, and not of the syndicate, for which they are bound, as he is the agent of such vendor and not of the purchaser. *Crittenden v. Armour*, 80 Iowa, 221.

So, a transaction by which members of an association for dealing in lands, without in any way apprising their associates and continuing to act apparently for the promotion of the common enterprise, become subscribers in a new deal by which a tract of land is purchased, and by each taking advantage of the position of his associates they succeed in inducing the association to take it off their hands at an advanced price, thus realizing a large profit, is a fraud upon the association rendering them liable to account to their associates for the profits realized. *McDowell v. Joice*, 149 Ill. 124.

And a contract between a syndicate and another, the provisions of which require the members of the syndicate to act as a unit in certain contingencies, does not mean that one member of it may transfer his interest to a hostile party and thus prevent unanimous action, and in case of such a transfer to one who is hostile to the interests of the other members the covenant is abrogated and unanimity of purpose is no longer necessary. *Coffin v. Grand Rapids Hydraulic Co.* 46 N. Y. S. R. 851.

II. Rights and powers of members.

The contract between the members of a syndicate under which it derives its existence furnishes the measure of the rights of the associates to act for the body and their powers to bind each other.

Thus, the Constitution and by-laws agreed upon by the members of an association not organized in pursuance of any statute, and of which the terms of membership are not fixed by the principles of the common law containing the stipulations of the parties, form the law which should govern, and not the uncertain will of the majority of the members. *Leech v. Harris*, 2 Brewst. (Pa.) 511.

And resolutions made by an association of the stockholders of a steamboat company, agreed to and signed by all the members acting as independent tenants in common of the property to be held by them by which they regulate the number of shares belonging to each and provide for the method of transfer and of descent in case of death, are in the nature of permanent constitutional provisions. 40 L. R. A.

a fund claimed by a wrongdoer is under its control.

6. **A principal is bound by and responsible for the representations** and concealments made by an agent in the line and within the scope of his employment.
7. **One who pays commissions to a member of a syndicate** who acted as his agent in forming it, under a secret agreement giving him an advantage over the other members, is liable to the syndicate as for misapplication of its funds, especially when it was part of a fund held in trust for syndicate expenses in which such member declared to his associates that he had no interest.
8. **A payee who knows of the facts involved** has no better right to enforce drafts

visions binding upon all the members when adopted by all as a solemn private contract which can be only abolished by the like concurrent will by which they were adopted, and are not mere by-laws subject to the control of a majority. *Livingston v. Lynch*, 4 Johns. Ch. 573.

So, an agreement for the formation of a syndicate contemplating that the title to lands purchased for it should be taken in the name of one of the number, who should hold one fifth of the same in trust for each of his four associates, binds such trustee whoever may be selected to convey an undivided one fifth to each of the four others, without reference to any disposition that might be made by any one of the members of his own interest. *Johnson v. Elkins*, 1 App. D. C. 430.

And where an account is opened with a banking house by an association formed of a great body of persons united for the purpose of adventure or undertaking, and by the subscribers' agreement the managing committee was authorized to bind the members and make regulations and by-laws, it is not beyond the powers of the committee to order that the checks of any three of them shall be sufficient, and a check so drawn will not render any of the committee more liable than the other members of the company, in the absence of proof that the money came into his hands. *Maitland's Case*, 4 De G. M. & G. 769.

And a note signed by the agents of a syndicate composed of themselves and other persons, the object of which was to buy the securities of two railroads and consolidate the companies and issue the bonds and stock of the consolidated company to the subscribers, which was used for syndicate purposes, and recited the giving of syndicate securities, will be held to be the note of the syndicate and not the individual loan or debt of the agents, where the application for the loan is shown to have been made by the syndicate, and the lender entered the loan on its books in the name of the syndicate, and sent demands for interest to it. *Continental Nat. Bank v. Heilman*, 81 Fed. Rep. 36.

So, an assessment made by a voluntary association upon its members for improvements made upon its property pursuant to a statute for the purpose of increasing the head of water in a stream and regulating the flow thereof for the supply of their mills, is not unjust and oppressive and inequitable as between themselves, because it provides that each associate shall be liable in proportion to the height of the fall instead of in proportion to the quantity used by him, where it appears that they have by their articles of association consented to be assessed, and the plan of assessment was adopted after due deliberation, and fully approved. *Troy Iron & Nail Factory v. Corning*, 45 Barb. 231.

And any shareholder in an association or private company, for the purchase and sale of lands for the benefit of the members, the articles of which provide that within six years from the date

drawn by his secret agent than the latter had to claim the fund drawn upon.

(January 5, 1897.)

APPEAL by defendant's Hambleton *et al.* from a decree of the Circuit Court of Baltimore City in favor of defendant Rhind in an interpleader proceeding to determine the right of defendants to certain funds in the hands of the trust company. *Reversed.*

The facts are stated in the opinion.

Messrs. D. K. Este Fisher, William Cabell Bruce, William A. Fisher, and Archibald H. Taylor, for appellants:
The commission, in any event, was payable only upon the first \$2,000,000 of bonds.

thereof the trustee shall proceed to take measures for closing the concerns of the association, and to that end shall cause all effects and securities held by them or the association to be collected or converted into money, and all property converted into money by sale or otherwise as fast as practicable, has a right to insist that such contract shall be carried into effect according to its spirit and intent, though it be not for the interest of the shareholders, or even a majority of them, to have the affairs of the association wound up. *Mann v. Butler*, 2 Barb. Ch. 362.

A provision in a contract for the formation of a syndicate for the purchase of lands that no sale should be made unless four out of the five contracting parties should give their consent in writing, however, is to be regarded as a limitation of the powers of the one holding the title in trust for all, as it would require a plain and unmistakable declaration to that effect, even if that could be enforced to restrict each individual's power of alienation of his own interest. *Johnson v. Elkins*, 1 App. D. C. 430.

And in an association of the stockholders of a steamboat company in matters of mere private confidence or personal trust or benefit, the majority cannot conclude the minority, but where the power is of a public or general nature the voice of the majority will control on grounds of public convenience. *Livingston v. Lynch*, 4 Johns. Ch. 573.

So, a conveyance by the owners of a tract of land who have formed an association by articles dividing their interests into transferable shares, and appointed directors to manage, improve, and dispose of the land to trustees who were to sell and dispose of the same for the benefit of the association, of the deed referring to the articles, vests the whole title legally and equitably in the trustees, and the directors of the company cannot dispose of any portion of the land by a dedication to the public or otherwise without the co-operation of the trustees. *Ward v. Davis*, 3 Sandf. 502.

And a syndicate agreement by which the members were to contribute a large sum of money to be placed in the hands of trustees, whose duty it was to purchase a tract of land and improve the same and sell it when improved, the proceeds of which are to be distributed among the shareholders, vests the land in the trustees with the power of subdivision and sale and the division of the proceeds, and does not contemplate that the shareholders shall be entitled to an interest in the land, or to a partition thereof. *Horner v. Meyers*, 29 Ohio L. J. 403.

And the managers of an oil company the capital of which was not to be increased without the consent of a majority of the stockholders, and to whom no authority is given to borrow money or to increase the capital, cannot ratify a transaction by

In order to support so unreasonable a proposition as that Mr. Rhind was to receive \$78,000 for a service which admittedly was sufficiently compensated by \$30,000, unless the option was exercised, the terms must, without any ambiguity, point out that such was the intention.

If the court shall be of opinion that the contract was intended to stipulate for commissions on the entire amount under the second or option contract, as well as under the contract for the purchase of the \$2,000,000 of the bonds, then Mr. Rhind is entitled only to the amount less the sum received by Lancaster.

When a syndicate is formed there is the implication that all its members shall stand upon an equal footing, and that no one member shall take a secret benefit.

which the president purchased a lot for oil operations and borrowed money with others for its payment on their individual credit, and their ratification will not bind the other stockholders to contribute to the payment thereof. *Crum's Appeal*, 66 Pa. 474.

So, expenses of trustees of an association for the purchase of land for the purpose of laying out a town, incurred in the erection of a tavern and public county buildings, though made in good faith and tending greatly to enhance the value of the town lots, cannot be allowed as a credit in their account unless they were authorized by the authority under which they acted, or unless the shareholders expressly or impliedly consented thereto. *McKinley v. Irvine*, 13 Ala. 631.

And a deed from the members of a syndicate of their property to a trustee for a corporation which adopts a resolution of the syndicate that the shares shall be distributed ratably among them, according to their interest in the property, and be deemed in great part paid up, is not a contract within the New South Wales act 1874, § 57, which will protect the shares from liability to calls in respect of the amounts deemed paid up, as it does not effect a genuine transfer of property of which the paid-up portion of the shares forms part of the consideration, or create any legal rights or liabilities. *Smith v. Brown* [1896] A. C. 614, 75 L. T. N. S. 213, 65 L. J. P. C. N. S. 89.

III. *Rights, duties, and liabilities in transactions between themselves.*

a. *General rule as to good faith required.*

Associates engaged in a common enterprise for their mutual benefit have the right to demand and expect from each other good faith in all that relates to their common interest, and one cannot be permitted to take to himself a secret or separate advantage to the prejudice of the others. *Getty v. Devlin*, 54 N. Y. 403.

And a trustee of a syndicate for the purpose of buying and selling land, though not technically an agent or trustee for the other members of the syndicate, is subject to the rule that an agent cannot make a profit in dealing with his principal; the latter has the option to rescind the contract or claim his share of the profits. *Ferguson v. Bateman*, 1 App. D. C. 279.

And members of the association for dealing in land, who have in no way manifested their election to no longer remain members, are incapable of dealing with the association for their own profit,—at least without its full knowledge and consent. *McDowell v. Joice*, 149 Ill. 124.

So, an agent appointed by the trustees of an unincorporated land company organized for the purpose of laying out a town, to bring its affairs to a close and to settle and compromise with debtors,

Mr. Rhind now presents himself and invokes equitable principles, in order that the fund in court shall be turned over to him, although it is payable to Lancaster.

Mr. Rhind cannot obtain any part of the money without the assistance of a court of equity, and he can obtain that only upon the condition that he shall do what is equitable on his part, and the very first condition must be that he shall not take over again out of the fund what he has already procured, and what he has, in disregard of the equities of the syndicate, turned over to his agent and partner, Mr. Lancaster.

Emma Silver Min. Co. v. Grant, L. R. 11 Ch. Div. 938.

Evidence of knowledge upon the part of Rhind is unnecessary.

and having authority to receive the stock of the company at a designated price in final settlement with the purchasers of lots and lands of the company, cannot purchase the stock of the company for his own use, as such a purchase would be regarded as having been made on behalf of the association. *McKinley v. Irvine*, 13 Ala. 681.

And one who had been an agent for such a company, who after such agency ceases becomes the owner of stock in the company, cannot thereby entitle himself to retain in his hands money which he had collected as agent and attorney at law unless insolvency or some independent ground of equitable interposition exists, and the fact that the trustees are nonresidents is not sufficient where it was known to him previous to his purchase of stock. *McKinley v. Irvine*, 13 Ala. 681.

And a part owner of a contract for the purchase of a claim to a mine whose co-owner uses such contract for the purpose of procuring such claim for a third person without his consent, and who secures another outstanding title for the benefit of such third person and receives from him in return for such services an interest in the mine, is entitled to a share of such interest proportionate to his interest in the original contract. *Delmonico v. Roubenush*, 2 McCrary, 28.

So, when the common stock of an association for the purpose of carrying on a business of mining and collecting gold and other minerals in California consists of the capital of one or more of the members and the labor and skill of others, the diversion by any of the members from the common object to which it was pledged of the labor and skill, as well as of the capital, during the existence of the enterprise, and its employment for other productive purposes, either of the same or any other kind, entitles the other members of such association to have the profits derived therefrom brought into the common fund. *Waring v. Cram*, 1 Pars. Sel. Eq. Cas. 516.

b. Sales by member to association.

A sale made by a member of a voluntary association who induces his associates into the purchase for the common benefit, concealing the fact that he is the real vendor, and misrepresenting the interest or advantages of the purchase or the value of the property, may, at the election of the betrayed associates, be vacated and set aside, and the seller compelled to account for whatever loss his associates may have sustained. *Bestor v. Barker*, 106 Ala. 240; *Getty v. Devlin*, 54 N. Y. 403.

And a subscriber to a paper by which each subscriber agreed jointly for their mutual benefit and advantage to purchase certain lands designated, for a price named, cannot purchase the lands for a less price, and compel his associates to allow him more than he paid; his purchase would inure to

Western Maryland R. Co. v. Franklin Bank, 60 Md. 44.

Messrs. Rhind and Lancaster and their agent Mr. Williams were promoters of the syndicate, charged with all the duties and responsibilities of that relation to the members of the syndicate, and Lancaster, in order to aid the scheme, became a member of it.

Bagnall v. Carlton, L. R. 6 Ch. Div. 382; *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. Div. 455; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 118.

The contract between Lancaster and Rhind discloses the fact that they were associates and partners to earn the commission.

White v. Sawyer, 16 Gray, 589.

Rhind can only claim under the terms of the contract, and only on the theory that Lan-

the benefit of all the subscribers. *Getty v. Devlin*, 54 N. Y. 403.

And associates in a common enterprise who conceal the fact of their interest in property, nominally owned by an outside party, and misrepresent its value and the necessity for renting it in order to prevent competition, and induce the association to rent or purchase it at an exorbitant price, can be compelled to account to their associates for whatever loss they sustain thereby. *Bestor v. Barker*, 106 Ala. 240.

And it is not for a member of a voluntary association who had induced his associates into a purchase of his property for the common benefit, concealing his ownership and misrepresenting the interest or advantages of the purchase, to show that the property was worth all he received for it, and that all the advantages contemplated from its purchase have accrued. *Bestor v. Barker*, 106 Ala. 240.

So, the estate of a deceased member of a syndicate who fraudulently procured the conveyance of his own property to the syndicate at a greatly advanced price, concealing the fact that he was the vendor, is liable on the ground that he was a partner, and that the action therefore did not die with him. *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436.

And the purchase by some of the members of an association for the purpose of dealing in land of lands through a third person, and turning them over at an advanced price to the association, is a fraud upon the other members for whom the persons thus purchasing became trustees. *McDowell v. Joice*, 46 Ill. App. 627, Affirmed 149 Ill. 124.

And an agent for a syndicate, who represents that the title to property is in another, and leads the members to believe that he will procure it for the benefit of the syndicate, is estopped from subsequently claiming that he was the owner of the land and from selling it at an advance upon the amount paid to third persons for such land, although the members of the syndicate had agreed to pay the amount charged by the agent under a representation that it could not be obtained for less. *Lyon v. Worcester*, 40 Ill. App. 630.

So, a trustee of a syndicate for the purchase and sale of land, who by his answer in an action for an accounting as such trustee shows that he had purchased land from himself and others instead of from the person mentioned in the syndicate contract as the owner from whom he had purchased at a profit, must show that he made the profit under such circumstances that a court of equity would permit him to retain it, and the complainant does not have the burden of showing that he made it in violation of his duty and in fraud of the rights of the other members of the syndicate. *Ferguson v. Bateman*, 1 App. D. C. 279.

caster was in reality acting for him, and therefore that he has an equitable title to the fund.

Any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this court.

Panama & S. P. Teleg. Co. v. India Rubber G. P. & Teleg. Works Co. L. R. 10 Ch. 526.

When jurisdiction has once been obtained, it will be retained for the complete adjudication of the rights of all.

Phelps, Juridical Equity, pp. 260, 261; *Bispham*, Eq. p. 53.

The court will mould the relief to the circumstances, such being the unique power of a court of equity upon which it has been builded up, and the sole motive for its separate existence.

No amount of successful practice or general acquiescence in purchases of property by one who, after organizing a syndicate for the purchase of the same property, procures its transfer to the syndicate at an advanced price, can give such methods a standing in a court of equity. *Ferguson v. Bateman*, 1 App. D. C. 279.

In *Ferguson v. Bateman*, 1 App. D. C. 279, *Kilbourn v. Sunderland*, 130 U. S. 555, 32 L. ed. 1005, *infra*, was distinguished upon the ground that in that case the syndicate employed as agent for the purchase of property at a designated price, persons who had already contracted for its purchase for themselves at a lesser price, who afterwards sold it to the syndicate at the price fixed by it, the parties thus coming into the market upon their own judgment, fixing the price which they were willing to pay.

The promoters of a syndicate stand in a fiduciary relation to it, and are bound to make a full and fair disclosure of their interest in property to be purchased by it; and where they suppress the fact that they were the real vendor, and that they gave for the property only half what the syndicate was going to give, and had obtained the acceptance of the contract by a board created by them, there is no binding contract, and the sale will be set aside and judgment given against them for repayment of the purchase money. *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436. And see *BALTIMORE TRUST & GUARANTEE CO. v. HAMBLETON*.

And where a syndicate for the purchase of mining property promotes a corporation and sells the property to it for double the amount paid, and prepares a prospectus stating that the directors had entered into a provisional contract to purchase the property at a certain figure, when the fact was that they had not done so, and that the trustee who purported to purchase on behalf of the company was really acting as the agent of the syndicate, and omitting to state therein the names of the real owners and the price which the vendors had paid for the property, it shows that the syndicate did not, as promoters of the company, make such full and fair disclosure as was required of them in their fiduciary position. *New Sombrero Phosphate Co. v. Erlanger*, 25 Week. Rep. 436, L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222.

So, the payment of a large sum of money to the promoters of a company out of the purchase price of a concession for the working of guano on a certain island, which is put in by the owners and promoters of the company at an excessive valuation, where the concession was worthless and voidable because of a breach of the conditions thereof, is to be regarded as fraudulent and a bribe to induce the promoters on behalf of the company to accept 40 L. R. A.

Crain v. Barnes, 1 Md. Ch. 155; *Eastman v. Savings Bank*, 58 N. H. 422; *Poland v. Lamouille Valley R. Co.* 52 Vt. 175; *McGean v. Metropolitan Elev. R. Co.* 133 N. Y. 16; *Walters v. Farmers' Bank*, 76 Va. 12; *Rust v. Ware*, 6 Gratt. 50; *Phoenix Ins. Co. v. Ryland*, 69 Md. 449, 1 L. R. A. 548.

An agent or a promoter, whatever may be the nature of his employment, or under whatever circumstances, is bound, if he has any interest in the matter, not only to declare that fact, but to specify the nature of his interest; and all persons who act with him, and who share in that interest, are jointly and severally bound to make good, when their interest is discovered, to the principals, the whole benefit which has been obtained without the sanction of the principals.

a defective title to the concession, and they are therefore liable to refund the same. *Phosphate Sewage Co. v. Hartmont*, 24 Week. Rep. 530, L. R. 5 Ch. Div. 394, 46 L. J. Ch. N. S. 661, 37 L. T. N. S. 9.

Where a person projecting the formation of a company invites the public to join him in the project upon the representation that he had acquired the property which was intended to be applied for the purposes of the company, the invitation is only to participate in the benefit of the property purchased on the terms on which the projector had acquired it, and the fiduciary character of the projector would in such case commence from the time when he first began to deal with the public, and would be controlled in equity by the representations he then made to the public. *Foss v. Harbottle*, 2 Hare, 461.

And one who, having made a contract for the purchase of property, procures others to join him in the formation of a syndicate for the purchase of the same property, representing to them that it belonged to the person holding the title, with whom he had contracted, and sells it to himself as trustee for such syndicate at an advanced price procuring the conveyance to himself as trustee, will be held in equity to account to the other members of the syndicate for their due proportion of the profit he actually made in the transaction. *Ferguson v. Bateman*, 1 App. D. C. 279.

Where persons form an association, or begin or start the project of one, from that time they stand in a fiduciary relation to each other and to all others who may subsequently become members or subscribers, and it is not competent for any one of them to purchase property for the purpose of such a company and then sell it at an advance without a full disclosure of the facts, and they must account to the company for the profit, because it is legitimately theirs. *Densmore Oil Co. v. Densmore*, 64 Pa. 43.

And one who purchases petroleum property for \$18,000, and proposing to improve the property and form an oil company, and representing that the property cost \$28,000, and that \$4,000 working capital was required, induces another to embark in the speculation, placing the title in another in trust for the association, after which the venture proves a failure, is answerable to the person thus investing for the moneys which without his fault he lost in the speculation. *Crater v. Binninger*, 33 N. J. L. 517, 97 Am. Dec. 737.

And where land is purchased at a comparatively low price with a view of turning it over at a great advance to a company which the purchasers proceeded to organize, selecting three other persons, who consent to lend their names knowing little and caring nothing about the business in hand, to satisfy the law requiring five incorporators, and induce other persons to take stock in the company

Bagnall v. Carlton, L. R. 6 Ch. Div. 385.

Messrs. Charles Marshall, William L. Marbury, and Henry J. Bowdoin, also for appellants.

Messrs. Richard M. Venable and Edwin G. Baetjer, for appellee:

Even if Rhind knew that Lancaster's profit was concealed from the syndicate, and with this knowledge paid over the money to Lancaster, the syndicate must recover it from Lancaster, and cannot recover it from Rhind, or, which is the same thing, out of a fund to which he is entitled.

Whaley Bridge Calico Printing Co. v. Green, L. R. 5 Q. B. Div. 109.

In an interpleader suit the only question to be tried is the title to or lien on the debt in controversy.

by representing that the land had cost nearly eight times the price actually paid, and receive money from subscribers as officers of the company, and pay it over to themselves individually as consideration money, the stockholders can recover in an action against them for money had and receive the difference between the actual and represented cost of the land; and although one of them alone had received the money, the action will lie in the form *ex contractu* against both. *Vulcan Oil Co. v. Simons*, 6 Phila. 561.

So, persons owning oil lands which cost them about \$30,000, who procure a subscription paper to be drawn in which the subscribers agree to pay the sums set opposite their names for the purchase of the property at the sum of \$125,000, and subscribe the paper, not intending to pay; and knowing that they will not have to pay their subscriptions and cause it to be circulated and subscriptions to be procured for the purpose of filling up subscriptions given away by them in what may properly be called decoy subscriptions, procuring subscriptions upon the assurance that the original cost of the land was \$125,000, and upon the belief upon the part of the subscribers that they become such on a footing of equality with others, the money which is subscribed being divided among and retained by them, are liable therefor, as the fair implication of such paper is that the lands were to be bought of the owners, and that such owners are not any of those who subscribed as purchasers, and that each is engaged in an enterprise for the mutual and common benefit and advantage of all, and that each has a common interest with the others according to the amount of his subscription. *Getty v. Devlin*, 54 N. Y. 403.

And where the owner of mines worth not more than \$4,000 agrees with another to promote a company to purchase them at £7,000 of which the latter is to receive £3,000, and the company is formed, the parties to the agreement becoming parties to a prospectus in which such facts are fraudulently concealed, and in their capacity as directors by the like fraudulent concealment they induce the company to complete the purchase, a bill will lie by one of the shareholders on behalf of himself and others where the majority thereof refuse to take steps to get the contract set aside, such majority being due to the votes of the parties who perpetrated the fraud, and the agreement will be canceled and the company wound up. *Atwool v. Merryweather*, 37 L. J. Ch. N. S. 35.

And one who associates himself with another who has purchased certain calico printing works for the sum of £15,000, to promote the formation of a company to purchase such works, which company is ultimately formed and such promoters are made directors, which purchases such property for £20,000, with an agreement between the promoters

National Park Bank v. Lanahan, 60 Md. 477.

The claimant who cannot show a lien on the fund in the stockholders' hands has no standing in an interpleader suit, no matter whether the claimant who has the fund is indebted to the other claimant or not.

Zihlman v. Zihlman, 75 Md. 372; *Sherman v. Partridge*, 4 Duer. 646; *Spring v. South Carolina Ins. Co.* 8 Wheat. 268, 5 L. ed. 614.

McSherry, Ch. J., delivered the opinion of the court:

There are ten appeals now before us in a single record, but only one opinion will be required to cover them all; because, while there are some slight variations in minor details, the material facts in all the cases are identical

that, the vendor should pay the other £3,000 out of the purchase money, is not entitled to secure any profit to himself out of the formation of the company without the knowledge of the directors, and they are entitled to treat the agreement as made in their behalf, and enforce it against such vendor, and are entitled to recover so much of the £3,000, which he agreed to pay to the other promoter, as remains unpaid. *Whaley Bridge Calico Printing Co. v. Green*, L. R. 5 Q. B. Div. 109, 49 L. J. Q. B. N. S. 326, 41 L. T. N. S. 874, 28 Week. Rep. 351.

But while a sale by a member of a voluntary association of his own property to his associates for the common benefit, inducing them to purchase, and concealing the fact that he is the real vendor, and misrepresenting the interest or advantage of the purchase or the value of the property, is voidable at the election of the parties injured, there must be a restoration or compensation for whatever of benefit they may have derived from it. *Bestor v. Barker*, 106 Ala. 240.

And persons joining an association formed for the purchase of property to which other members of the association conveyed property belonging to themselves at a greatly advanced price over the cost thereof, fraudulently representing that it was purchased from a third person and that each was engaged in an enterprise for the mutual and common benefit of all, and that they had paid their proportionate share of the price, cannot maintain an action for the recovery of the entire amount paid by them, where they cannot or have not restored the persons thus defrauding them to a position which they were in before the transfer to the company. *Getty v. Devlin*, 54 N. Y. 403.

And the rule that the doctrine that associates who engage in a common enterprise for their mutual benefit have the right to demand and expect from each other good faith in all that relates to their common interest, and one of the subscribers cannot be permitted to take to himself a secret or separate advantage to the prejudice of his associates, applies to a purchase made before the formation of the association as well as to a purchase made after it has been laid down. *Getty v. Devlin*, 54 N. Y. 403.

Upon the other hand, it has been held that any man or number of men who are the owners of any kind of property, real or personal, may form an association with others and sell that property to the association at any price which may be agreed upon between them, no matter what it may originally have cost, provided there be no fraudulent misrepresentations made by the vendors to their associates. *Lungren v. Penell*, 10 W. N. C. 297; *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005.

Within this doctrine a transaction by which a person who had purchased oil property and con-

and precisely the same legal principles are applicable to them.

Some time in the early fall of 1892, the appellee, Colden Rhind, a resident of the state of Georgia, obtained authority from the governor and treasurer of South Carolina to float for that state, upon certain stipulated terms, an issue of about six millions of her 4 per cent bonds, the proceeds of which were to be used in retiring an outstanding and shortly maturing prior series known as Brown Consols. He proceeded to New York, and after endeavoring, without success, to organize a syndicate to purchase the bonds, suggested a change in the character of the securities and then resumed his efforts. By the new scheme the bonds, instead of being 4 per cent forty-year bonds, were, subject to the approval of the

legislature, to be 4½ per cent twenty-forty-year bonds, and were, when negotiated, to net the state par. Rhind approached a banker by the name of Lancaster, who carried on business in both New York and Richmond, and agreed to give him, as compensation for his aid in forming a syndicate, one third of the commissions which Rhind himself might realize out of the transaction. Failing to secure a sufficient number of subscribers in New York, Lancaster, acting for and as the agent of Rhind, proceeded to Richmond, in the month of December, and there enlisted the co-operation of the banking firm of Williams & Son, one of whose members suggested that he could probably fill up the syndicate from amongst his acquaintances in Baltimore.

Accordingly, with the sanction and ap-

proved one-sixth shares to five others at actual cost, after which the six sold eighty-fourth interests to others, when the whole party as owners of the eighty-fourth interests combined together to form a company, putting in the property on the basis of a much higher value than that actually paid for it by the original purchaser, is not illegal, as the original purchaser did not stand in a fiduciary relation with the other shareholders and could sell property to the association at such price as they might agree upon without reference to the original cost. *Lungren v. Pennell*, 10 W. N. C. 297.

So, persons who had for a considerable time been the owners of property, having acquired it with no reference to the formation of a company, and had improved and developed it by a very large outlay of their own capital, may put their own price upon it in the formation of a company to which they sell it. *Densmore v. Densmore*, 64 Pa. 43.

And one who forms an association with others, and sells property to the association which he had previously owned, is not bound to disclose the profit which he may realize by the transaction; being in no sense an agent or trustee in the original purchase, it follows that there is no fiduciary relation between the parties which affects him with a trust. *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Lungren v. Pennell*, 10 W. N. C. 297.

And the fact that the principal or active member of a syndicate commenced negotiating with some of the persons, who afterwards became directors with a view to the formation of a company, does not make the syndicate promoters or agents of such company. *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73, 25 Week. Rep. 436, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222.

So, where a lease of an island containing extensive deposits of phosphate of lime is contracted to be sold, subject to the sanction of the court, to a person who was in fact the agent or trustee for a syndicate of speculators who agreed to sell the property to a trustee for a company to be organized for its purchase for double the price at which he had purchased, the syndicate will be deemed to have purchased the property as of the date when it was contracted to be sold to the members thereof, and from that date they were at liberty to dispose of it as they thought proper, but as there was no one representing the future company who could then treat the syndicate as being in a fiduciary relation toward him, the company is not entitled to set aside the contract, because there was no disclosure of the price at which the syndicate had purchased, or to say that the syndicate members were trustees as to the difference between the two purchases. *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73, 25 Week. Rep. 436, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222.

But though the promoters of a company are not 40 L. R. A.

to be considered as standing in the position of trustees towards the company so that they may not lawfully make a profit upon a sale of property to it, they do stand in a fiduciary relation toward it, and are bound to give it the opportunity of exercising, through fair and independent directors, an independent judgment upon all matters affecting its existence. *Erlanger v. New Sombrero Phosphate Co.* 30 L. T. N. S. 200, L. R. 3 App. Cas. 1218, 48 L. J. Ch. N. S. 73, 27 Week. Rep. 65.

And where a syndicate is formed for the purpose of purchasing mining property, and a company formed to which the syndicate resells the property at double the price they had given for it, the syndicate nominating the five directors, two of whom are out of England at the time, and a third is a member of the syndicate and the nominal vendor of the company, and the fourth a personal friend of the leading member of the syndicate, receiving his qualification from him, the fifth only being an independent director, and the solicitor of the company being also a member of the syndicate, the company is entitled to rescission of the contract of purchase which was adopted by the three last-named directors under the advice of the solicitor, and repayment of the whole of the purchase money. *Erlanger v. New Sombrero Phosphate Co.* 30 L. T. N. S. 200, L. R. 3 App. Cas. 1218, 48 L. J. Ch. N. S. 73, 27 Week. Rep. 65; *New Sombrero Phosphate Co. v. Erlanger*, 25 Week. Rep. 436, L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222.

c. Purchases with secret advantages.

A person engaged in a common enterprise with others, who also acts as an agent on behalf of all the associates for the purchase of a gold mine, who secretly stipulates for advantages to himself in the shape of commissions from the vendor of the mine, will be held to account for them and share them with his associates. *Emery v. Parrott*, 107 Mass. 95.

And a person employed as an agent for the sale of mining property, who makes false representations that the price at which he offered it was the price which the owners were to receive, and that he was not to receive any profit by the sale, who joins a syndicate for its purchase, contributing the bonus given him for getting them to buy the property, is not to be regarded as the agent of the vendors in selling their property, so that his fraud will be imputable to them notwithstanding the fact that they are personally innocent of misrepresentation. *Cortes Co. v. Thannhauser*, 45 Fed. Rep. 730.

And one who becomes the partner of a person associated with others in a common enterprise, and acting as an agent on their behalf for the purchase of a gold mine, secretly stipulating for advantages to himself in the shape of commissions

proval of Lancaster, I. Skelton Williams went to Baltimore in the latter part of December, approached and interviewed the appellants and others, and solicited them to join the syndicate; and if this was not done with the knowledge of Rhind, certainly it was subsequently ratified by him. Williams represented to the appellant that all the subscribers to the bond purchase were to be placed on the same footing of perfect equality, and that each was to share alike in the profits of the venture. He further represented that there were expenses connected with the syndicate that would have to be provided for out of the profits. After considerable negotiation a sufficient amount was conditionally subscribed in Baltimore to make up with what had been taken elsewhere, the sum of two millions of

dollars; and the Baltimore Trust & Guarantee Company was selected as the agent of the syndicate to carry out and consummate the transaction. Each of the appellants became a subscriber, and each signed a memorandum setting forth the terms and specifying the amount of his subscription; and whilst these papers were executed at different times, they all bear date on the 30th of December, 1892, and they were all executed in anticipation of the purchase of the bonds from the state. The material parts of these subscription contracts are in these words:

"2. The said Trust Company shall pay to R. A. Lancaster & Co., of New York city, for syndicate expenses, two thirds of the interest on said bonds from January 1, 1893, to July 1, 1893, that may be received by it, that is to say,

from the vendor of the mine with knowledge of his position, uniting with him to effect the sale of the property to the associates for the sake of dividing with him the secret commission which the vendor had agreed to pay, being fully cognizant of the illegal conduct of his associate, and participating in the profits of the transaction, will be compelled to disgorge the secret gain which he thus obtained and divided with the others. *Emery v. Parrott*, 107 Mass. 95.

So, a financial agent who agrees with the vendors of a mine to sell it to a company to be formed by him for its purchase at a price named and that he should receive 20 per cent of the amount of the allotted capital, which company was subsequently formed and the mine purchased, is liable to such company for the amount of the secret profit which he had made, but in estimating the amount of such profit he is to be allowed all sums bona fide expended in securing the services of the directors and providing for their qualification, and any payments legitimately made to the brokers and officers of the company, and to the public press in relation to the company. *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. Div. 918, 40 L. T. N. S. 804.

And a newspaper statement by the promoters of an oil company that negotiations now pending will in a few days place the company in possession of the most successful oil territory in America, and suggesting to those contemplating investment that a few advance subscriptions for stock might be obtained at once at the original price of \$1 per share, leading to the inference that much of the stock was already taken, when no such negotiations were pending and no stock had been sold, as a solicitation addressed to persons known or unknown to share in an enterprise directed to a common end must be regarded as fraudulent, both in what it alleges and in what it was designed to conceal. *Vulcan Oil Co. v. Simons*, 6 Phila. 561.

So, where members of a syndicate under cover of a secret option for the purchase of land at \$4,000 procured it for the syndicate, representing that the owner's price was \$8,000, the other members advancing their share and believing that the persons so representing were to share equally with them, and that the payment of such price was necessary to secure the land, the members thus defrauded are entitled to relief. *Iler v. Griswold*, 83 Iowa, 442.

And such right is not affected by the fact that the land was of increasing value, and worth the amount represented. *Iler v. Griswold*, 83 Iowa, 442.

And members of a syndicate who purchased property, and are induced by the representations of one of their number as to the purchase price to pay the full price therefor, and to allow such person a two-fifths interest therein, under the supposition that such person contributed his just pro-

portion, are entitled to their interest in the land. *Shoupe v. Griffiths*, 4 Wash. 161.

And such right is not affected by the fact that the land was worth all that such members had fraudulently represented to be its purchase price. *Shoupe v. Griffiths*, 4 Wash. 161.

And false representations of a person employed to sell a mining claim, while negotiating with a syndicate organized for its purchase, that the price at which he offered the property was the price which the owners were to receive, and that neither he nor they were to receive any profits by the sale, when in fact the price for which it was offered was far in excess of that which the owners were to receive, which excess was to go for his benefit, is sufficient to annul the sale where such agent was about to enter into the fiduciary relation of a copurchaser with those to whom he made it by joining the syndicate and subscribing thereto, but was not investing any money, his contribution consisting mainly of a bonus for getting them to buy the property. *Cortes Co. v. Thannhauser*, 45 Fed. Rep. 730.

So, where four out of about five persons who entered into a provisional contract to purchase a mine which they agreed to sell for their joint benefit to a company were deceived by the fifth, who represented to them that the vendor would not take less than about £38,000, when he had secretly obtained from him an agreement that if the contract were perfected and money paid he should receive therefrom a bonus of £20,000, after which two of the four, having absolute power from the rest to sell to the intended company, formed themselves with others into a committee of management, and being still ignorant of the surreptitious agreement, issued a prospectus stating that a contract had been entered into for the purchase by the company of the entire property for £125,000, including all preliminary expenses and a premium to the parties incurring the risk of the original purchase, and a company was established and the requisite capital paid up and the provisional contract perfected, the £20,000 transaction is fraudulent and void, not only as against the four original purchasers, but also as against the company, notwithstanding the mine proved to be cheap at the price at which it was purchased. *Beck v. Kantorowicz*, 3 Kay & J. 230.

And representations by members of an association about to make a purchase for its benefit acting for all that an option has been obtained at a certain sum when in fact a rebate was to be made therefrom, upon which the others rely in entering into an agreement for the purchase thereof with those making such representations, constitutes actual fraud entitling the persons defrauded to an accounting, though no partnership exists between them. *Bunn v. Schnellbacher*, 163 Ill. 828.

a commission of 1½ per cent out of the interest or profit received on said bonds. 3. The said . . . shall have no right by virtue of his said subscription to actual delivery of said bonds from said trust company, but shall, in addition to the interest provided for by § 2 hereof, be entitled to receive from said trust company a share of the whole profits. If any, that may be realized by the sale of said bonds by syndicate, at a greater price than that paid for the same, the share of the said . . . in the said profits to be in the proportion that the number of said bonds subscribed for by him may bear to the whole number of bonds subscribed for by the syndicate. 4. The said Baltimore Trust & Guarantee Company is also authorized to pay R. M. Marshall & Bro.

\$2,500; the Bank of Charleston, N. B. A., \$1,000; the Baltimore Trust & Guarantee Company, \$500, and such other expenses as may be authorized by the syndicate. 5. It is understood that the syndicate shall have the same rights and privileges in the balance of about \$3,800,000 of bonds as hereinbefore provided with reference to the said \$2,000,000 of said bonds."

The subscriptions first made related only to the sum of two millions of the issue, but under the fifth clause, an option was given to the subscribers to take the residue of the bonds, amounting to \$3,250,000, on precisely the same terms. This option was availed of on March 7, 1898. It was understood that the subscriptions for the first two millions were

The rule to be applied to the case of one person falsely representing the value of the property inducing another to join an association with others and take shares in such property, the value of which had been misrepresented, however, is that the person misrepresenting is responsible for those injuries resulting to the other which must be presumed to have been within his contemplation at the time of the commission of the fraud. *Grater v. Binnliger*, 33 N. J. L. 513.

And the objection that a trustee of an association for the purchase of lands for the purpose of laying out a town cannot make a profit by the purchase of the trust property can only be raised by persons interested. *McKinley v. Irvine*, 13 Ala. 681.

And the formation of a company consisting of eight persons, seven of whom were the directors and the eighth a solicitor, for the purpose of working a patent belonging to some of the shareholders, in which the directors allotted shares without consideration to some of their number, to which all the members consented, is not a fraud as against shareholders who became such more than a year afterwards without being informed of the manner in which the original shares had been allotted, where no prospectus was issued and it was at first intended to be a private partnership in which no other members should be admitted; and the official liquidator as representing the company cannot call upon the directors under the company's act to account for the value of shares so allotted to them. *Re British Seamless Paper Box Co. L. R. 17 Ch. Div. 467*, 50 L. J. Ch. N. S. 497, 44 L. T. N. S. 498, 29 Week. Rep. 660.

But a company organized for the purpose of working certain patents for the defecation and utilization of sewage in the formation of which the promoters and others put in a concession for the working of guano on a certain island, which was voidable and unprofitable through a breach of the conditions thereof, at the price of £85,000, the promoters to be paid the sum of £15,000 out of the purchase money, is not precluded from suing for such fraud by the absence of proof that the present shareholders were shareholders at the time of transactions complained of. *Phosphate Sewage Co. v. Hartmont*, 24 Week. Rep. 530, L. R. 5 Ch. Div. 394, 46 L. J. Ch. N. S. 661, 37 L. T. N. S. 9.

d. Dealings between associations having common members.

Sales by the general manager of a syndicate organized to deal in mining shares and to purchase from and to sell to other associations, made to an association of which some of the members of the selling syndicate were members, are not beyond the authority of the manager though disadvantageous to a member not belonging also to the other association. *Laughton v. Griffin* [1895] A. C. 104.

And the manager of a syndicate who sells the 40 L. R. A.

bonds belonging to it to another syndicate having common members, which bonds afterwards improve in value, is not chargeable with their improved value where the former syndicate had over-purchased, and the transfer was of the excess, and was made to relieve it of the difficulty in which it was placed by the overpurchase, and the loss which a forced sale would cause. *Laughton v. Griffin* [1895] A. C. 104.

So, while a loan by a syndicate to another syndicate having common members is improper there is nothing of which complaint can be made against its manager where the money was repaid with interest exceeding the amount which the bank was charging for interest. *Laughton v. Griffin* [1895] A. C. 104.

And a transaction by the manager of a syndicate, entered upon his books as being had with another syndicate which in fact had no existence, the entries representing matters in which he alone was interested, could not stand if challenged by a person interested therein, but where the amount involved which would be credited to the person complaining would necessarily fall short of the sum with which he is charged as his share of the general loss on the accounting which he has not paid, the account of the manager will not be opened. *Laughton v. Griffin* [1895] A. C. 104.

But, contracts for the leasing of rolling stock to a railroad, made by a syndicate composed mainly of directors of the railroad and persons interested in its organization, and the raising of money by car-trust certificates issued to themselves or to other members of the syndicate, are a constructive fraud upon a prior mortgagee, and, so far as they are securities at all, must be treated as mortgages. *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 38 L. ed. 1079.

And any arrangement by which directors of a corporation become interested adversely to it by entering associations or syndicates for the purpose of making contracts with it or securing to themselves a share in the profits of any transaction to which it is a party is voidable at the election of the corporation or of the party whose rights were sacrificed. *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 38 L. ed. 1079.

And contracts by which railroads lease or purchase rolling stock by conditional sale made by the contractors with themselves or with others with whom they have associated in confidential relations, which appear to have been made directly or indirectly for their own benefit, will not be given effect by the courts. *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 38 L. ed. 1079.

So, where persons owning a concession from a foreign government, knowing at the time that through their default it was voidable and liable to forfeiture, combined together to form a company to purchase it, and fraudulently sell it, being aware

only to be binding in the event that the syndicate should succeed in disposing of that amount of the bonds to parties in South Carolina or elsewhere outside of the syndicate. This condition having been ultimately complied with, a meeting of the members of the syndicate was held in Baltimore, on January the 11th or 12th, 1898, and this meeting was attended by Lancaster. It is proved, beyond the possibility of a doubt, that Lancaster then and there, and repeatedly afterwards, unequivocally declared that he had no interest, beyond about \$500 for traveling expenses, in the fund payable under the second clause of the subscription agreements to R. A. Lancaster & Company "for syndicate expenses."

He urged the members of the syndicate not

to press him with inquiries as to what disposition was to be made of this fund for "syndicate expenses," and strongly intimated that it was to be used in some way among parties who exercised political influence in South Carolina, though he declared emphatically that he knew not to whom the money was to go and persistently protested that he did not wish to know. This fund, as the clause already quoted from the subscription agreement shows, was to be raised by deducting two thirds from the amount of interest due July the 1st, 1898, on the new $4\frac{1}{2}$ bonds. The syndicate agreeing to take the two millions of bonds at par flat as of July the 1st and also agreeing under the option to take the remaining three million two hundred and fifty thousand, the interest coupons

of the infirmity, to trustees of the intended company, by whom it was transferred to the company, and to whom was to be paid a portion of the purchase money for their share in the transaction, the solicitors of the vendor being also the solicitors for the company, the owners and promoters will be held to repay the whole purchase money on a bill filed by the company against them, and the trustees, directors, and solicitors, and all the defendants interested will be held liable for the costs of the suit. *Phosphate Seware Co. v. Hartmont*, L. R. 5 Ch. Div. 455, 24 Week. Rep. 590, 46 L. J. Ch. N. S. 661, 37 L. T. N. S. 9.

e. Contribution to capital, expenses, and losses.

The rule applicable to partnerships would seem to apply to the question of contribution between syndicate members to capital stock, and to meet expenses and losses.

Thus, members of a voluntary association formed for the purpose of placing improvements upon their common property to be paid for by assessments upon the members are not exonerated from responsibility by the fact that they have not enjoyed the full benefit of the improvements made, and have refused to participate further in the business of the association, and have sought to abandon their connection with it. *Troy Iron & Nail Factory v. Corning*, 45 Barb. 231.

And an agreement in articles of association of an unincorporated association formed for the purpose of increasing the head of water in a stream and regulating the flow thereof for the supply of mills of the members, that parties who might cease to be owners or occupants should, upon written notice of the fact to the secretary, be discharged from further assessments, and that their successors should, upon signing the articles, become members of the association, imposes upon those who remain after a withdrawal and neglect of the successor to become a member the burden of contributing their due proportion as previously agreed upon to sustain the expenses of the association, a transfer without the successor becoming a member of the association, not necessarily destroying the plan upon which it was organized; and if a portion of the associates voluntarily pay assessments upon property originally liable but not represented by a member, other members sued upon their assessments cannot avail themselves of the objection that such voluntary payment was illegal and unauthorized. *Troy Iron & Nail Factory v. Corning*, 45 Barb. 231.

So, losses of moneys coming into the hands of two agents and trustees and shareholders in an association for the prosecution of a sealing voyage, sustained from their joint neglect, which on adjustment of their accounts with their associates are charged to them jointly, ought to be borne, on an adjustment of the accounts between themselves,

by them equally, and not in proportion to the number of shares respectively owned. *Coit v. Tracy*, 9 Conn. 15.

Nor can one of several persons uniting in an enterprise for the purchase of land which proves unsuccessful claim repayment for advances from others because of a clause in the agreement providing for repayment of all sums advanced by him, as, in the absence of agreement, such clause will be considered to mean repayment out of the proceeds. *Bell v. McAboy*, 8 Brewst. (Pa.) 81.

And a member of an association for the purpose of carrying on the business of mining and collecting gold and other minerals in California, who furnished the money for the enterprise while two other associates agreed to proceed to the mines and engage in digging for gold, but who abandoned the enterprise as fruitless after the capital advanced was exhausted, and engaged in another and different employment of their labor, has no specific lien on the profits produced by such labor which could be enforced in a court of equity; his remedy, if any, would be by action for damages against those who abandon the association. *Waring v. Cram*, 1 Pars. Sel. Eq. Cas. 516.

So, a person cannot be held liable to contribution as a member of a voluntary unincorporated association with others, where the only organization consisted of a subscription paper by which the subscriber promised to pay a fixed sum of money to such person as a majority of the subscribers should appoint to receive it, containing no contract of association, and there was no stipulation for any other individual or collective action by the subscribers, and no criterion of membership was established, and the membership was not limited to signers of the subscription paper, and it does not appear that the signers present at any meeting were a majority of those present and participating in the meeting, and there was no determinate meeting of the association which could pass votes binding on its members. *Cheney v. Goodwin*, 88 Me. 563.

And the court in an action to collect an assessment made by a voluntary association upon its members for improvements cannot, by way of affirmative relief to the defendants, interfere with or readjust the apportionment, or relieve them from the obligations which the award and their own agreement contained in the articles of association have imposed upon them. *Troy Iron & Nail Factory v. Corning*, 45 Barb. 231.

f. Interest in property of association.

An association of individuals may hold property in common for their mutual benefit, and it may confer power on some of their number to hold title for the purpose of sale. *Michenor v. Reinach*, 49 La. Ann. 360.

And where real estate is purchased by an unin-

to mature that day for the preceding six months and amounting to 2½ per cent, were to be the property of the syndicate, and out of their proceeds, when paid by the state treasurer, a portion of the profits of the members was to be derived after the syndicate expenses and other items named in the fourth paragraph of the subscription papers were first subtracted.

It is obvious, therefore, that one of the things which the members of the syndicate contracted to get, and one of the things that was to be their common property, under both the original subscription and the option, was this six-months' interest, amounting to 2½ per cent on the \$2,000,000 to the sum of \$45,000, and on the remaining \$3,250,000 to the further

sum of \$73,125, and aggregating the gross sum of \$118,125. The trust company was authorized to disburse in discharge of "syndicate expenses" from this common and partnership fund for the benefit of the whole syndicate two thirds, or \$78,750, if the entire \$5,250,000 of bonds were included under the second clause of the subscription agreements, or \$30,000, if only the \$2,000,000 purchase was embraced in and covered by that clause.

It was perfectly natural that the members of the syndicate should inquire of Lancaster himself, also a member, as to what these expenses were for; and both as a promoter of and a participant in the enterprise he was bound to disclose the literal truth on this subject to his associates; but as already stated, and as the

corporated association formed for the purpose of facilitating the disposition of certain products of the business of the members thereof respectively with funds raised by obtaining subscribers and issuing certificates for shares in the association, the holders of such certificates, and not the whole association, are equitably entitled to such real estate. *Crawford v. Gross* (Pa.) 7 Ry. & Corp. L. J. 123.

But they have no power to compel a partition thereof or divert it from the use for which it was purchased, without a concurrence of a majority of the stockholders. *Crawford v. Gross* (Pa.) 7 Ry. & Corp. L. J. 123.

So, the members of a telegraph company by the articles of association of which the promoter was authorized to receive subscriptions to capital stock, and if a subscriber failed to pay he forfeited his stock and became liable to an action at law or bill in equity for any deficiency, the property of which was to be vested in trustees, are not partners, but tenants in common, of the property and franchises of the company, and the majority cannot bind the minority unless by special agreement. *Irvine v. Forbes*, 11 Barb. 599.

And where six of seven associates in a purchase of land on speculation each agreed to take a specified number of the twelve and one half shares in which the scheme was divided at a fixed price per share, and to take the shares that might remain unsold each in proportion to the shares taken by him at the same price per share, and another associate subscribes for a half share but refuses to enter into an agreement to take a proportion of unsold half shares, the shareholder is not entitled, on winding up, to any part of the unsold shares or of the profits thereon, but the shareholders who agreed to purchase them are bound to pay and account for the full price thereof and the interest thereon out of their own fund, and cannot have any part of the profits in the scheme appropriated to pay for them before such profits are divided. *Douglas v. Mercedes*, 23 N. J. Eq. 331.

And lands held by stockholders of an unincorporated association may be converted into personality as between themselves if the change is one which will promote any beneficial object; but such a conversion merely varies the relations of the parties *inter se*, and does not affect the nature of the property. *Crawford v. Gross* (Pa.) 7 Ry. & Corp. L. J. 123.

So, lands conveyed by one of the members of an association for the purchase and division of land after a division among the members to another in good faith in payment of an indebtedness due him cannot be charged in the hands of such innocent purchaser with a sum found due from his vendor upon an accounting because of fraudulent representations made by him to other members of the association. *Bunn v. Schnellbacher*, 163 Ill. 323.

It has been held, however, that the doctrine 40 L. R. A.

which protects bona fide purchasers without notice is applicable solely to purchasers of the legal title, and does not apply to one who takes a mortgage from two members of a syndicate of their equitable estate when the legal title was vested in other members in trust for the syndicate, the purchaser of an equitable interest purchasing at his peril and acquiring the property burdened with every prior equity charged upon it. *Shoufe v. Griffiths*, 4 Wash. 491.

g. Compensation for services.

An unincorporated company formed for the purpose of trading in land is to be treated as an ordinary partnership and the members as partners, and if one of them is selected to perform the duties of secretary and treasurer without any stipulation for remuneration he comes within the principle of law that a partner is not entitled to compensation for services performed in furtherance of the partnership interests. *Re Fry*, 4 Phila. 129.

The manager of a syndicate for the purchase and sale of mining stocks should be allowed brokerage, however, where he devoted his time and skill to the transaction of the business of the syndicate, and employed a broker, and kept the accounts of the syndicate in his office. *Laughton v. Griffin* [1885] A. C. 104.

But a trustee and agent of an association for the prosecution of a sealing voyage should not be allowed interest on his commissions and disbursements in the adjustment of his accounts during a period when he had in his hands money of the association more than sufficient to cover all his demands upon which he was not charged interest. *Coit v. Tracy*, 9 Conn. 15.

IV. Remedies.

An undertaking in articles of association of an unincorporated body formed for the purpose of placing improvements upon their common property by which each of the associates severally bound himself to pay a ratable proportion of all expenditures for the improvements made or to be made, is mutual, the covenants of the associates being made with each other, and the liability arises on the promise by each to the other which can only be enforced by an action among themselves, and those to whom the promise is made are the proper parties to bring the action; and it is not essential that there should be a formal division of the interest of the associates into shares where the proportions were agreed upon in the articles, fixing the interest of each and the shares it represented. *Troy Iron & Nail Factory v. Corning*, 45 Barb. 231.

And where a person subscribes with others a sum of money to carry out some common project lawful in itself, and supposed to be beneficial to the projectors, and moneys are advanced upon the faith of such subscription, an action for money paid, laid

sequel will further show, he not only did not content himself with a mere concealment and a suppression of the truth, but he deliberately uttered the most unblushing falsehoods, strictly in keeping with his subsequent reprehensible efforts, during his examination as a witness to deny, avoid, and explain away his glaring duplicity. After the most unqualified declarations on the part of Lancaster, who, it must be borne in mind, was acting throughout this whole transaction as the agent and partner of Rhind, to the effect that he had no interest in these expenses, and was to get no part of the proceeds of these coupons beyond the \$500 already named; the arrangement to take the two millions of bonds was concluded, and on January the 19th, 1893, a contract for the purchase

of the bonds with the interest coupons attached was entered into between the Baltimore Trust & Guarantee Company, as agent for the syndicate and the governor and the treasurer of South Carolina in behalf of the state. By that agreement it was provided: "That under and by virtue of the act of the general assembly of the state of South Carolina, hereinafter mentioned, the parties of the first part hereby covenant and agree to sell and deliver to the party of the second part, its successors or assigns, and the party of the second part, in its own behalf, to the extent of its subscription and as agent as hereinbefore set forth, hereby covenants and agrees to purchase from the parties of the first part, for itself and its associates, two million (\$2,000,000) dollars of the

out, and expended may be maintained to recover the amount of the subscription or such part of it as will be equal to the subscriber's proportion of the expenses incurred. *Bryant v. Goodnow*, 5 Pick. 223.

And a money judgment may be rendered against members of a syndicate who held lands under a secret option at \$4,000, and procured their purchase by the syndicate at \$8,000, under the supposition on the part of the other members that they contributed their share, in an action to have the title to the land quieted under the Iowa Code, § 2855, providing the court may grant any relief consistent with the case made by the petition and within the issue. *Iler v. Griswold*, 83 Iowa, 442.

So, members of an association for the purchase of property to which other members had conveyed their own property at an exorbitant price, fraudulently representing that it was purchased from a third person and that they had paid their proper proportion, may each sue the persons thus defrauding him to recover damages for the fraud perpetrated upon him in procuring his subscription, and can probably recover the difference between the actual value of what he received and the amount paid him, but such an action would be a common-law action to which each person or firm defrauded would be plaintiff and the wrongdoers alone would be defendants. *Getty v. Devlin*, 54 N. Y. 403.

Nor are the members of a syndicate for dealing in land, who are defrauded by other members thereof by the purchase of lands individually and their transfer to the syndicate at an advanced price confined to the remedy or rescission, but may call upon the members defrauding them to account for the profits thus fraudulently realized. *McDowell v. Joice*, 149 Ill. 124.

And a bill for an accounting, brought against the trustee of a syndicate for the purchase and sale of property by other members thereof, brings the entire administration of the trustee into review, as it may be developed by the evidence, and embraces a claim that he occupied such a fiduciary relation to the other members of the syndicate that he could not in equity and good conscience retain from them the difference between the price he had paid a person for a piece of property and that at which he had sold it to the syndicate, under a prayer for general relief. *Ferguson v. Bateman*, 1 App. D. C. 279.

A bill may be filed by one of several associates or shareholders of a private association for the purchase and sale of lands where they are numerous, in behalf of himself and all others, against the trustees thereof, to compel the execution of the trust and for an account and distribution of the funds and property of the association among the shareholders, and it is not necessary that all of the associates should be united in a bill for that

purpose; and the court will see that the rights of all to their distributive shares of the trust fund are protected. *Mann v. Butler*, 2 Barb. Ch. 302.

There must be a community of interest between two or more persons, however, to entitle them to unite in a bill in equity, and members of an association are not entitled to relief from a transaction by which another member induces them into a purchase of particular property for the common benefit, concealing the fact that he was the real vendor and misrepresenting the interest or advantages of the purchase and the value of the property, where one or more of them is without right thereto. *Bestor v. Barker*, 106 Ala. 240.

And a member of a syndicate who contributes a portion of a sum of money loaned by the syndicate to a railroad company cannot maintain a bill in equity to compel the agents of the syndicate to pay him his share of the loan or damages for its loss, where shortly after it had matured all the other members of the syndicate agreed to extend the time for the payment of the loan at a meeting of which he had notice, in consequence of which the agents failed to proceed to collect the notes, and the fund was finally lost; the remedy, if any, was by assumpsit. *Paton v. Clark*, 156 Pa. 49.

And the question of the validity of a contract of settlement between a building-lot association and a syndicate which had taken the initiative in securing the land necessary for the purposes of the incorporation before it was organized, and had advanced money for that purpose, allowing the syndicate members paid-up shares of \$612 for the payment of \$300, cannot be passed upon in an action brought by members of the corporation to be reinstated as such and to have certain acts of the corporation declared void as against them, as the syndicate members are not parties to such action in such a sense that their individual rights to shares can be passed upon. *Buker v. Leighton Lea Asso.* 18 App. Div. 548.

A trust created by a syndicate agreement between five persons contemplating the purchase of lands, the title to be taken in the name of one of the number who should hold one fifth of the same in trust for each of his four associates, however, is a direct one within exclusive equity jurisdiction, to which the statute of limitations does not apply. *Johnson v. Elkins*, 1 App. D. C. 430.

And a company to which a sale of property procured to be made by a syndicate at double the price they had given for it, four of the five directors which adopted it being under the control of the syndicate, which was adopted in September, is not debarred from relief by reason of laches where nothing was done at the first general meeting of the company held in the following February, though it appeared that the suspicions of some of the members were aroused and a committee of investigation was appointed at the next ordinary

bonds and stocks bearing four and a half (4½) per cent interest, payable semiannually, and issued pursuant to the terms of "an act of the general assembly of the said state of South Carolina, entitled 'An Act to Provide for the Redemption of That Part of the State Debt, Known as the Brown Consol Bonds and Stocks, by an Issue of Other Bonds and Stocks,'" approved the 22d day of December, 1892, upon the following terms and conditions, that is to say: The bonds and stocks so purchased shall bear date January 1, 1893, and shall carry interest from January 1, 1893, payable semiannually; they shall be sold by the parties of the first part, and purchased by the party of the second part at par flat; that is to say, nothing additional shall be paid for any interest which may have accrued at the time of delivery; the purchase money of said bonds and stock shall be due and payable one hundred thousand (\$100,000) dollars thereof upon the execution of this contract, and the remainder thereof on or before the 30th day of June, 1893, in such sums and at such times as to the party of the second part may be most convenient, and the said bonds and stock shall be delivered by the parties of the first part to the parties of the second part in such amounts and at such times as they may be called for by the party of the second part upon payment of the balance of ninety-five (95) per cent due thereon

the said sum of \$100,000, being held and taken to be 5 per cent upon the whole purchase of \$2,000,000, and that payments of said balance of 95 per cent, may be made by said party of the second part, either in cash or in Brown Consols, due July 1, 1893, the July coupons thereon being retained by the party of the second part.

A subsequent clause of the same agreement reads as follows: And in consideration of the purchase aforesaid by the party of the second part, the parties of the first part hereby further covenant and agree to sell and deliver to the party of the second part, its successors or assigns, so much of the remainder of the bonds and stock issued, or to be issued, by virtue of the said act, as is salable by the governor and treasurer under the said act, or any part thereof, said bonds and stocks to bear date January 1, 1893, to carry interest from January 1, 1893, and to be paid for at par flat, said remainder of such bonds and stocks being understood to be \$8,800,000.

On the 2d of January, 1893, and consequently before the syndicate was fully formed and before its obligation to take the bonds was complete, and before Lancaster made his false representations, Rhind and Lancaster entered into a secret agreement by which it was stipulated that in the matter of the refunding of the "South Carolina state debt," the commissions

meeting in June, which reported in August following, when a new board of directors was constituted, and after an ineffectual attempt at a compromise the bill was filed in the following December. *Erianger v. New Sombrero Phosphate Co.* 39 L. T. N. S. 289, L. R. 3 App. Cas. 1218, 48 L. J. Ch. N. S. 73, 27 Week. Rep. 66.

So, the failure of some of the members of a syndicate, in an action of interpleader brought by a trustee to settle conflicting claims to certain funds, to claim portions that would have gone to them had they made claim thereto, which were fractions of the entire fund which belonged to the syndicate in common, does not divert those portions from, or divest them out of, the syndicate, and does not transfer them to a person who, through an agent employed by him to promote the syndicate, had fraudulently managed to become possessed of some of its funds. *Hambleton v. Rhind* (Md.) 38 Atl. 40.

And the failure of members of a syndicate who had been made parties to a bill of interpleader in such an action to answer until after the decree directing the parties to interplead had been passed, because of which it was adjudged that they were entitled to no interest in the fund in an interlocutory decree, does not preclude them from answering the claim at any time before a final decree is passed; and where the final decree is reversed and becomes a nullity, it cannot interpose any obstacle or hindrance to the assertion of a claim to participate in the distribution of the fund. *Heald v. Rhind* (Md.) 38 Atl. 43.

Persons who were members of a syndicate, disposing of their interest therein to another with knowledge that such person claimed to hold certain bonds in his hands as collateral security for the claim of the syndicate against a railroad company of which he was the president, however, and receiving payment therefor with that knowledge, are estopped to assert that such bonds belonged to such railroad company, and to deny that they are held as claimed by him. *Hook v. Ayers*, 53 U. S. App. 185, 80 Fed. Rep. 973.

But an intent on the part of the president of a 40 L. R. A.

railroad company, who was also a member of a syndicate to which the company was indebted, that bonds of the company in his hands should be pledged to the syndicate as security for such indebtedness, unaccompanied by any act of the debtor company, is not sufficient to constitute an equitable pledge on account of the absence of a sufficient delivery. *Hook v. Ayers*, 53 U. S. App. 185, 80 Fed. Rep. 973.

So, stockholders of a building-lot association cannot object to a contract between the association and a syndicate which had taken the initiative in securing the land necessary for the purpose of the incorporation, which gave its members a large bonus, as fraudulent and void as against them, where the corporation had settled such matter and put the settlement in its constitution, and received substantial benefit by reason of such settlement, and the stockholders, with full knowledge of all the circumstances, had approved of and consented to it. *Buker v. Leighton Lea Asso.* 18 App. Div. 548.

And an objection upon the part of one who subscribes to an undertaking between several for the purpose of establishing a line of stages and to raise capital therefor, that he was not notified of the first meeting of the company, is waived so as to constitute no defense to the subscription, where he afterwards offered to pay if oats would be received in payment, and declared that he would have paid but for some supposed ill-treatment. *Bryant v. Goodnow*, 5 Pick. 228.

But declarations of trust, made by members of a syndicate, representing two of their number to be the owners of a two-fifths interest in the land owned by them, do not estop them to deny that such members of the syndicate owned any interest in the land as against a mortgage made by them on their interest, where such members had induced the others by fraud to pay the full purchase price for the land, and at the time the declaration was made they were ignorant of their rights in the premises. *Shouffe v. Griffiths*, 4 Wash. 161.

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we expect to earn thereon of $1\frac{1}{2}$ per cent is to be divided between us in the proportion of two thirds to Colden Rhind and one third to R. A. Lancaster & Co.

When it was concluded to avail of the option provided for in the clause quoted above, as to the residue of the bonds over and beyond the first two millions, a second contract, bearing date March the 7th, was made between the trust company and the state officials of South Carolina. Some of the members of the first syndicate declined or failed to write in the second purchase and other parties took their places, and this is what is called in the record the second syndicate. One of the questions to be disposed of is, whether two thirds of the July, 1893, interest on these \$3,250,000 of bonds covered by the second purchase in execution of the option, is payable to Lancaster & Co. under clause 2 of the original subscription agreements for "syndicate expenses."

The trust company conducted the business for the syndicate with the state's officers, and the proceeds of the July coupons were remitted to it or treated as if in actual possession. On the 6th of June, 1893, Lancaster & Company drew five drafts, aggregating \$25,250, on the trust company, payable to the order of Colden Rhind, which Rhind at once indorsed in blank without recourse and delivered to Lancaster who procured them to be accepted by the treasurer of South Carolina with the consent of the trust company in part payment of the bonds bought by Lancaster. The drafts for this sum of \$25,250 were drawn upon and were ultimately paid out of the fund set apart in the subscription agreement for "syndicate expenses." When it was discovered by other members of the syndicate that Lancaster, one of their number and a copartner with them in the transaction, had received a large sum in excess of his legitimate share of profits, they promptly notified the trust company not to pay out any further portions of this fund and asserted a claim to the residue.

The trust company was thus confronted with conflicting claims to the fund—on the one hand, Rhind asserted that he was entitled to it for two reasons: first, under three drafts drawn in his favor by Lancaster & Co. on the Baltimore Trust & Guarantee Company for sums aggregating \$48,500; and secondly, because, though the fund was made payable to Lancaster & Co., it was known and understood by the members of the syndicate that the money was really payable and belonged to Rhind. On the other hand, the appellants insisted that the fund belonged to them to the extent that was necessary to equalize them with Lancaster; and they further contended that only two thirds of the interest due on the first two millions purchase was payable for syndicate expenses under clause 2 of the subscription agreements.

Threatened by these opposing demands, and unable to decide between them, the trust company filed a bill of interpleader against the appellants and other members of the syndicate, including Lancaster, and against Rhind, praying that they be summoned into the circuit court of Baltimore city, and be there required to interplead and adjust their conflicting claims and demands upon this fund amongst them-

selves. Most of the defendants filed answers. Lancaster disclaimed any interest in the controversy, having been paid by Rhind all he claimed to be entitled to. Subsequently a cross bill was filed, which was, later on, dismissed by a decree of June 13, 1894. By this decree the original bill of interpleader was dismissed as to Lancaster and several other defendants who disclaimed any interest in the fund; and it was adjudged as to certain others of the defendants, who had failed to answer, that they were not entitled to any part of the money in controversy. It was further provided that the remaining defendants should interplead, and for that purpose all except Rhind were made plaintiffs and Rhind was made defendant. An agreement was then signed to the effect that Rhind would not in the subsequent proceedings make claim or contention that Lancaster was a necessary party to the suit. Quite a mass of evidence was taken, and, after the hearing, the court below, on May the 5th, 1896, adjudged and decreed that the funds in court belonged to Colden Rhind, free from any claims or interest of the other parties in the cause. From that decree these ten appeals have been taken.

There are two questions involved: First, It is insisted that the $1\frac{1}{2}$ per cent for syndicate expenses out of the $2\frac{1}{2}$ per cent interest, does not extend to and include $1\frac{1}{2}$ per cent on the \$3,250,000 of bonds taken by what has been called the second syndicate. And, secondly, if the $1\frac{1}{2}$ per cent does extend to the second purchase, then it is maintained that Rhind ought to be required to account for and pay to the appellants out of the funds in court, and which are claimed by him, the amount that he stipulated to pay Lancaster, under the secret agreement between them, in prejudice of the rights of the other members of the syndicate.

With regard to the first question little need be said. While there is some conflict of opinion amongst the witnesses who, being members of the syndicate, have testified as to what their understanding of the matter was, we lay that out of view altogether, and look alone to the face of the written instruments themselves; and from their tenor and terms construed in the light of the surrounding circumstances this first contention must be judged. Now what the syndicate agreed to purchase from the governor and treasurer of South Carolina was, first, a block of two millions of certain bonds with attached coupons; and secondly, if the syndicate availed of an option given to it, another block of three millions, two hundred and fifty thousand of the same series of bonds with attached coupons. The separate obligation of each member of the syndicate bound the individual signing it to pay, first, for such portion of the two millions as he had agreed to take, and secondly, should the option be availed of, then to pay such proportion of the residue as his original subscription would entitle him to in the larger amount.

Each subscriber further stipulated that out of the interest which would accrue July the 1st on the bonds subscribed for, the trust company should pay to R. A. Lancaster & Co. for syndicate expenses two thirds, or, in other words, "a commission of $1\frac{1}{2}$ per cent out of the interest or profit received on said bonds." So

that the rights of the members as to the profits of the venture were restricted to the excess for which the bonds might sell over and above the cost at which they were purchased, plus a share in $\frac{1}{4}$ of 1 per cent of the July interest—this $\frac{1}{4}$ of 1 per cent being the amount of the July interest remaining after the commission of $1\frac{1}{2}$ per cent was paid by the trust company. Therefore, though the title to the proceeds of the July coupon vested in the trust company under the agreement with the state of South Carolina, it vested interest for specified purposes. When the option to take the remaining \$3,250,000 of bonds was exercised, the syndicate was to "have the same rights and privileges in them as hereinbefore provided with reference to said two millions of said bonds." That is to say, with respect to the three millions, two hundred and fifty thousand, the title to the proceeds of the coupons should vest in the trust company, subject to the same trusts declared with respect to the proceeds of the July interest on the two million block, *viz.*: for the payment of two thirds to R. A. Lancaster & Co. for syndicate expenses, and for the payment of the other one third, or the $\frac{1}{4}$ of 1 per cent less other syndicate expenses, to the subscribers as part of their profits.

As the rights and privileges which the members of the syndicate were to have under the two millions purchase depended in part on what disposition was provided to be made of the proceeds of the coupon on that block of bonds; and as they were to have precisely the same rights and privileges, and none other, with respect to the second purchase that they had in regard to the first,—it follows that the right to share in the proceeds of the July coupon on the three million two hundred and fifty thousand block could not be larger or more extensive than the right to share in the proceeds of the coupon on the two million block; and that consequently the option subscription was also subject to the provision that two thirds of the proceeds of the July interest was to be deducted for syndicate expenses or commissions.

This brings us to the other question respecting the claim of the appellants to a portion of the funds now in court.

It has been stated in preceding part of this opinion that the syndicate acquired title to the proceeds of the July interest, through the trust company, on the whole issue of \$5,250,000 of bonds; but the reasons for that conclusion have not yet been set forth. The correctness of this position is of vital consequence in the discussion still to follow; and it is therefore appropriate that it should now be clearly established. What was it that the syndicate agreed to purchase? Was it the bonds less the coupons, or the bonds plus the coupons? This inquiry is answered by the written contract between the syndicate on the one side through its agent the trust company and the state of South Carolina by her governor and treasurer on the other. Under that contract, dated as already stated on January the 19th, 1893, the parties of the first part, that is, the governor and treasurer, agreed to sell and deliver to the party of the second part, that is, the trust company for the syndicate, and the party of

the second part on behalf of itself and as agent for the others whose subscriptions were appended, agreed to purchase from the parties of the first part two millions of bonds and stock of the state; and it was stipulated that "the bonds and stock so purchased shall bear the date January the 1st, 1893, and shall carry interest from January the 1st, 1893, payable semi-annually; they shall be sold by the parties of the first part and purchased by the party of the second part at par flat; that is to say, nothing additional shall be paid for any interest which may have accrued at the time of delivery."

The same terms were prescribed with reference to the remaining bonds over and above the first 2,000,000. It seems too clear for controversy that under this contract the bonds and their accrued interest up to the time of delivery were sold by the state and bought by the syndicate. No other meaning can be ascribed to the written contract; and if this be so, then, as a matter of course, each and every one of the coupons was included in the sale to the syndicate, and of necessity, therefore, the coupon to mature on the 1st day of July, 1898. There being no reservation of this July coupon, and no exception of it from the sale, but, on the contrary, the clearest manifestation of an intention that it should accompany and go with the bonds to which it was attached; when the bonds were sold to the syndicate the July coupon or interest was also sold, and the syndicate—the purchaser—through the trust company, acquired title to that July interest. Under the individual subscriptions, antecedently made, the proceeds of the July coupon thus acquired by the syndicate were impressed with a trust, and the Trust & Guarantee Company was authorized to disburse the fund for account of syndicate expenses and in a particularly designated way. Whatever the antecedent arrangements between Colden Rhind and the authorities of South Carolina may have been, they were obviously superseded by the contracts of January 19 and March the 17th, and no title to this interest passed to Rhind. Whatever claim he has, or can assert, to any part of this interest, whether the claim be preferred as commissions or as syndicate expenses, must now be made through the syndicate, and must be derived from, and founded on, the second clause of the individual subscription contracts which were the basis of the final transaction and of the actual purchases of January the 19th and March the 7th, 1893. As the claim made by Rhind must, to have any standing at all, come through the syndicate, it is necessary to describe his relations with and attitude towards that syndicate, and to define the legal consequences flowing from that relation and attitude, as bearing upon his asserted right to the fund in controversy.

Now, a syndicate, according to the undisputed evidence, is an association of individuals formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested. It is, as respects the persons composing it, a partnership, and in so far as these same persons are concerned the legal obligations as-

sumed by them are, as between themselves, substantially the same as those which the law imposes on a member of an ordinary copartnership. Scrupulous good faith is naturally, if not necessarily, implied from the very nature and character of the relation of partnership; and, consequently, intrigues by one member for a private benefit to himself are clearly offenses against the partnership at large, and as such are relivable in a court of equity. For, as observed by Lord Eldon in *Crawshay v. Collins*, 15 Ves. Jr. 227, there is an implied obligation among partners to use the property for the benefit of those whose property it is. A secret agreement, therefore, that one of the partners shall reap an advantage out of the partnership property to the prejudice and injury of his associates, and of which they are kept in ignorance by his fraud and deception, is essentially at war with the good faith upon which the relation is founded.

The evidence in this record illustrates the truth of this proposition, as the appellants without exception all testify that had they been informed that Lancaster was to receive any share of the sum set apart for "syndicate purposes," they would never have entered the syndicate, for the obvious reason that to the extent that Lancaster received a part of this sum he paid less for his bonds, and could, therefore, sell them at a price below that which the other members were required to pay, whereby he secured an advantage over them wholly at variance with any notion of equality. It was the duty of Lancaster acting for himself and as the agent of Rhind, to be perfectly candid and frank in his dealings with his associates, but he was not, and both he and his principal are answerable for his deception.

Again, both Rhind and Lancaster were promoters of the syndicate, and it was their plain and imperative duty towards the persons who were invited to co-operate in the enterprise, not only to abstain from stating as a fact that which was not a fact, but not to have omitted to state any circumstance within their knowledge, the existence of which might in any way affect the extent or the quality of the advantages held out as inducements to the others. *Cortes Co. v. Thannhauser*, 45 Fed. Rep. 730, and numerous other cases collected in a very full note to *Yale Gas Stove Co. v. Wilcox* (Conn.) 25 L. R. A. 90. Or, as put by Vice Chancellor Bacon in *Bagnall v. Carlton*, L. R. 6 Ch. Div. 385, relying on *Imperial Mercantile Credit Assn. v. Coleman*, L. R. 6 H. L. 189: "The law I take to be clear, that under such circumstances an agent, whatever may be the nature of his employment, or under whatever circumstances, is bound, if he has any interest in the matter, not only to declare that fact, but to specify the nature of his interest; and that all persons who act with him, and who share in that interest, are jointly and severally bound to make good, when their interest is discovered, to the principals, the whole benefit which has been obtained without the sanction of the principals."

The application of these familiar principles to the facts in these cases inevitably leads to but one result. If we treat the syndicate as a partnership subject to the law incident to that relation, and the fund arising from the July,

1898, interest on the whole \$5,250,000 of bonds as a partnership and belonging to the syndicate, then all third persons who dealt with that fund in an unwarrantable way, knowing that it was a partnership fund devoted to a particular purpose, must take the consequences which the law affixes to unauthorized dispositions of trust or partnership property. Rhind knew of the existence of the syndicate. He had commissioned Lancaster to form it. He likewise knew that the money to which he lays claim was payable by the state of South Carolina to the trust company, as the money of the syndicate; and he knew this because it was the legal result of the purchase of the bonds by the syndicate. He also knew that Lancaster was a member of the syndicate, and he was chargeable with knowledge that Lancaster could not stipulate with him for a share of these very funds, unless by the consent of the other members of the syndicate; and was bound to know that the advantage derived by Lancaster under that secret arrangement was one which, under the law, would inure to the use and the benefit of the copartnership.

The payment made by Rhind to Lancaster of \$25,250, out of the syndicate funds, and pursuant to the terms of the secret agreement, was, under the facts in evidence, declared a clearly illegal diversion of the partnership funds. As concisely stated by Col. Marshall in his brief: "That money was clothed with a trust—as it were—a partnership money dedicated by contract to the payment of syndicate expenses, and while other persons might become entitled to it for lawful consideration, there was one person who could not become entitled to it without the full knowledge and acquiescence of his associates, and that person was Lancaster." Rhind turned over part of this fund to his confederate, and he used every device to keep the other members of the syndicate in profound ignorance of what he had done. He thus gave to a person who was not entitled to receive any part of the fund, and who was bound in good faith not to receive it, nearly one third of the sum set apart for expenses; and having thus unlawfully dealt with the partnership property, by giving it to a person who he knew was not entitled to receive it, and to whom he knew he had no right to give it, he is as accountable for that misapplication as is his confederate, who clandestinely received it. This was an offense by both Rhind and Lancaster against the partnership, and, as such, is clearly cognizable in equity under the general principle upon which equity prevents the abuse of undue influence and of fiduciary relations.

The arm of a court of equity is strong enough to strike down such transactions as this. That court will not falter or hesitate before mere technical terms of procedure when gross injustice has been done; and where a fund claimed by a wrongdoer is under its control, it will devise a remedy to meet each new emergency, and will enforce a restitution if the ends of justice require it. It is for such exigencies that a court of equity exists. If a decree can be made upon the record to meet the substantial justice of the case, it will be passed. *Crain v. Barnes*, 1 Md. Ch. 155. As said by Lord Justice James, in *Panama & S.*

P. Teleg. Co. v. India Rubber, G. P. & Teleg. Works Co. L. R. 10 Ch. 526: "According to my view of the law of this court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him. It is said there is no authority and no *dictum* to that effect. The clearer a thing is the more difficult it is to find any express authority or any *dictum* exactly to the point."

But to deal with the transaction from another point of view—Lancaster was confessedly Rhind's agent to form the syndicate—he was intrusted with full authority to accomplish that end—and Rhind is obviously bound by and responsible for the representations and concealments made by Lancaster in the line and within the scope of his employment. *Raulins v. Wickham*, 3 DeG. & J. 304; *Andrews v. Clark*, 72 Md. 398; *West Maryland R. Co. v. Franklin Bank*, 60 Md. 36. Now, as we have said already, before the final formation of the syndicate and at least a week prior to the execution of the contract of January the 19th with the state of South Carolina, consummating the purchase of two millions of the bonds, Lancaster falsely represented to the appellants that he had no interest different from theirs in the undertaking, though at that very time he had in his possession a secret written agreement signed by himself and Rhind, under which he was to receive one third of the sum that might go to Rhind as commissions. He deceived, misled, and deliberately imposed upon the appellants, and induced them to incur obligations to large amounts which they would never have entered into had he revealed the truth with respect to the advantage which this secret agreement gave him. Rhind now comes forward and claims under drafts drawn by his agent Lancaster, the very funds which if demanded by the agent would be payable to the syndicate, and they would be payable to the syndicate upon the theory that the stipulation made by the promoter for his own gain inures to the concern which he organized.

The rule is well settled that if the principal sues upon a contract made with and in the name of his agent, the opposite party is entitled to be placed in the same position at the time of the disclosure of the principal, as if the agent had been the real contracting party. *Baltimore Coal Tar & Mfg. Co. v. Fletcher*, 61 Md. 295. If Lancaster was seeking to recover the funds in court for his own benefit and behoof after his explicit declarations that he was not to receive any portion of them beyond the \$500, there can be no question that he would be denied relief, because as promoter and partner he would not be entitled to them; and as Rhind occupies no better position than his agent could have maintained, he will not be permitted to receive the same funds except those in excess of the amount he unlawfully

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agreed to pay to Lancaster. In other words, before he can be paid through Lancaster under the drafts he now holds, any part of the fund now in court, he must make restitution of the amount which he participated in the diversion of from the syndicate. There is nothing in the evidence to show that more than one or two of the appellants ever knew that Rhind claimed any of the commissions when the syndicate was organized, and his right to them depends, therefore, not upon any understanding with the appellants, but upon the drafts drawn by Lancaster in his favor and not yet paid. There is, however, part of the fund payable to Rhind under assignments from members of the syndicate other than the appellants, but this is not in controversy.

It is clear that Rhind has no greater or better right to these funds under the drafts drawn by Lancaster, than Lancaster had at the time the drafts were drawn, and it is not material, so far as the consideration of this proposition is concerned, whether Lancaster is still a party to the case or not. He could not transfer to Rhind, under the circumstances stated, a right to or claim upon the funds which would be superior to that which he possessed himself; and consequently any equities which the members of the syndicate had against Lancaster or the fund, growing out of his dealing with them in respect to it as the agent of Rhind, still attach to the fund when claimed by Rhind under the drafts drawn by Lancaster, because Rhind simply stepped into Lancaster's shoes. If Lancaster could not recover the fund, and we have said he could not under the circumstances stated, in what better position does Rhind, his associate and assignee, stand? By his own acts he enabled Lancaster to take an unlawful advantage of Lancaster's fellow partners, and the advantage thus taken and participated in by Rhind is the very occasion that gives the copartners a claim upon the residue of the fund. Rhind comes, therefore, to a court of equity, and asks it to decree to him a fund which it would not have directed to be paid to the very person under whom Rhind claims.

But it is retorted that Rhind was at liberty to employ such agents as he thought fit to form the syndicate, and that he could agree for and pay them such commission as he might be inclined to do, and that this was a matter which concerned only him and his agent, and that, therefore, he is in no sense blamable for not disclosing the secret agreement in which no one but himself and Lancaster were interested. This contention may be briefly but satisfactorily answered in the following sentence from *Bagnall v. Carlton*, L. R. 6 Ch. Div. 385: "But, although this may have a certain air of plausibility, and it might be true if the vendors and their agents were the only persons concerned in the transactions, it is wholly fallacious when applied to the facts of this case. It wholly omits the consideration that the employment of the agent was for the purpose of forming a company and of inducing other persons to subscribe in reliance upon a representation which was untrue."

But it is insisted that the case of *Whaley Bridge Calico Printing Co. v. Green*, L. R.

5 Q. B. Div. 109. establishes and applies a principle which sustains the decree appealed from. The learned judge who decided these cases below relied exclusively upon the case just cited. We fail, after a most patient study of that case, to see that it conflicts with any conclusions we have reached. Indeed it is an authority directly in point to support a part of the appellant's contention as will appear in a moment.

The *Whaley Bridge Calico Printing Co. Case* was this: One Robert Ellis Green purchased certain calico printing works for the sum of £15,000. Green and John Smith associated themselves together as promoters of a company formed for the purchase of the works from Green, and for the purposes of the negotiations for such purchase, a contract, which the jury found to be a sham contract, was entered into between them for the pretended sale of the works by Green to Smith for £20,000. The company was ultimately formed, its directors being nominees of Green and Smith, and the works were conveyed by Green and Smith to the company for £20,000. It was agreed between Green and Smith that Green should pay the sum of £3,000 out of the £20,000 purchase money, to Smith, but this agreement was not communicated to the directors of the company when the sale to the company was effected. It was held by Bowen, J., that Smith, as a promoter of the company, was not entitled to secure any profit to himself out of the formation of the company without the knowledge of the directors, and that, such being the case, the company was entitled to treat the agreement made between Green and Smith for the payment of the £3,000, as made by Smith on the company's behalf, and to enforce it against Green, and that consequently the company could recover from Green so much of the £3,000, which he had agreed to pay Smith, as remained unpaid. The action was founded on the contract between Green and Smith, and the company sought to enforce that contract for the payment of the £3,000 as a contract made for the profit of the company, and not for the profit of Smith. The sole defense was made by Green,—Smith not appearing,—and he claimed "that as Smith could not enforce against Green a contract based on an illegal consideration, so neither can the company." But this was brushed aside with the remark that "it does not lie in Green's mouth to say that his own bargain with Smith was a fraudulent one, and therefore cannot be enforced;" and it was decided that it was enough for the company to show that the £3,000 was a profit coming to its agent, Smith, to entitle it to claim the same. As £800 of the £3,000 had been paid by Green to Smith, a judgment was entered against Green for £1,200, and the negotiation of one of the company's promissory notes held by Green for £1,000, and which had been given him in part payment of the purchase money, was restrained, and an order was passed directing the note to be delivered up to be canceled. Apparently no claim was made against Green for the £800 actually paid by

him to Smith. If such a claim had been proffered, it is not easy to see how logically there could have been any escape from allowing it. If it was rightly decided that the undisclosed contract between Green and Smith for the payment to the latter of the £3,000 out of the purchase money was a contract for the benefit of the company and not of Smith, then the money was payable by Green to the company and to no one else; and if payable only to the company, obviously a payment by him to Smith was no payment to the company and was no discharge of Green's obligation; and consequently such a payment would have been no defense to a demand by the company that the £800 should be paid to it. In a word, if the money was legally payable to the company, Green could not properly pay it to someone else; but if he did pay it to someone else, that fact did not relieve him of liability to the company. This is inevitable, and to this conclusion the case relied on must logically lead. But the case does not decide that the company could not recover from Green the £800 which Green had paid to Smith—it merely decides that the company could recover the £2,200 remaining unpaid by Green to Smith, whereas in the pending cases what is sought is not only a decree to compel Rhind to pay over to the syndicate what is still unpaid to Lancaster under the secret agreement, but to require him to make good the sum he actually did pay to Lancaster thereunder—this latter exaction being precisely the very thing not discussed, and not decided one way or the other in the *Whaley Bridge Case*.

The appellants each claim, in the first syndicate, an amount that will bear the same proportion to the $1\frac{1}{2}$ per cent on two millions of bonds that the amount of subscription of each bears to the entire two millions; and in the second syndicate an amount which will bear the same proportion to the $1\frac{1}{2}$ per cent on three million two hundred and fifty thousand of bonds that the amount of the subscription of each bears to the whole three million two hundred and fifty thousand.

We hold, then, for the reasons we have given, that Colden Rhind is accountable for the \$25,250 actually paid over by him to Lancaster; and on the authority of the *Whaley Bridge Case* we further hold that he is accountable for the \$1,000 not paid over—it being part of the \$26,250 agreed to be paid by Rhind to Lancaster as the latter's one third of the $1\frac{1}{2}$ per cent commission under the secret agreement of January the 2d, 1893; and that this sum of \$26,250 with interest from July the 1st, 1893, and the costs of these cases above and below, must be deducted from the funds in court and paid to the appellants, the residue being payable to Rhind. It follows, therefore, that the decree appealed from must be reversed, and the cause must be remanded for a new decree.

Decree reversed, and cause remanded, that a new decree may be passed conformably to this opinion, the costs in this court and the court below to be paid by Rhind out of the funds in court.

VIRGINIA SUPREME COURT OF APPEALS.

S. D. FERGUSON *et al.*, *Appts.*,
v.

W. S. GOOCH, Trustee, etc., *et al.*
(94 Va. 1.)

1. **The selection of a trustee to take title to property purchased for a syndicate**, and to give a deed of trust thereon for a part of the purchase price, is not within the implied authority of real-estate agents who are members of, and who formed, the syndicate.
2. **A purchase of lands by real-estate agents** on behalf of a syndicate of which they are members, when the agents are also secretly acting as agents of the vendor, cannot be enforced against the other members of the syndicate.
3. **A syndicate agreement which merely provides for raising money** to purchase certain lands at a given price, without any provisions for selling the lands and dividing the profits, does not constitute a partnership agreement.
4. **A usage or custom of real-estate agents in a certain city** to get up syndicates to buy property in their hands for sale will not bind members of a syndicate who have no knowledge thereof, especially if they live at other places, so as to sustain a purchase of property for the syndicate made by such agents, who are also acting as secret agents of the vendor.

(December 3, 1896.)

A PPEAL by interveners from a decree of the Hustings Court of Roanoke disallowing their claim as holders of notes secured by deed of trust upon certain property a sale of which under a prior deed of trust the trustee sought to enjoin in this action and to have the rights of the respective parties determined. *Affirmed.*

The facts are stated in the opinion.

Messrs. Scott & Staples, for appellants:

The purchase of the property by the beneficiaries constitutes a complete consideration, and makes those beneficiaries liable for all of the liens on the property assumed in the purchase.

Osborne v. Cabell, 77 Va. 462; 2 Warvelle, Vendors, 658-662 *et seq.*; *Whitlock v. Gordon*, Va. L. J. 1877, p. 378.

A company which receives the benefit of the transaction, ratifies it, although it did not originally authorize its agent to make the contract. *Cook, Stock & Stockholders*, § 716, p. 924.

If the company does not question the authority of W. S. Gooch, no other person can. *Curtis v. Leavitt*, 15 N. Y. 9.

The consideration operates to bind each subscriber for the benefit of the other; as soon as the company is formed, and accepts the subscription, it binds all for the benefit of the company, and the company has its right of action thereon.

Cook, Stock & Stockholders, 2d ed. § 69; 1 Beach, Stockholders, § 63.

When one subscribes with others a sum of money to carry on some common project, lawful in itself, and supposed to be beneficial to

the projectors, and money is advanced upon the faith of such subscription, an action for money paid may be maintained against a subscriber for the amount of his subscription, or such portion of it as may be equal to his proportion of the expenses incurred.

George v. Harris, 4 N. H. 533, 17 Am. Dec. 447; *Bryant v. Goodnow*, 5 Pick. 228.

An agreement to share in the profit and loss of a business or adventure shows an intention to create a partnership unless such evidence of intention is controlled by stipulations or interpreted by conduct inconsistent with it.

1 Bates, Partn. § 25; *Yeoman v. Lasley*, 40 Ohio St. 190; *Hulett v. Fairbanks*, 40 Ohio St. 238; *Canada v. Barksdale*, 76 Va. 899; *Brinkley v. Harkins*, 48 Tex. 225; *Fisher v. Sweet*, 67 Cal. 228; *Hill v. Sheibley*, 68 Ga. 556; *Richards v. Grinnell*, 63 Iowa, 44, 50 Am. Rep. 727; *Canada v. Barksdale*, 76 Va. 899.

On petition for rehearing.

If Powell were the agent of both, with the intelligent consent of the syndicate, there can be no objection to his acting in that capacity.

Mechem Agency, § 67; *Adams Mining Co. v. Senter*, 26 Mich. 78; *Cohewell v. Keystone Iron Co.* 36 Mich. 58; *Fitzsimmons v. Southern Exp. Co.* 40 Ga. 330, 2 Am. Rep. 577; *Rowe v. Stevens*, 53 N. Y. 621; *Joslin v. Cowee*, 56 N. Y. 626; *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.* 34 Ohio St. 450, 32 Am. Rep. 380; *Leekins v. Nordyke*, 66 Iowa, 471; *Alexander v. North-Western Christian University*, 57 Ind. 466; *DeSteiger v. Hollington*, 17 Mo. App. 387; *Robinson v. Jarvis*, 25 Mo. App. 421.

Powell's agency, if any there were, for the vendors of this property, was not a secret agency; but it was known to at least two of the defendants.

The effect of the fraud upon the contract is to render it voidable only, and it is the duty of the deceived party to elect, on the discovery of the fraud, to rescind it, or else he will be bound by it.

Maz Meadows Land & Improv. Co. v. Brady, 92 Va. 71.

Mr. S. S. P. Patteson, for Cunningham Hall, appellee:

While it was doubtless the purpose of the parties who signed the paper to form a joint-stock company and have the company purchase the property for them, no such company was formed, and there is not a shadow of evidence to show that any agent was appointed by them to purchase for them as a partnership. There is no question at all of ratification, for all of the parties repudiated the alleged purchase as soon as they knew of it.

Shoe & Leather Nat. Bank v. Dix, 128 Mass. 148, 25 Am. Rep. 49.

It was impossible for the defendants to ratify the deed in the case at bar, for they knew nothing of it.

See Bishop, Contr. § 1109.

Messrs. Phlegar & Johnson and *Hansbrough & Hall* also for appellees.

Buchanan, J., delivered the opinion of the court:

In the year 1890, McC. Willis, who was the

owner of certain lots in the city of Roanoke, on which there were two deeds of trust (one to secure to G. A. Camp the payment of two notes, for \$2,000 each, and the other to secure the payment of two notes, of \$1,333.33 each, payable to J. J. Roberts), conveyed the lots to the Old Dominion Investment Company in consideration of the sum of \$12,000. Of this sum it was to pay a portion in cash, assume the payment of the debts due Camp and Roberts, and execute a note for \$2,000, the residue of the purchase money, and secure it by a deed of trust upon the lots. Soon after the purchase of the property by the Old Dominion Investment Company L. L. Powell & Co., real-estate agents in that city, and through whom it made its purchase, approached the president of the Old Dominion Investment Company to know if that company would sell the property at the price of \$15,000, as it had not yet paid anything upon it. After consultation with the secretary, the president agreed to sell it at that price. To whom the property was sold by Powell & Co. does not clearly appear. There being some delay in closing the contract, the president of the Old Dominion Investment Company spoke to Powell about the delay, and he said he was getting up a "syndicate" to take the property. The syndicate which was gotten up consisted of some nineteen or twenty persons, among whom were L. L. Powell & Co. and the Old Dominion Investment Company. The paper which evidenced the agreement between the members of the syndicate was lost or mislaid, but its contents were proved, and are substantially as follows: We, the undersigned, hereby agree to take the amount set opposite our respective names in the syndicate organizing for the purpose of purchasing certain lands, at the price of \$18,000. After the sum of \$18,000 had been subscribed, L. L. Powell & Co. collected from the greater portion of the members of the syndicate the cash payment due from each. At the instance of L. L. Powell, Gooch, the president of the Old Dominion Investment Company, on the 8th day of November, 1890, executed a deed for his company, by which it conveyed the lots to him as trustee for the members of the syndicate (naming them, and stating what the fractional interest of each was in the lots conveyed), at the price of \$18,000. The deed acknowledged the payment of \$4,666.66 in cash, and Gooch, trustee for the syndicate named, "assumed and agreed to pay off and discharge the following interest-bearing negotiable notes: Two notes, for the sum of two thousand dollars (\$2,000) each, said notes executed by D. R. Bowman, and made due and payable to Georgia A. Camp, at the National Exchange Bank of Roanoke, Virginia, at one and two years, respectively, from date of June 13, 1890; two notes, for the sum of thirteen hundred and thirty-three dollars and thirty-three cents (\$1,333.33) each, executed by McC. Willis, and made due and payable to J. L. Roberts, at the National Exchange Bank of Roanoke, Virginia, at one and two years, respectively, from date of September 13, 1890; and one note, for the sum of two thousand dollars (\$2,000), executed by the Old Dominion Investment Company, and made due and payable to McC. Willis at four

months from date of September 17, 1890,—all of said notes bearing interest at the rate of 6 per cent per annum until paid. The residue, \$4,666.66, as evidenced by four interest-bearing notes of date herewith,—two notes for the sum of \$1,500 each, and two notes for the sum of \$833.34 each, said notes executed by W. S. Gooch, trustee, and made due and payable to the Old Dominion Investment Company as follows: One of each of said notes payable one year from date hereof, and one of each at two years from date hereof,—all of said notes payable at the Citizens' Bank of Roanoke, Virginia, with interest at the rate of 6 per cent per annum until paid." To secure the \$4,666.66 for which Gooch, trustee, executed his four notes as above stated, he executed a deed of trust contemporaneously with the deed made to him by the Old Dominion Investment Company.

Upon the failure of Gooch, trustee, to pay the \$2,000 note payable to Mrs. Camp, due one year after date, the trustee, L. L. Powell, in the original deed of trust to secure it, advertised the lots for sale at the instance of the Fidelity Trust & Loan Company, the then holder of the note. Thereupon Gooch, trustee, filed his bill to enjoin the sale. After setting out what debts were liens upon the lots, he alleged that he had no interest in the property; that he became trustee to oblige the parties interested; that the beneficiaries, or members of the syndicate, were all in default in making payments; that there were funds in the hands of L. L. Powell & Co., arising from the rents of houses upon the lots; that he held the mere legal title to the property, and has no means of enforcing collections from members of the syndicate, or of compelling Powell & Co. to pay over the funds in their hands; that there was a controversy between some of the members of the syndicate and L. L. Powell & Co. over the property purchased, and that he was unable to administer the trust without the aid of a court of equity; that a sale of the property under the circumstances would result in great sacrifice,—made the persons interested parties to the bill, and prayed for an injunction, and that the trust might be administered by the court, that he might be allowed to resign, and for general relief.

During the progress of the litigation Ferguson & Fries, the appellants, came into the case by petition, alleging that they were the owners of the notes executed by Gooch, trustee, for the \$4,666.66; that they had acquired them before maturity, and were entitled to have them paid; and also asked to have the sale of the lots postponed until the liens could be ascertained, the liabilities of the debtors and the rights of creditors fixed, and the title to the property cleared of the clouds upon it. Some of the persons who had agreed to become members of the syndicate appeared and made defense, but others did not. Upon the hearing of the cause the trial court was of opinion that there was no valid contract of purchase of the lots named in the deed of November 8, 1890, that was binding upon any of the beneficiaries named therein except L. L. Powell & Co., and that they were not liable for the purchase price of

the lots, or any part thereof, and decreed that the deed of November 8 between the Old Dominion Investment Company and Gooch, trustee, and the deed of trust executed by him on the same day to secure the purchase money due the Old Dominion Investment Company to be void, except as to L. L. Powell & Co.

It further decreed that L. L. Powell & Co. should refund to the other members of the syndicate the moneys paid by them on account of the purchase of the lots, with interest.

It also decreed that the lots should be sold to satisfy the liens upon them as reported by the commissioner, except in so far as that report was modified by its decree.

From that decree Ferguson & Fries appealed. Neither of the other parties to the controversy is seeking to have the decree reversed.

The only question we have to consider, therefore, is whether there is any error in the decree appealed from to the prejudice of the appellants.

The right of the appellants to have the deed of trust executed to Gooch, trustee, enforced depended upon the question whether Gooch, trustee, was authorized to make the notes held by them, and give a deed of trust upon the lots to secure their payment.

It clearly appears that Gooch, trustee, was not selected as trustee by the members of the syndicate other than Powell & Co., unless Powell & Co. had the right to select him for them. It is not pretended that either of them, except Powell & Co., ever spoke to Gooch upon the subject, or even knew of his action for months afterwards, unless, perhaps, it be the Old Dominion Investment Company, of which he was president. Powell & Co. had not, by virtue of their authority as real estate agents, or by reason of their relation as tenants in common or co-owners with the other members of the syndicate, the right to select a trustee for them, or to do or to authorize to be done for them any of the acts attempted to be done by Gooch, trustee. *Halsey v. Monteiro*, 92 Va. 581.

It is claimed that the syndicate was a partnership, and that Powell & Co., under their authority as partners, had the right to select a trustee to hold the title for them, and also to authorize him to make the notes for the purchase price, and to execute the deed of trust upon the lots to secure the notes.

The agreement between the members of the syndicate, by which they undertook to subscribe \$18,000 for the purpose of buying the lots, is the only contract between them. It does not appear that the parties to that agreement ever considered the question, or determined how the property was to be held, further than is shown by the agreement itself. Their relations to each other must, therefore, be determined by the terms of that paper. It provided for raising money with which to purchase certain lands at a given price. There is no provision in it for selling the lands and dividing the profits. It may have been, and probably was, the intention of the parties, in that era of wild speculation, to sell the lots and divide the profits; but that does not appear from that agreement, which is the only contract between the parties in reference to

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the matter. It is wholly wanting in the essentials of a partnership agreement, nor does it show that the parties intended to do these acts from which a partnership could be inferred.

In no view of the case did Gooch have any authority to act as trustee, or bind the members of the syndicate, other than Powell & Co., in making the notes held by appellants, and in executing the deed of trust to secure them.

If it be admitted that the appellants were entitled, in equity, to so much of the purchase price of the lots as was equal to the amount of the notes held by them, their right to subject the lots, or to have a personal decree against the members of the syndicate therefor, would depend upon the question whether, under the facts of this case, a court of equity would specifically execute the alleged agreement for its sale and purchase.

The contract of sale and purchase, if made at all, was made by Powell & Co., representing both the vendor and the vendees. They were the agents of the vendor or vendors to sell the lots, and were to receive, and did receive, a commission for making the sale. They worked up the syndicate, and made the contract of purchase for them, if one was made, and were also members of that syndicate, and interested in its purchase. They did not disclose to the members of the syndicate that they were the agents to sell, though some of them, it appears, knew this fact. Some members of the syndicate, however, especially John H. Powell, of Richmond, Virginia, and James S. Groves, of North Carolina, relied upon the judgment and skill of L. L. Powell, in making the investment for them, and did not know, until long after they had made their cash payments, that their agents were also the agents of the vendors.

Nothing is better settled than that a man cannot be the agent of both the seller and the buyer in the same transaction, without the intelligent consent of both. Loyalty to his trust is the most important duty which the agent owes to his principal. Reliance upon his integrity, fidelity, and ability is the main consideration in the selection of agents; and so careful is the law in guarding this fiduciary relation that it will not allow an agent to act for himself and his principal, nor to act for two principals on opposite sides, in the same transaction. All such transactions are voidable, and may be repudiated by the principal, without showing that he was injured. In such cases the amount of consideration, the absence of undue advantage, and other like features are wholly immaterial. Nothing will defeat the principal's right of remedy, except his own confirmation, after full knowledge of all the facts. Actual injury is not the principle upon which the law holds such transactions voidable. The chief object of the principle is not to compel restitution where actual fraud has been committed, or unjust advantage gained; but it is to prevent the agent from putting himself in a position "in which to be honest must be a strain on him," and to elevate him "to a position where he cannot be tempted to betray his principle." "Under a less stringent rule," it was said by the court in *Porter v. Woodruff*, 36 N. J. Eq. 174, 180, "fraud might be committed, or unfair ad-

vantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or to prove it in such manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against an agent acting in a dual character is made broad enough to cover all his transactions. The rights of the principal will not be changed, nor the capacity of the agent enlarged, by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price. No such distinction is recognized by the adjudications, nor can it be established without removing an important safeguard against fraud." *Buckles v. Lafferty*, 2 Rob. (Va.) 292; *Howery v. Helms*, 20 Gratt. 1; 1 Minor, Inst. 4th ed. 244; 2 Pom. Eq. Jur. § 959; 1 Story, Eq. Jur. § 315; *Mechem, Agency*, §§ 454, 455, 713; *Michoud v. Girod*, 4 How. 503, 11 L. ed. 1076; *Story, Agency*, §§ 210, 211; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; 2 Warvelle, Vendors, p. 882.

It is claimed that it was at that time common for real estate agents in that city to get up syndicates to buy property in their hands for sale. No such custom or usage is proved; and, if it were, it could not avail unless it were clearly shown (and it was not) that the members of the syndicate, many of whom did not live in or near Roanoke city, had knowledge of the usage or custom when Powell & Co. became their agents. To be secretly in the service of the opposite party, while the agent is acting ostensibly for his principal only, is a fraud upon the latter, and a breach of public morals which the law will not permit. "It is also an elementary proposition," said Willes, J., "that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character." In the case of *Robinson v. Mollett*, L. R. 7 H. L. 802, this question was very fully discussed in the House of Lords. It was said by Baron Cleasby in that case, after quoting § 210 on *Story on Agency*, which declares "that, in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves." "I submit that this fundamental and important rule cannot be defeated by a usage, or, as Mr. Justice Willes calls it, a lax practice, of brokers, which is plainly of their own creation, for their convenience and advantage in the settlement of speculative dealings." Mr. Justice Grove said: "I am of opinion, with the late Mr. Justice Willes, that here the importation of the usage 'does not merely control the mode of performance of the contract, but that it changes its intrinsic character' (L. R. 5 C. P. 656); that it converts a broker into a principal seller without the knowledge of the buyer who employs him, and that it must be rejected." Pages 829, 831.

Lord Chelmsford said in the same case (p. 838): "But the usage is of such a peculiar character, and is so completely at variance with the relation between the parties, converting a broker employed to buy into a principal seller for himself, and thereby giving him an interest wholly opposed to his duty, that I think no person who is ignorant of such an

usage can be held to have agreed to submit to its conditions, merely by employing the services of a broker, to whom the usage is known, to perform the ordinary and accustomed duties belonging to such employment." In the views expressed by both of these judges the lord chancellor (Cairns) concurred.

Such a usage was held by the supreme court of Massachusetts in *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, to be contrary to good morals and sound policy, because it would tend to sanction an unwarrantable concealment of facts essential to a contract, and operate as a fraud on parties who had a right to rely on the confidence reposed in their agents. *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66.

The evidence wholly fails to show that the members of the syndicate, for whom Powell & Co. were agents, after full knowledge of all the facts, confirmed or ratified the action of Powell & Co. in purchasing the lots, or in selecting Gooch as trustee for them.

Under these circumstances, without passing upon the other grounds relied on to defeat a specific execution of the agreement, it is clear that the members of the syndicate other than Powell & Co. could not, upon well-settled principles of equity, be compelled to specifically perform the agreement for the purchase of the lots. Pom. Spec. Perf. Contr. §§ 267, 268.

Upon the whole case, we are of opinion that there is no error in the decree appealed from to the prejudice of the appellants, and, as no other party is complaining of it, it must be affirmed.

Rehearing denied.

VIRGINIA FIRE & MARINE INSURANCE COMPANY, *Plff. in Err.*,

v.

NEW YORK CAROUSAL MANUFACTURING COMPANY.

(.....Va.....)

1. **Motion to dismiss an appeal** because the appeal bond does not provide for payment of all actual damages incurred in consequence of the supersedeas is too late if not made until the time has elapsed in which a new bond might have been given or a new appeal taken.
2. **One garnished for a debt due a non-resident creditor may prevent a judgment against him** in the garnishment proceeding by showing that, without his collusion and notwithstanding his plea of the pendency of the garnishment proceeding, a court at the creditor's domicile, having jurisdiction, rendered a judgment against him on the debt in favor of the creditor, which, having property in that jurisdiction, he was compelled to pay.

(January 20, 1896.)

ERROR to the Circuit Court of the City of Richmond to review a judgment in favor

NOTE.—As to garnishment of debt of nonresidents, see *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 577, and note; also *Lancashire Ins. Co. v. Corbetta* (Ill.) 86 L. R. A. 640, and other cases cited in footnote.

of plaintiff in a proceeding to reach money in the hands of defendant as garnishee which was alleged to belong to a person residing in the state of North Carolina. *Reversed.*

The facts are stated in the opinion.

Mr. Beverley T. Crump, for plaintiff in error:

The trustees, i. e., the garnishees, cannot equitably be put to the trouble and expense of protecting themselves against a double liability put upon them for the plaintiff's benefit. It is for the plaintiff to employ all procedure necessary for the trustee's safety.

Burke v. Adams, 64 N. H. 86.

The prevailing doctrine according to the weight of authority, in the states which have enactments substantially like those in Virginia, is that a judgment debtor cannot be garnished, even in his own state, except by a proceeding in the same court in which the original suit is pending.

Scott v. Rohman, 43 Neb. 618.

On principle the North Carolina court was right in insisting upon its prior jurisdiction.

Wallace v. McConnell, 13 Pet. 136, 10 L. ed. 95; *Mack v. Winslow*, 16 U. S. App. 602, 59 Fed. Rep. 316, 8 C. C. A. 134; *Burke v. Hance*, 76 Tex. 76.

Mrs. Anderson & Anderson, for defendant in error:

The attaching creditor in this case, the New York Carousal Manufacturing Company, in suing out and levying its attachment complied strictly with the provisions of §§ 2959, 2967, of the Code of Virginia.

Baltimore & O. R. Co. v. Gallahue, 12 Gratt. 663, 65 Am. Dec. 254.

The Virginia Fire & Marine Insurance Company, chartered under the laws of the state of Virginia, and having its home office in Richmond, Virginia, was a citizen of the state of Virginia, which gave the circuit court of Richmond jurisdiction.

Concardin v. Universal L. Ins. Co. 32 Gratt. 445; *Drake*, Attachm. 597; *East Tennessee, V. & G. R. Co. v. Kennedy*, 83 Ala. 464.

Full protection would have been afforded the garnishee in this case had application been made to the North Carolina court after the rendition of judgment, for a stay or suspension of execution, until the attachment proceedings in Virginia could be determined, when the amount for which the garnishee might be held liable could easily be credited upon the North Carolina judgment.

Crawford v. Clute, 7 Ala. 157, 41 Am. Dec. 92; *Crawford v. Slade*, 9 Ala. 887, 44 Am. Dec. 463; *Drake*, Attachm. 7th ed. § 701; *Fazio & M. Valley R. Co. v. Fulton*, 71 Miss. 385; *Gray v. Henby*, 1 Smedes & M. 598; *Jones v. New York & E. R. Co.* 1 Grant, Cas. 457; *Minor v. Rodgers Coal Co.* 25 Mo. App. 79; *Allen v. Watt*, 79 Ill. 284; *McKeon v. McDermott*, 22 Cal. 669, 83 Am. Dec. 86; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84.

Riely, J., delivered the opinion of the court:

The defendant in error, at the hearing of the case, moved to dismiss the appeal upon the ground that the appeal bond is defective, in that it omits to provide, as a part of the con-

dition, for the payment of "all actual damages incurred in consequence of the supersedas."

The statute (Code, § 3471) prescribes that the bond is to be given before the clerk of the court below, and requires that this officer shall take the bond and indorse on the process that it has been given. The plaintiff in error, upon the allowance of the writ of error, promptly gave bond in the required penalty, and with all the prescribed conditions, save the one above stated, before the clerk of the circuit court, who accepted the same, and indorsed on the process that the bond had been given.

It is usual for the clerk, whom the law designates as the officer to take the bond, to prepare it; and the bond in this case was no doubt prepared by him, and not by counsel. The plaintiff in error executed it, and the clerk took it, presumably in good faith, both of them supposing that it conformed to the requirements of the statute; and the defendant in error acquiesced in its sufficiency, and in the perfection of the appeal, until the hearing.

If the defendant in error was not satisfied with the bond, or deemed the defect now pointed out a sufficient ground for the dismissal of the appeal, he should have taken the necessary steps, within the time that a new bond might have been given or another appeal allowed (Code, § 3474), where he has had a reasonable time in which to do so, to require a proper bond to be given, and, in the event of a failure to give it, moved to dismiss the appeal. It is too late to wait, before making such motion, until a new bond cannot be given or another appeal allowed. To dismiss the appeal at this late day, under these circumstances, would be grossly unjust. The appellee, after such delay, must be considered as having waived any objection to the defect in the bond. Following the course which has been heretofore pursued by this court in dealing with similar cases, the motion to dismiss must be overruled. *Jackson v. Henderson*, 3 Leigh, 196; *Pugh v. Jones*, 6 Leigh, 299; *Brown v. Matthews*, 1 Rand. (Va.) 462; *Syme v. Johnston*, 3 Call (Va.) 522; *Acker v. Alexandria & F. R. Co.* 84 Va. 648; *Orr v. Pennington*, 93 Va. 268.

The judgment appealed from was rendered against the plaintiff in error as garnishee under an attachment sued out by the defendant in error against the garnishee's creditor, who was a nonresident of this state.

The creditor resided in the state of North Carolina, and, prior to the issue of the attachment, had brought suit in that state against the garnishee to recover the same debt which it was sought to subject by the attachment. This suit was still pending and undetermined when the attachment was sued out.

The writ of error awarded by this court brings under review the right of the circuit court of the city of Richmond, upon the facts disclosed by the record, to give judgment against the garnishee.

Where there is an action by a creditor against his debtor to recover a debt due to him pending in a court in one jurisdiction, and at the same time an attachment against the creditor and a garnishment against his

debtor pending in another court in a different jurisdiction, to subject the same debt to the satisfaction of a liability of the creditor, there is a conflict among the authorities as to the proper course to be pursued by the respective courts.

It is held by one line of the authorities that the court which first acquires jurisdiction over the debt has the right to maintain it to the end of the litigation, and enforce or subject the debt, irrespective of the proceedings in the other court; and that the court which last acquires jurisdiction as to the debt, whether it be by the action of the creditor to recover his debt or under a garnishment by his creditor, must dismiss the action or garnishment, when the pendency of the prior action or garnishment is duly brought to its notice. *Wallace v. M'Connell*, 88 U. S. 13 Pet. 136, 10 L. ed. 95; *Whipple v. Robbins*, 97 Mass. 107, 93 Am. Dec. 64; *American Bank v. Rollins*, 99 Mass. 813; *Embree v. Hanna*, 5 Johns. 101; *Shrewsbury v. Tufts*, 41 W. Va. 212; *Drake*, Attachm. 7th ed. § 700; 2 *Wade*, Attachm. § 494.

The other line of the authorities holds that whether the action by the creditor to recover his debt or the garnishment be first commenced, the court in which the action by the creditor is pending should, upon due notice of the garnishment, either suspend all proceedings in the action to await the determination of the garnishment, or, which is deemed better, proceed to judgment on the debt, with a stay of execution on the judgment until the garnishment is determined, which stay can be removed or made perpetual, in whole or in part, as the exigency of the case may require. By this course the rights of the attaching creditor would not be injuriously affected, and the garnishee would at the same time be effectually protected against a double liability. *Crawford v. Clute*, 7 Ala. 157, 41 Am. Dec. 92; *Crawford v. Slade*, 9 Ala. 887, 44 Am. Dec. 463; *Montgomery Gaslight Co. v. Merrick*, 61 Ala. 534; *McFadden v. O'Donnell*, 18 Cal. 160; *McKeon v. McDermott*, 22 Cal. 667, 88 Am. Dec. 86; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84; *Hobland v. Chicago, R. I. & P. R. Co.* 184 Mo. 474; *Drake*, Attachm. § 701; *Gallego v. Chevallie*, 2 Brock. 285, note at end of the opinion.

It is unnecessary in this case, however, to decide between these conflicting authorities, for under neither line of them can the judgment appealed from be upheld.

The insurance company (the plaintiff in error), on January 18, 1895, filed its answer to the complaint in the suit brought against it in the superior court of Lenoir county, North Carolina, by its creditor, J. H. Turnage, who was also the debtor in the attachment suit, and duly set forth, among other defenses, the pendency of the attachment suit in the circuit court of the city of Richmond, and the garnishment against the company, averred the validity of the said proceedings according to the laws of Virginia; and asked that it be protected against the recovery of any part of the debt sued for which it might be adjudged to pay by the circuit court of the city of Richmond under the garnishment.

It also, on February 4, 1895, filed its answer to the garnishment in the circuit court of the

city of Richmond, wherein it referred to the action brought against it in the court in North Carolina, and exhibited with its answer a certified copy of all the proceedings in the said action up to that time. The circuit court thereupon without entering a formal order to that effect, directed that the garnishment should await the result of the suit in North Carolina.

At the May term, 1895, of the superior court of Lenoir county, North Carolina, it presented to the court a certified copy of the proceedings in the attachment suit in the circuit court of the city of Richmond, and claimed that the court should not, and moved that it do not, proceed to the trial of the action of Turnage against the company until the attachment suit was determined. The court, however, overruled the motion, and on May 17, 1895, gave judgment against the company for the entire amount of the debt. Execution was issued on the judgment on May 22, 1895, directed to the sheriff of Lenoir county, whereby the company was obliged to pay, and did pay, the same on October 12, 1895.

On November 22, 1895, the garnishee filed an amended and supplemental answer to the garnishment in the circuit court of the city of Richmond, in which it set forth that the court in North Carolina had overruled its plea of the pendency of the attachment suit and garnishment against it on the ground that the suit in North Carolina was instituted prior to the attachment suit, and that, therefore, the court in that state acquired priority of jurisdiction of the subject-matter of the litigation; and that the court had given judgment against it for the full amount of the debt; that execution was at once issued on the judgment; and that, having moneys in the hands of its agents in that state liable to the execution, it had been compelled to pay the same. It exhibited with its amended answer a certified copy of the record of the suit in the court in North Carolina, containing all the proceedings had therein subsequent to the proceedings contained in the copy of the record filed with its former answer, the two making a complete record of the suit, and prayed a dismissal of the garnishment against it. This the circuit court refused to do, and gave judgment against the garnishee for the amount of the debt of the attaching creditor, the defendant in error. If this judgment be sustained, then the garnishee will, to that extent, have to pay its debt over again.

It is a settled rule, founded on obvious principles of natural justice, that a garnishee cannot be lawfully compelled to pay the same indebtedness twice. Nothing can be more clearly just than that a person who has been compelled by a court of competent jurisdiction to pay a debt should not be compelled to pay it over again. Consequently, when he is in such a situation that, if charged as garnishee, this would be the result, he will not be charged, unless his situation is due to his own fault or neglect.

The garnishee in this case was guiltless of any fraud or collusion. It took all necessary steps to prevent a recovery in the suit in the state of North Carolina of the debt against it. It made a full disclosure to the court of the facts of its situation. It duly pleaded the pendency of the attachment suit and the gar-

nishment against it. It endeavored to obtain a suspension of all proceedings in the suit until the determination of the garnishment against it, but the court, holding that it had priority of jurisdiction, refused to stay the suit, and gave judgment, upon which it allowed execution to be issued.

The garnishee is a corporation created under the laws of the state of Virginia, with its home office in the city of Richmond, and was engaged in the business of insuring property against loss by fire in this and other states. It had complied with the laws of North Carolina, by which foreign corporations were authorized to do business in that state, and under its laws, for the purposes of suit, was deemed a resident of that state, and amenable to a personal judgment. It had moneys in the hands of its agents in that state, and execution having been issued on the judgment, it could not escape its payment.

Under these circumstances, the circuit court should not have given judgment against the garnishee. It had been compelled, after a full disclosure, to pay the debt once under the judgment of a tribunal having legal jurisdiction to decide and adequate power to enforce its decision, and had therefore an indisputable claim to the protection against the second payment of the debt. *Garity v. Gigie*, 130 Mass. 184; *Eddy v. O'Hara*, 132 Mass. 56; *Lancashire Ins. Co. v. Corbetta*, 165 Ill. 592, 36 L. R. A. 640.

For the foregoing reasons the judgment appealed from must be reversed, and the garnishment against the plaintiff in error be dismissed.

W. D. CARDWELL, Receiver of the Virginia Steel, Iron, & Slate Company, Appt.,
v.

M. KELLY.

(.....Va.....)

1. Stockholders cannot set up the illegality of the scheme of the corporation, which did not appear on the face of the contract of subscription or the prospectus therein referred to, in order to escape liability to creditors whose debts had been contracted upon the faith of the subscriptions to the stock.

2. A subscriber is estopped, as against creditors, to set up the invalidity of a subscription to capital stock, as to which, if invalid, he was in part delicto.

(January 27, 1898.)

ERROR to the Circuit Court of the City of Richmond to review a judgment in favor of defendant in an action brought to enforce payment of a stock subscription. *Reversed.*

The facts are stated in the opinion.

Messrs. Cardwell & Cardwell, Leake & Carter, and Christian & Christian, for plaintiff in error:

In partitions of land under the law, the usual and proper method of assigning the parcels to

NOTE.—For fraud or misrepresentation to justify rescission of subscription for stock, see note to *Fear v. Bartlett* (Md.) 33 L. R. A. 721.

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the different part owners is by allotment, and this method is always practised unless there is a strong reason against it.

See 2 Minor, Inst. p. 423; *Cox v. McMullin*, 14 Gratt. 91.

The distribution by lot, then, is in no way inconsistent with the idea that it was contemplated that the lots should be of substantially equal value; and if that is the case it is admitted on all sides the distribution would not constitute a lottery.

The only extrinsic evidence tending to show that a lottery or unequal distribution was contemplated or intended is the testimony of the defendant who states that the agent of the company who took his subscription told him that one of the lots drawn by him might be equal to his whole subscription.

Such oral statements, unless constituting fraudulent representation inducing the subscription, cannot be relied upon by a subscriber in defense of an action to recover his subscription.

2 Thomp. Corp. § 1311.

Nemo allegans turpitudinem suam est audiendus.

Where one of the parties to an agreement, invalid on the ground of fraud, can make out his case without proving the fraud, it is established that the defendant will be estopped from alleging his own fraud in defense.

Collins v. Blantern, 1 Smith, Lead. Cas. pt. 2, p. 750; *Martin v. South Salem Land Co.* 2 Va. Law Reg. 743; *Holman v. Johnson*, 1 Cowp 348; *Starke v. Littlepage*, 4 Rand. (Va.) 372; *Montefiori v. Montefiori*, 1 W. Bl. 364; *Doe, Roberts, v. Roberts*, 2 Barn. & Ald. 868; *Hendrickson v. Evans*, 25 Pa. 444; *Pettit v. Jennings*, 2 Rob. (Va.) 676; *Dan. Neg. Inst.* § 197; *Biglow, Estoppel*, pp. 484 *et seq.*; *Brogden v. Metropolitan R. Co.* L. R. 2 App. Cas. 666, 6 English Ruling Cases, 103; *Thompson, Liability of Stockholders*, §§ 3683, 3684; *Casey v. Galli*, 94 U. S. 680, 24 L. ed. 170.

Equitable estoppel or estoppels by conduct, are created for the purpose of promoting justice and to repress fraud upon third persons; and such estoppels, where the requisites therefor exist, are not disfavored by the courts, for fraud is prevented and justice is attained by means of them.

See 2 Pom. Eq. Jur. § 802, and note; *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111.

If the circumstances were such that the party against whom the estoppel is sought to be raised so conducts himself that a reasonable person would infer that a certain state of things existed and acts upon that inference, he shall afterwards be estopped from denying it.

2 Pom. Eq. Jur. §§ 805, 811; 2 Best, Ev. § 543; *Bigelow, Estoppel*, p. 541; *Brogden v. Metropolitan R. Co.* L. R. 2 App. Cas. 666, 6 English Ruling Cases, 103.

Messrs. Pollard & Sands, for appellee:

Contracts partaking of the characteristics here admitted to exist are incapable of enforcement between the parties or their privies.

Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682; *Holman v. Johnson*, 1 Cowp. 341; 1 Parsons, Contr. 382; *Middleton v. Arnolds*, 13 Gratt. 489.

The term "lottery" includes, not only a scheme for the distribution of prizes by chance, but the distribution itself

2 Whart. Crim. Law, §§ 1490, 1491; *United States v. Olney*, Deady, 461; 13 Am. & Eng. Enc. Law, p. 1187; *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682; *Ridgeway v. Underwood*, 4 Wash. C. C. 129; *Den, Wooden, v. Shotwell*, 23 N. J. L. 465; *United States v. Olney*, 1 Abb. (U. S.) 275; *United States v. Zeisler*, 30 Fed. Rep. 501; *Dunn v. People*, 40 Ill. 469; *Thomas v. People*, 59 Ill. 160; *Lynch v. Rosenthal*, 144 Ind. 86, 31 L. R. A. 835.

Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery.

Bull v. Ruggles, 56 N. Y. 425. See also *Horner v. United States*, 147 U. S. 449, 37 L. ed. 287; *Phalen v. Com.* 1 Rob. (Va.) 718; *Watson v. Fletcher*, 7 Gratt. 1; *Embrey v. Jimison*, 181 U. S. 386, 33 L. ed. 172; 1 Parsons, Contr. 380-382, and note Bon p. 382; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508; *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720; *Yellow Stone Kit v. State*, 88 Ala. 196, 7 L. R. A. 599.

Contracts, void as this one is, between the parties cannot be enforced for the benefit of the creditors of one of the parties.

Bank of United States v. Owens, 27 U. S. 2 Pet. 527, 7 L. ed. 508.

Nihilum ex nihilo oriatur is as true in law as in philosophy.

Williams v. Gibbs, 58 U. S. 17 How. 265, 15 L. ed. 144; *Woodson v. Barrett*, 2 Hen. & M. 88, 3 Am. Dec. 612; *McBlair v. Gibbs*, 58 U. S. 17 How. 232, 15 L. ed. 132; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 469, 33 L. ed. 760; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 286, 34 L. ed. 346.

That the receiver takes property subject to all subsisting liens and vested rights, carries with it the correlative proposition that he is in no sense what is called a bona fide purchaser for value.

5 Thomp. Corp. § 6917; *Lincoln v. Fitch*, 42 Me. 456; *Davis v. Brown*, 94 U. S. 425, 24 L. ed. 205; *Cook, Stock & Stockholders*, § 151.

But here we would have the court bear in mind that the contract is void and no action can rest upon it.

28 Am. & Eng. Enc. Law, p. 473.

The so-called maxim, *Nemo allegans suam turpitudinem est audiendus* has no sort of application to cases where the contract is void *ab initio*.

Rosebrough v. Ansley, 35 Ohio St. 118; *Tribble v. Anderson*, 63 Ga. 31; *Harris v. Harris*, 23 Gratt. 787; *Hanauer v. Doane*, 79 U. S. 12 Wall. 842, 20 L. ed. 439; *Starks v. Littlepage*, 4 Rand. (Va.) 868; *James v. Bird*, 8 Leigh, 510, 31 Am. Dec. 668; *Terrell v. Imboden*, 10 Leigh, 321, and *Owen v. Sharp*, 12 Leigh, 429.

The defendant in error cannot have the doctrine of estoppel urged against him, for the plaintiff in error did not show, nor attempt to show, that there was any misrepresentation or concealment of a material fact, made with knowledge of the facts, to one who was ignorant of the truth, with the intention that he should act upon it, and leading him, to act upon it. This is essential.

Stebbins v. Bruce, 80 Va. 389; *Pickard v. Sears*, 6 Ad. & El. 469; *Bower v. McCormick*, 40 L. R. A.

23 Gratt. 321; *Jones v. Sasseeer*, 18 N. C. (1 Dev. & B. L.) 464.

The maxim, *Nemo allegans suam turpitudinem est audiendus* does not reach to the height of being a definitive rule of decision, but, when properly understood and applied, it is addressed to the credibility of the testimony of a party alleging his own wrong.

United States v. Leffler, 36 U. S. 11 Pet. 94, 9 L. ed. 645; *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204; *Jordaine v. Lashbrooke*, 7 T. R. 601.

A voidable act will have all its proper legal effects unless and until it is disputed and pronounced invalid. And it can be disputed only by certain persons and under certain conditions.

Pollock, Contr. p. 8; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 272, 6 L. ed. 472.

If any part of the consideration for a promise or set of promises is unlawful, the whole agreement is void.

Pollock, Contr. p. 318; Story, Contr. § 700; Whart. Contr. § 363; *Miller v. Ammon*, 145 U. S. 421-427, 36 L. ed. 759-762; *Bartlett v. Vinor*, Carth. 252; *Holman v. Johnson*, 1 Cowp. 343; *Hunt v. Knickerbacker*, 5 Johns. 327.

Contracts founded on an act prohibited by a statute under a penalty are void, although not expressly declared so to be.

Wilson v. Spencer, 1 Rand. (Va.) 76, 10 Am. Dec. 491; *O'Donnell v. Sweeney*, 5 Ala. 467, 39 Am. Dec. 386; *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58, and note; *Gravier v. Carraby*, 17 La. 118, 36 Am. Dec. 608; *Deventorf v. Beardsley*, 23 Barb. 656.

On petition for rehearing.

An English judge has said: "All authorities, from first to last, concur in one thing—viz., that the doctrine on this subject is founded on 'public policy,' and I cannot but regard the jarring opinions as exemplifying the well-known dictum of Mr. Justice Burrough in *Richardson v. Mellish*, 2 Bing. 229, that public policy 'is a very unruly horse, and when once you get astride it you never know where it will carry you.' Public policy does not admit of definition, and is not easily explained. . . .

Egerton v. Earl Brownlow, 4 H. L. Cas. 1, . . . Public policy is a variable quantity; . . . it must vary and does vary with the habits, capacities, and opportunities of the public; . . . it cannot have been the same when Chief Justice Tindal decided *Horner v. Graves*, 7 Bing. 785, in 1831, as it was when Chief Justice Parker decided *Mitchell v. Reynolds*, 1 P. Wms. 181, in 1711; . . . it must have changed, and did change, between 1831 and 1869 when Vice-Chancellor James decided *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; and if there had not been a further change before Lord Justice Fry decided *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, in 1880, it must have occurred ere now."

Davis v. Davies, L. R. 36 Ch. Div. 864.

No case can be found where an action has been sustained, which goes in affirmance of an illegal contract; and where the object of it is to enforce the performance of an engagement prohibited by law. Wherever an action has been sustained against a party, to prevent him from retaining the benefit derived from an unlawful act, the action proceeds in disaffirmance of the

contract; and, instead of endeavoring to enforce it, presumes it to be void.

Hunt v. Knickerbacker, 5 Johns. 327; *Wilson v. Spencer*, 1 Rand. (Va.) 76, 10 Am. Dec. 491; *Jones v. Comer*, 5 Leigh, 358; *Didier v. Patterson*, 98 Va. 586; *Gravier v. Carraby*, 17 La. 118, 36 Am. Dec. 606; *Devendorf v. Beardsley*, 23 Barb. 656; *Bower v. McCormick*, 23 Gratt. 821; *Pickard v. Sears*, 6 Ad. & El. 469.

The court errs when it brings forward the maxim, *Nemo allegans suam turpitudinem est audiendus*, as furnishing a positive rule of law essential to create an estoppel.

United States v. Leffler, 36 U. S. 11 Pet. 94, 9 L. ed. 645; followed in *Davis v. Broten*, 94 U. S. 423, 24 L. ed. 204; has approved of *Jordaine v. Lashbrooke*, 7 T. R. 601.

Riely, J., delivered the opinion of the court:

The sole question for decision is whether a subscriber to the stock of a corporation, who was allured to make the subscription by the chance of being allotted a lot or lots in a drawing for distribution of lots of unequal value, can by reason thereof escape the payment of the money due on his subscription, not to the corporation, but to its creditors, whose debts were contracted upon the faith of his and other subscriptions.

It is a fact conceded in the record that the corporation, the Virginia Steel, Iron, & Slate Company, is insolvent, and that its creditors cannot be paid their debts unless the assessment of 45 per cent made by the chancery court of the city of Richmond on its stockholders is collected.

In conformity to the Constitution of the state, the buying, selling, or transferring of tickets or chances in any lottery is prohibited by statute, and a penalty therefor prescribed. Const. art. 5, § 18; Code, §§ 3825, 3826. Whether the scheme out of which this controversy has arisen is within the prohibition of the statute, we express no opinion, as, in the view we take of the case, it is unnecessary to decide that question.

It is a general rule, as stated by an able law writer, that a contract or an agreement cannot be made the subject of an action if it can be impeached on the ground of dishonesty, or as being opposed to public policy,—if it be either *contra bonos mores*, or forbidden by the law. Broom, Legal Maxims, 706.

A defendant, against whom it is sought to enforce such a contract, may show its illegality, and a court of justice will decline to lend its aid to enforce a contract thus wrongfully entered into. Where, however, the parties are *in pari delicto*, but the plaintiff can make out his case without disclosing the unlawful nature of the contract, it is not a universal rule that the defendant will be allowed to show its illegality for the purpose of defeating the action.

Contracts which are founded upon an illegal consideration, as being immoral or contrary to public good, or which are forbidden by law, are void; and in the language of Chief Justice Wilmut in *Collins v. Blantern*, 1 Smith, Lead. Cas. 646, "the reason why the common law says such contracts are void, is for the public good." They are injurious to the community, and violative of the policy of the law;

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and so the courts, having in view the good of the public, and the policy of the law, will not lend their aid to enforce such a contract unless they can see that to do so will defeat the object of the illegal transaction, and promote the interests of society and the policy of the law. But where, in the particular case, it appears that this will be the result of the enforcement of such contract, the maxim, *Nemo allegans turpitudinem suam audiendus*, is rigorously applied, and the defendant will not be allowed to plead and prove his own wrong.

In *Starke v. Littlepage*, 4 Rand. (Va.) 369, Judge Green, in commenting on the maxim, *In pari delicto potior est conditio defendantis*, said: "But this rule operates only in cases, where the refusal of the courts to aid either party frustrates the object of the transaction, and takes away the temptation to engage in contracts *contra bonos mores*, or violating the policy of the laws. If it be necessary, in order to discountenance such transactions, to enforce such a contract at law, or to relieve against it in equity, it will be done, though both the parties are *in pari delicto*. The party is not allowed to allege his own turpitude in such cases, when defendant at law, or prevented from alleging it when plaintiff in equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transactions."

In a case of the nature of that at bar, the court will be governed in some degree, at least, by its particular circumstances. It will consider whether the good of the public and the policy of the law will be subserved, and the making of such contracts be discouraged, by enforcing the contract in the case before it, or by refusing to do so, and will do the one or the other as will advance the interests of the public and the policy of the law.

It is apparent that to enforce the contract in this case will defeat the illegal purpose of the parties to it, and tend to deter other persons from entering into similar contracts, thereby upholding the policy of the law and promoting the public good. To refuse to enforce it would encourage the making of such contracts; for, if the venture succeeded, the parties would reap the profits, and, if it failed, would suffer no loss.

If the corporation was seeking to recover the subscription, and was solvent, then, inasmuch as its payment would enable the unlawful design of a lottery to be carried out, it would be proper to allow the defendant to show the unlawful purpose, in order to defeat the transaction and prevent similar ones in the future; but to allow him to do so after it has become insolvent would confer immunity from liability on the guilty, and not restrain, but encourage, such illegal schemes.

Moreover, the refusal to enforce payment of the subscription after insolvency of the corporation would not only fail to advance the interests of the public, and contravene the policy of the law, but would result in great injustice to innocent creditors. This is not an action by the corporation, one of the guilty parties, seeking to enforce payment of the illegal subscription, but an action by the receiver

of the court, appointed at the instance of creditors of the corporation, to collect the subscriptions due to it, for the purpose of paying its debts.

It was asserted by Lord Mansfield in *Montefiori v. Montefiori*, 1 W. Bl. 864, and repeated by Broom in his work on Legal Maxims, that "it is an indisputable proposition that, as against an innocent party no man shall set up his own iniquity as a defense, any more than as a cause of action."

In *Pettit v. Jennings*, 2 Rob. (Va.) 676, we have a forcible illustration of the application of this principle in the case of an illegal and void contract. In that case the attempt was made to be relieved from the payment of a bond that was alleged to have been given for a gaming consideration, as against the assignee thereof, who had been induced to purchase the bond by the assurance of the obligor that there was no objection to its payment, and that it would be paid. The court denied relief to the obligor, upon the ground that he was estopped by his conduct from showing the unlawful consideration of the bond. Judge Baldwin, who delivered the prevailing opinion in the case, said, after adverting to the doctrine of estoppel: "I can perceive no good reason why a gaming security should form an exception to the general rule on this subject, which rests upon principles of justice equally applicable, whether the debt be void in its inception, or be avoided by payment or release, or by any other matter *ex post facto*. It is true that a contract or security which is void, either by positive law or upon principles of public policy, is deemed incapable of confirmation; but the doctrine we are considering is not based upon the idea of confirmation, which excludes the supposition of fraud, but upon the fact of fraud in the original representation or subsequent denial, which, to prevent iniquity, is made to operate as an estoppel. Admissions which have been acted upon by others are conclusive upon the party making them, in all cases between him and the person whose conduct he has thus influenced; and the party is estopped, on grounds of public policy and good faith, from repudiating his own representations."

The capital stock of a corporation is its basis of credit. It is to this that persons dealing with the corporation look, and upon which they rely as security for the payment of its obligations. They have the right to assume, in the absence of knowledge to the contrary, that it exists in fact; that it has been fully paid, or is vouched by valid subscriptions. The defendant in error and his fellow subscribers by their subscriptions, enabled the Virginia Steel, Iron, & Slate Company to organize and engage in the business for which it was incorporated, and in the prosecution whereof it contracted debts to insol-

veny. Those who dealt with it, having no knowledge of any vice in the subscriptions, were entitled to rely upon its capital stock as having been lawfully created. The subscribers to its stock, having by their conduct enabled the company to hold out to the public that it had a validly subscribed capital stock, are estopped to deny the reality of what they made to appear to exist, and upon which others were led to rely. The law in such a case makes the apparent real, as to those who have been thus misled to their injury.

In *Martin v. South Salem Land Co.* 94 Va. — (a case that was most carefully considered), subscribers to the stock of a joint-stock company, who asserted that they had been defrauded in making their subscriptions, were held to be estopped, though innocent, from setting up the fraud as a defense, because they had failed to repudiate their subscriptions until after the company had become insolvent. The estoppel was raised in that case in favor of the creditors of the company, against innocent subscribers, merely because they had delayed too long in repudiating their subscriptions. There mere delay was the ground of the estoppel. How much greater reason is there for holding that subscribers to the capital stock of a company are estopped, as against creditors, from setting up the invalidity of their subscriptions, as to which, if invalid, the subscribers were *in pari delicto*? By their conduct in making the subscriptions they enabled the company to obtain credit on the faith thereof, and to allow them now to repudiate their subscriptions would operate as a fraud on the creditors.

Neither the contract of subscription, nor the prospectus which was referred to and made a part of it, was unlawful on its face. Their introduction in evidence was all that was necessary to make out a *prima facie* case, so that the plaintiff could make out his case without disclosing anything unlawful in the transaction. Its unlawfulness had to be shown by the defendant. This he could only do by pleading and introducing proof of his own unlawful conduct. And this he was estopped from doing as against creditors whom his unlawful conduct had contributed to mislead, and whom the plaintiff represents.

The circuit court erred in the admission of evidence on the part of the defendant to prove the illegality of the contract of subscription, and its instruction to the jury. Its judgment must therefore be reversed, the verdict of the jury set aside, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

Cardwell, J., absent.

Rehearing denied.

GEORGIA SUPREME COURT.

Fred HAUG, *Plff in Err.*,

v.

C. F. RILEY, Admr., etc., of M. W. Hall,
Deceased.

(..... Ga.)

***1. It is, on the trial of an action upon a promissory note, after showing the loss or destruction thereof, competent to prove by parol that a paper attached as an exhibit to the plaintiff's declaration is a true and correct copy of the lost original.** In the present case the court properly allowed proof of the contents of the instrument declared upon, over objection that the same was not, and had never been, "an office paper," and that the alleged copy thereof showed "only one credit of \$30, while the allegations in the declaration admitted and allowed four credits amounting to \$140."

2. The indorsee of a negotiable promissory note has a right, as the legal holder thereof, to institute a suit thereon in his own name, notwithstanding the fact that, before bringing his action, he had, by a written assignment, not indorsed on the note itself, but on a separate paper, transferred the note to another as collateral security, who subsequently surrendered the note to him merely for the purpose of collection; and, nothing more appearing, the plaintiff will be entitled to recover.

3. A negotiable promissory note, payable at bank, does not become due until the last day of grace; and one to whom such an instrument is indorsed and transferred on the second day of grace takes the same before maturity, and will be presumed to have been a bona fide purchaser for value.

4. Even where such a note is, before maturity, actually paid by the maker to the payee, and by the former again put in circulation, as against one signing apparently as a joint principal, but who is in fact a surety only, such a purchaser will, nevertheless, be protected.

5. In view of the evidence submitted on the trial of the present case, a verdict for the plaintiff was the only legal result which could have been reached, and the court did not err in directing the jury to find in his favor.

(July 10, 1897.)

ERROR to the Superior Court for Baldwin County to review a judgment in favor of plaintiff in an action brought to enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. Daniel B. Sandford, for plaintiff in error:

Whitfield, maker of the note, paid the same in full on the 21st of January, 1892, and had it transferred to his firm, Whitfield & Allen, when Haug was not present. This was the payment of the note by the proper party to the proper payee; and no transfer or assignment of the same to another person could be

valid and binding on Haug, without his knowledge and consent expressly given.

Story, Prom. Notes, §§ 180, 372; *Mickelberry v. Shannon*, 25 Ga. 237; Ga. Code 1892, §§ 2153, 2154; *Georgia Southern R. Co. v. Reeves*, 64 Ga. 496; *Hall v. Capital Bank*, 71 Ga. 715; *Tanner v. Gude* (Ga.) 27 S. E. 938.

The court erred in establishing a copy of the note sued on, as it was not an office paper and varied materially with the allegations in the declaration. The facts on this point take the case out of the rule in *Jernigan v. Carter*, 60 Ga. 131.

The court erred in directing the jury to find a verdict for the plaintiff against Robert Whitfield, principal, and F. Haug, security, for the amount sued for, notwithstanding the contention of plaintiff in error by his pleas and the evidence in support thereof made issues for the jury to pass on.

Collier v. Barnes, 64 Ga. 485.

The note was payable to a chartered bank, or its order, and if the same was not paid by the maker, Whitfield, at maturity, then the note was subject to protest, and F. Haug, as security, was entitled to notice of nonpayment and of the protest of same within a reasonable time.

Ga. Code 1892, § 2781.

The bank being the original payee could not deprive the security of this statutory right by a transfer of the note, and the same was still subject to protest, and the security entitled to notice thereof.

Randolph v. Fleming, 59 Ga. 776; *Pritchard v. Smith*, 77 Ga. 463.

Messrs. Roberts & Pottle and J. D. Howard, for defendant in error:

The copy of the note sued on was tendered in evidence as secondary evidence under Code, 3767. There was a complete showing as to diligence. When a bond for title, counted on as a part of the abstract of title, was lost, and diligence shown, a copy was admissible.

Whether secondary evidence will be admitted is largely in the discretion of the court. Code, 3882; *Jernigan v. Carter*, 60 Ga. 131.

The assignment was before the grace on the note expired, and this, under our law, was before its maturity.

Dalton City Co. v. Haddock, 54 Ga. 584.

Even admitting that Haug was surety only, he is manifestly liable if the principal is liable.

Camp v. Simmons, 62 Ga. 73.

The note showing on its face that he is joint maker, he cannot set up, as against an innocent holder, that he is surety.

Ferst v. Larkin, 68 Ga. 293; *Meador v. Dollar Sav. Bank*, 56 Ga. 605; *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; *Stubbs v. Goodall*, 4 Ga. 106; *McLaren v. Marine Bank*, 52 Ga. 181; Code, 2151.

Lumpkin, P. J., delivered the opinion of the court:

Suit was brought in the court below against Robert Whitfield and F. Haug upon a promissory note signed by them as joint makers. The court directed a verdict in favor of the plaintiff, and Haug brings the case here for review. As his codefendant filed no defense

Headnotes by LUMPKIN, P. J.

NOTE.—For recovery on lost negotiable instrument, see also *Butler v. Joyce* (D. C.) 16 L. R. A. 205, and note; see also *Kirkwood v. First Nat. Bank* (Neb.) 24 L. R. A. 444.

40 L. R. A.

to the action, and is not a party to the present writ of error, we shall, for convenience, deal with the case as though the plaintiff in error was the only party defendant in the lower court.

1. Complaint is made that the court, over the defendant's objection, allowed the plaintiff "to establish a copy of the note sued, in lieu of the alleged lost original, by oral testimony, . . . said original note not being, or having ever been, an office paper, and the note so allowed to be established showing only one credit of \$60, while the allegations in the declaration admitted and allowed four credits, amounting to \$140." As to the first ground of objection urged, the law in this state is well settled. "A party is not obliged to establish a lost paper under the judiciary act, but may, by showing its loss or destruction, as in this case, give in secondary evidence of its contents, and, upon sufficient proof, recover on it as a lost or destroyed paper." *Lindsay v. Kendrick*, 30 Ga. 546, citing *Ross v. Wright*, 12 Ga. 509. "A lost note may be sued upon without taking steps to establish a copy; Code, § 3986 [Civ. Code, § 4750], being permissive or cumulative, not mandatory or exclusive. *Wallace v. Tumlin*, 42 Ga. 462. The loss of the note while suit upon it was pending did not render the establishment of a copy indispensable in order for the suit to proceed." *Jernigan v. Carter*, 60 Ga. 133. "The genuineness of the original, and the correctness" of a copy thereof attached as an exhibit to the plaintiff's petition, "may be established by parol evidence." 60 Ga. 181. And "on proof of loss of the original agreement, and the correctness of a copy, the copy may go to the jury as evidence." *Goodman v. Henderson*, 58 Ga. 567. Nor is there any merit in the objection that the paper which the plaintiff was allowed to introduce in evidence, upon proof that it was a correct copy of the lost original, showed only one credit, whereas, "the allegations in the declaration admitted and allowed four credits." A plaintiff may very properly admit more payments than are actually entered upon the instrument on which he brings his action. This, apparently, is what was done in the present case; for, although the exhibit attached to the plaintiff's petition showed only one credit, it was nevertheless, according to the undisputed evidence, a true and correct copy of the lost original. This copy was simply used as evidence to show the basis of the plaintiff's cause of action, and the amount claimed and recovered was not that which on the face of the instrument purported to be due, but only that which was sued for.

2. As originally brought, this was a suit instituted by M. W. Hall, to whom the original note in question had been transferred by proper indorsement. He having died before the trial, the case was prosecuted by his administrator. It appears from the evidence that, prior to bringing his action, Hall had assigned this note to Mrs. Brake, as collateral security, the assignment being written on "a paper other than the note" itself; and that, subsequently, the note had been returned to him, he executing and delivering to Mrs. Brake a receipt in the following words: "Re-

ceived of M. L. Brake note signed by F. Haug and Robert Whitfield, for collection, said note being transferred by myself to said M. L. Brake to secure my note given said Brake for \$320, and due May 1st, 1892."

A motion was made in the court below to dismiss the plaintiff's action, on the ground "that the legal title to the alleged lost original note was in" Mrs. Brake "when said action was brought and filed;" and the overruling of this motion is here assigned as error. As a matter of course, if it be true that the legal title to the note was not in Hall at the time he instituted his action, this would constitute an insuperable obstacle to the prosecution of his suit, and the defendant's motion should have been sustained; for one who is a mere stranger to the legal title, albeit he may have possession of the instrument upon which suit is brought, cannot maintain an action thereon against the maker. *Dalton City Co. v. Johnson*, 57 Ga. 398. In the present case, however, it unequivocally appeared that the instrument sued on was expressly made payable "to order," and was regularly indorsed to Hall; so, he certainly cannot be regarded as a stranger to the note. On the contrary, so far as the instrument itself furnishes evidence as to its ownership, title thereto passed into Hall, and remained in him as the last indorsee, no indorsement by him to Mrs. Brake or to anyone else appearing either upon the back or upon the face of the note. It is claimed, nevertheless, that Mrs. Brake became the holder of the legal title by reason of the assignment to her above mentioned. Tested by the familiar and universally recognized rules of the law merchant, this contention is not well founded. The note being payable "to order," mere delivery of it to Mrs. Brake certainly would not pass the legal title. Nor would a mere assignment thereof, evidenced by another and entirely distinct instrument in writing, have that effect; for, "where a bill or note payable 'to order' is transferred without indorsement, the transferee does not acquire the legal, but only the equitable, title." 1 Dan. Neg. Inst. § 741. Indorsement is the only method by which the legal title to such an instrument can be transferred. *Id.* § 664a. True, it may be transferred without indorsement; "but in such case the assignment is not in the usual course of business, in accordance with mercantile custom, only the equitable title passing to the assignee." *Id.* § 729. And, to the same effect, see 4 Am. & Eng. Enc. Law, 2d ed. pp. 255, 257, citing numerous cases, both English and American: *Norton, Bills & Notes*, 94, 155. "The indorsement must be written on the instrument transferred,"—"must be somewhere on the instrument." See authorities last cited. Of course, if necessary or convenient, another slip of paper, "generally called the French name 'allonge,'" may be annexed to the instrument, on which subsequent indorsements may be written, which will have the same effect as if written upon the instrument itself, such paper being deemed a part thereof. *Ibid.*; *Wood's Byles, Bills*, 152. But a written transfer upon another and entirely distinct instrument is not permissible, and will not have the effect of passing the legal title to

a note or bill expressly made payable "to order." *French v. Turner*, 15 Ind. 59; *Doll v. Hollenbeck*, 19 Neb. 689, 641. The fact that the maker expressly stipulates that he shall be called upon to pay none other than one to whom the instrument is transferred by regular indorsement should answer as furnishing a sufficient reason upon which this rule may rest. *Norton, Bills & Notes*, 156. Another and equally important reason may, however, be given. It is indispensably necessary, if such instruments are to fulfil the object for which they were designed, that they should carry with them the indicia by which their ownership is to be determined; otherwise, their value as a circulating medium would be largely curtailed, if not entirely destroyed. Adding an *allonge* when necessary or convenient is permissible only because furthering the object of their creation, *viz.*, free and unrestrained negotiability. This is and can be the only exception to the rule that the indorsement to pass the legal title must be entered upon the instrument itself. If this rule were so relaxed as to admit of transfer evidenced by an independent slip of paper, unattached to and forming no part of the instrument, the sole purpose it was intended to subserve would be defeated; for it would necessarily lose one of the most essential characteristics of "negotiable" paper, in the ordinary and technical sense of that term, and would stand upon practically no better footing, as a circulating medium, than strictly "non-negotiable" choses in action.

We believe the rule which obtains in this state is strictly in accord with what is immediately above announced. The only embarrassment with which we have met in arriving at our conclusion in the present case is some of the reasoning employed by Mr. Justice Speer in delivering the opinion of this court in *Adams v. Robinson*, 69 Ga. 627. The facts of that case were, in brief, as follows: The instrument sued on was a draft, payable "to the order of B. H. Robinson," drawn upon D. C. Adams by F. E. Grist, agent, and duly accepted. This draft was, for value and before due, transferred to Jones & Singleterry, "by an assignment in writing in a separate paper," but was not indorsed to them. The suit proceeded in the name of Robinson for their use. The defendant sought to set up the defense that the draft was delivered to Robinson, through his agent, under an express agreement in writing that it was to be deemed void, and was to be returned, upon a certain contingency, which had subsequently happened. To this defense the plaintiff interposed the objection that the instrument was on its face negotiable, and had been regularly transferred to his uses, Jones & Singleterry, before maturity and for value, who took the paper without notice of the stipulation upon which the defendant relied as a defense. Dealing with the question thus presented, this court held (1) that the instrument was negotiable; (2) that "while the ordinary mode of transferring a negotiable instrument, payable to order, is for the payee to indorse it, an assignment thereof by the payee on a separate paper is good, and passes title to the assignee for value, before due, and without notice of

any equities between the parties, free from them;" and (3) that "such assignees could sue on the paper in their own names, but, if they saw fit to sue in the name of the payee for their use, it did not render them subject to the equities between the payee and maker." In view of our conclusion, the reasons for which we shall presently state, that this decision is not unauthoritative upon our present question, we feel at liberty to comment upon it somewhat freely, and to point out wherein we think it cannot stand the test of close scrutiny.

In the first place, if the second proposition announced therein be sound, that which follows would seem to be a palpable *non sequitur*, in so far as it is susceptible of the construction being placed upon it (as we think was intended), that notwithstanding the legal title to the instrument was in the parties named as uses, and had passed completely out of the plaintiff, he could nevertheless maintain his action. It would, indeed, lead to a most remarkable state of affairs if one who had entirely parted with all interest, legal and equitable, in a chose in action were allowed to subsequently come into court, in the role of an intermeddler and volunteer, and maintain an action, in his own name and based upon his own right, for the use of the holder of the legal title. But we cannot assent to the soundness of the court's second proposition in the *Robinson Case*. The only authority relied upon in support of the holding that the assignment then under consideration passed the legal title was § 2244 of the Code of 1882 (§ 3077 of the new Civil Code), declaring that "all choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable." The object and meaning of this section can readily and clearly be ascertained by applying the old and well-known rule of construction laid down in § 9 of the Political Code, *viz.*: "In all interpretations, the courts shall look diligently for the intention of the general assembly, keeping in view at all times the old law, the evil, and the remedy." What, then, was "the old law" when the section to be construed was, by legislative sanction and direction, incorporated into the first Code of this state? The answer is, that which we had borrowed from England, familiarly known as the "law merchant." Nothing is better settled than that, "under the common law, choses in action, except negotiable securities, could not be assigned so as to carry the legal title; and, in a court of law, any rights in them acquired by other persons than the owner could be enforced only in his name." *Western Nat. Bank v. Mackerick Nat. Bank*, 90 Ga. 342, 343. This was the evil to be corrected. As is clearly indicated by the language employed, the "remedy" adopted was to declare that an assignment of a chose in action should operate to "vest the title in the assignee," in order simply that he might accordingly have the right to sue in his own name, it being further distinctly provided that "he takes it, except negotiable

securities, subject to the equities existing between the assignor and debtor," etc. Obviously, the only reason for mentioning "negotiable securities" at all was to negative any possible inference which might be drawn from the use of the general words "all choses in action arising upon contract," that the section was intended in any manner to affect the status of such securities. The correctness of this view is made apparent by what is said by the supreme court of Nebraska in *Doll v. Hollenbeck*, 19 Neb. 639, 641, when construing a similar section of the Code of that state. In summing up, Cobb, J., says: "The object of the enactment of the 29th and 30th sections of the Code was to do away with the necessity of uses and trusts, in the matter of bringing and prosecuting actions at law; and the object of the 31st section [providing that, 'in the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed, but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due'] was to prevent such change in the practice affecting injuriously the rights of defendants. But, as the rule which was thus being changed never had any applicability to negotiable paper, the latter clause of said section was added *ex majori cautela*, lest the language of the first clause might be construed to change the existing law applicable to such securities."

It is further to be observed that the section of our Code with which we are now dealing does not undertake to prescribe the manner in which choses in action "may be assigned so as to vest the title," its object, as has just been seen, being merely to declare generally, by way of correcting the evil in "the old law," that they could be legally so assigned. The term "assigned," in this connection, is used in the sense of "transferred." Indeed, in its ordinary acceptation, the word "assign" means "to transfer to another." It is the appropriate word for a transfer of personal property, and particularly for a transfer of rights in action. 1 Abbott, Law Dict. 95. In other words, this section leaves the method of transfer to be determined according to the law governing this matter theretofore existing. Section 3681 of the Civil Code (the provisions of which were incorporated into the first Code simultaneously with those of the section now under review, and are therefore to be read *in pari materia* with the latter section) distinctly provides that the manner of transferring the legal title to a negotiable instrument not payable to bearer is by indorsement. "As the derivation of the word would indicate, an indorsement is properly written upon the back of an instrument, and this is the ordinary mode in which an indorsement is made;" yet it is now well settled that it "may be made on the face of the instrument with the same effect as if made upon the back, if such is the intent of the indorser." The rule is imperative, however, that "the indorsement must be written on the instrument transferred." See 4 Am. & Eng. Enc. Law, 2d ed. p. 259. This was the law when the legislature, upon its adoption of the first Code, undertook to effect a change in the law regard-

ing the assignability of non-negotiable choses in action, but to leave negotiable securities upon the same footing as that upon which they had always stood.

In order to bring about the desired change in "the old law," the general assembly might have provided in general terms that "the real party at interest" should have a right to maintain an action in his own name, regardless of the question whether the legal title was or was not in him. But this was not the "remedy" adopted. On the contrary, it was doubtless thought advisable not to disturb the time-honored rule that none save the holder of the legal title could prosecute his action; and, to that end, it was in effect provided that a regular assignment, in conformity to established custom, should operate to pass the legal title, and thus enable the assignee to maintain a suit in his own name. That this is true is evidenced by numerous decisions of this court giving effect to the legislative intent in adopting the section under discussion. Thus, in the recent case of *Hartford F. Ins. Co. v. Amos*, 98 Ga. 534, which cites previous decisions made by this court, it was said: "If the assignment is not in writing, the assignee cannot bring an action thereon in his own name, but must necessarily use the name of the assignor, as suing for his use." To the same effect, see also *Foster v. McGuire*, 96 Ga. 447. This was the rule applied in *Cochran v. Strong*, 44 Ga. 636, wherein it was held that where a non-negotiable "instrument is assigned to A, who, in turn, assigns it to B, and, by some means it again comes into the hands of A, he cannot sue on it in his own name for use of last assignee." On the other hand, it is no defense to an action by the holder of the legal title that he has no pecuniary interest in the suit. *Houser v. Houser*, 43 Ga. 416; *Greer v. Woolfolk*, 60 Ga. 623. The question of title is to be determined "according to the words of the instrument or some indorsement or assignment thereof," and a mere "stranger to a contract which is not payable to bearer, and not indorsed or assigned, . . . [cannot] enforce it in his own name by reason of mere possession of the writing." *Dallan City Co. v. Johnson*, 57 Ga. 398. "Where a note, draft, or check is made payable to order, the indorsement of the payee is necessary to transfer the legal title to another." *Farris v. Wells*, 68 Ga. 604. There the plaintiff brought suit upon two bank checks, drawn by the defendant on a named bank, "payable to his own order, but not indorsed." The case was dismissed on demurrer in the court below, and, in affirming the judgment, this court said: "We know of no exception to the rule that where an instrument is made payable to order the indorsement of the payee is necessary to transfer the legal title to another."

All of the cases last above cited were decided prior to that of *Adams v. Robinson*; and as the decision in the latter case would seem to be in the very teeth of the law as previously announced, if any regard is to be paid to the principle upon which all of these former cases rest, there is, at least, strong reason for doubting whether *Adams v. Robinson* is to be considered authoritative. Certainly, the doctrine it lays down has not been followed, so far, at

least, as it disregards the rule of law that none other than the holder of the legal title can bring his action. Thus, in *Benson v. Abbott*, 95 Ga. 69, it was held that where a promissory note, payable to order, was transferred by delivery to another, "but, by mistake or inadvertence, the note was not indorsed or otherwise transferred in writing," the transferee took only an equitable title; and suit could be brought only in the name of the payee, in his right, and subject to all defenses which could be urged against him by the maker. In *National Bank v. Leonard*, 91 Ga. 805, it appeared that, "at the time a promissory note was indorsed in blank, another between the same parties was folded in it," and both delivered to the bank, which, upon nonpayment of the notes, brought suit thereon in its own name. It was accordingly held that the indorsement written upon the note first above mentioned "did not operate as an indorsement or to more than an equitable assignment of the" other note, "although such may have been the intention of the parties," and that, consequently, the bank "could not maintain a suit upon the latter in . . . [its] own name without equitable pleadings setting up the requisite facts."

As the law, in positive and unequivocal terms, declares indorsement to be the method by which a transfer of the legal title to a promissory note payable "to order" shall be evidenced, it would seem that nothing short of strict compliance with this plain mandate can operate to effect such a result. Were really sought to be transferred by a mere scratch of the pen, or in any less formal manner than the law prescribes, it would not for a moment be doubted that the legal title could not be deemed to have passed, no matter what may have been the intention of the parties; the test being, not what the parties intended to do, but whether they have complied with the requirements of the law. Is there any good reason for assuming that, although the law is imperative in regard to the mode of transferring title to real property, it does not mean what it says when it in no less positive and unequivocal terms declares what shall be the manner in which the legal title to a particular kind of personal property may be transferred? Although the reasoning employed in *Adams v. Robinson* seems anything but satisfactory, and conflicts with the views herein expressed, the decision in that case may, nevertheless, stand with what is now decided. It is not authority for the proposition that a regular indorsee of a negotiable promissory note payable to order, who is apparently the holder of the legal title, cannot recover in a suit thereon if it appears in evidence at the trial that he had, prior to bringing his action, made a written assignment of the note to another, evidenced by an independent slip of paper. On the contrary, although it was held that Robinson, the plaintiff in that case, was not the holder of the legal title when suit was brought, this court, nevertheless sustained a recovery in his favor. Indeed, we might in the present case waive the question whether or not title passed out of Hall and into Mrs. Brake by reason of his written assignment to her, and, conceding that it did, cite the case of *Adams v. Robinson* as a

precedent for holding that, notwithstanding this fact, Hall was entitled to institute and maintain his action. It is to be observed that the defendant in this case, while contending that the legal title was in Mrs. Brake, and not in Hall, did not undertake to urge, or even suggest, any defense against the former. This being so, and Hall, according to the terms of the instrument and the formal entries thereon, being the ostensible holder, his title to the note could not be inquired into. Civ. Code, § 3698; *Atkins v. Cobb*, 56 Ga. 88; *Greer v. Woolfolk*, 60 Ga. 623; *Davis v. Baker*, 71 Ga. 33, 34. This rule evidently proceeds upon the theory that the instrument itself is to be looked to in determining the question of ownership; that the maker will be fully protected in treating the holder and ostensible owner as the party to whom payment is due (if at all), and therefore is not concerned with the question as to who may be equitably entitled to the proceeds, as between such holder and third persons, unless some defense be shown which would be good as against the real party at interest.

8. It appears that this note was transferred to Hall after the day therein appointed for payment, but on the second of the three days of grace allowed by law on such instruments, it being one payable at bank. The question therefore arises whether he is to be regarded as having taken the note before maturity. Mr. Parsons says in his work on Notes & Bills (vol. 1, p. 416): "A note may be negotiated on the second day of grace, and the holder will then be protected; but if negotiated on the third, there is a conflict of authority on the question whether the note is dishonored." He adds that he considers the correct rule to be that a note is negotiable even on the last day of grace; and such is the view entertained by Mr. Daniel, also. 1 Dan. Neg. Inst. § 787a. See further, 2 Randolph, Com. Paper, § 1037. This rule obtains in New York, Illinois, New Hampshire, Maine, and Iowa. See *Continental Nat. Bank v. Townsend*, 87 N. Y. 8; *Walter v. Kirk*, 14 Ill. 55; *Crosby v. Grant*, 36 N. H. 273; *Farrell v. Lovett*, 68 Me. 330, 28 Am. Rep. 59; *Bosch v. Kassing*, 64 Iowa, 312. A contrary rule is of force in Massachusetts. *Pine v. Smith*, 11 Gray, 38. That case does not, however, go further than to rule that a transfer on the last day of grace is not to be considered as before maturity, it being conceded that a transfer on the first or second day of grace would clearly be before dishonor. In *Fox v. Kansas City Bank*, 30 Kan. 441, it was held that a negotiable bill or note indorsed and transferred on the first day of grace was negotiated before maturity. And see *Savings Bank v. Bates*, 8 Conn. 505, in which it appeared that the transfer was made on the second day of grace. In the latter case, Bissell, J., said (p. 511), in delivering the opinion of the court: "It is too well settled to admit of dispute, that in regard to negotiable notes, the days of grace make a part of the original contract. Such a note, payable by the terms of it in sixty days, is in law a note payable in sixty-three days. Before the expiration of that time, no demand of payment can be made; and, if negotiated on the sixty-first or sixty-

second day, it is not negotiated overdue." Thus, it will be seen that, while there is not unanimity of opinion upon the question whether or not a bill or note on which grace is allowable negotiated on the last day of grace is taken subject to existing equities, etc., the entire current of authority is to the effect that the time for payment expressed on the face of such an instrument is not to be regarded as fixing the day upon which the same will become due, but that days of grace are to be computed in determining the date of its maturity. Were this otherwise, however, we think our statute on the subject (Acts 1875, p. 92) would be conclusive, and should control our decision; for it was therein provided that "the last day of grace shall be deemed the date of maturity of any bill of exchange, check, or promissory note entitled to the three days known as 'days of grace,' for all the purposes of this act." Civil Code, § 8679. Accordingly we hold that one to whom a negotiable promissory note is transferred on the second day of grace takes the same before maturity, and therefore he will be presumed to have been a bona fide purchaser for value. Whether the same would be true as regards a transfer made on the last day of grace, we are not now called upon to decide.

4. Although, apparently, a joint principal, the defendant Haug filed a plea in which he set up the defense that his true relation to the note was that of a surety only, and that he had been discharged from all liability thereon by reason of the fact that his principal had, prior to its transfer to Hall, and with full notice to the latter of all the facts, paid off the note in full. In support of this defense, sufficient evidence was introduced at the trial to establish the following facts: Haug really signed the note as surety, and merely for the accommodation of his principal, Whitfield, receiving none of the money, and deriving no benefit therefrom. On January 21, the second day of grace, Whitfield went to the Milledgeville Banking Company, the payee, named in the note, paid it in full, and had it indorsed by the bank to his firm, Whitfield & Allen. Subsequently, on the same day, the note was indorsed and transferred by Whitfield & Allen to M. W. Hall, or order. This was all done without the knowledge or consent of Haug. No proof whatever was offered as to the circumstances connected with the transfer of the note to Hall, nor was there any evidence showing that he had any knowledge or even an intimation that the note had been paid, or had any reason to suspect that Whitfield & Allen were not at liberty to negotiate it. Plainly, then, the defense set up by Haug was not made out; for in the absence of proof showing that Hall had notice of the defendant's true relation to the paper, and of the fact that, notwithstanding it had been paid off in full, it had, without his consent or authority, again been put into circulation, his plea could avail him nothing. Although Whitfield & Allen may not have occupied the position of a bona fide holder for value, yet, if Hall purchased the note from them in perfect good faith, he would be fully protected against the

defense interposed by Haug. It cannot be questioned that "one may be a bona fide holder, despite bad faith on the part of his indorser." 2 Am. & Eng. Enc. Law, 1st ed. 390." Nor would the mere fact that Whitfield was a member of the firm having possession of the paper be notice to Hall that it had been paid. Indeed, it has been held that, even though the maker himself may be in possession of a note before it has fallen due, this fact will not charge a purchaser with notice that it has been paid off and discharged. *Mishler v. Reed*, 76 Pa. 76. And in that case, although it appeared that the note had been discounted at the instance of the maker himself, and its proceeds placed to his credit, the plaintiffs were allowed to recover in a suit against one signing as indorser, notwithstanding the latter's agreement with the maker was that the proceeds should be placed in bank to the credit of himself as indorser. As a general rule, "payment before maturity is at the risk of the party making it, and constitutes no defense against a subsequent bona fide holder for value before maturity." 3 Randolph, Com. Paper, § 1470. "Payment can only be made before maturity by consent of both debtor and creditor. And it can only be made with perfect safety at or after the maturity of the instrument, unless the payor receives it in his hands and cancels it; for a payment before maturity is not in the usual course of business; and should the bill or note afterwards, and before maturity, reach the hands of a bona fide holder for value, without notice, such holder could enforce a second payment." 2 Dan. Neg. Inst. § 1283. And, to the same effect, see *Paris v. Moe*, 60 Ga. 90. Thus, it will be seen how strictly are the rights of a bona fide purchaser guarded; and rightly so, for otherwise commercial paper could not possibly serve the great beneficial purpose for which it is intended.

If, as we are bound to assume from the record before us, Hall purchased in entire good faith, Haug would have no right—legal, equitable, or moral—to claim that he was discharged from liability simply because his principal, before maturity, got possession of the note by paying the original payee, and without express authority from Haug and without his knowledge, again put the paper in circulation. Haug, in the first instance, allowed this paper, a negotiable promissory note, to be floated into the channels of trade, representing to the world that he was a joint principal with Whitfield, bound to make payment at maturity, without reference to how many times, or through whom, the note might in the meantime be negotiated. Therefore, as against an innocent holder of the paper, he should not be permitted to urge his secret relation thereto, and set up a defense which he could not assert in the capacity in which he executed the payer, and in which he held himself out as being bound.

5. Under the facts disclosed by the evidence, a finding for the plaintiff was inevitable. Accordingly, it was proper to direct a verdict in his favor.

Judgment affirmed.

AMERICAN TRUST & BANKING COMPANY *et al.*, *Plffs. in Err.*,

v.

R. W. BOONE, Admr., etc., of B. F. Cooper, Deceased, *et al.*

(.....Ga.....)

- *1. As a general rule, a bank may assume that a trustee will apply money deposited by him to its proper purposes under the trust, and is not accountable for any misappropriation of trust funds in which it does not participate; but a bank cannot, without incurring liability to the true owner, knowingly appropriate to the satisfaction of a debt due to it by another trust funds deposited with it by him after the creation of such debt.
2. Where, in this manner, a bank improperly appropriates a portion of a fund to its own use, it is liable for interest thereon from the time of demand by the true owner and its refusal to pay, and is also liable for interest computed from the same time upon a balance of the identical fund not so appropriated, but payment of which was then demanded and refused.
3. A bank in this state will not be protected in paying a check of a person who had been lawfully adjudged to be insane, and who was in fact insane when the check was drawn. This is true though the fact of insanity was unknown to the bank at the time of payment, and though the adjudication of insanity was made in another state.
4. The grounds of the motion for a new trial based on alleged error in admitting evidence did not disclose what, if any, objections to the same, were made at the trial. There was no error in the charges complained of. The charge as a whole fairly submitted to the jury the issues involved. The evidence warranted the verdict, and there was no error in denying a new trial.

(August 7, 1897.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action brought to reach funds which plaintiff's intestate had deposited with the defendant bank. *Affirmed.*

The facts are stated in the opinion.

Messrs. Ellis & Gray, for plaintiffs in error:

An administrator is a public officer created by law, required to give bond for the faithful discharge of his duties, and charged with the sole responsibility of administering his estate in a proper and lawful manner.

Code, § 2505.

Nobody has the right to question his acts, or his manner of conducting business, unless there is a manifest misappropriation of the assets. The law imposes upon him the duty of making periodical reports of his actings and doings, and so long as he is prudently and honestly

*Headnotes by COBB, J.

NOTE.—As to the validity of a deed made by an insane person, see *Riley v. Carter* (Md.) 19 L. R. A. 489, and *note*.

As to the civil liability of an insane person for torts or negligence, see *Williams v. Hays* (N. Y.) 26 L. R. A. 153, and *note*.

As to contracts of insane persons generally, 40 L. R. A.

managing the estate not even the beneficiaries under his trust can call his methods in question.

Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 Am. Rep. 338; 1 Wms. Exrs. 6th ed. p. 709; 2 Wms. Exrs. p. 998; 1 Perry, Tr. § 225.

Third parties dealing with him are entitled to the benefit of the presumption that his acts are proper unless a corrupt motive is manifested.

Wood's Appeal, 92 Pa. 379, 37 Am. Rep. 696; *Munnerlyn v. Augusta*, 88 Ga. 336.

The bank had the right to deal with him as with any other individual, presuming that in his capacity as administrator his duty would be performed.

Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 Am. Rep. 342; *Field v. Schieffelin*, 7 Johns. Ch. 150, 11 Am. Dec. 441; *Wood's Appeal*, 92 Pa. 379, 37 Am. Rep. 694.

If the check was payable to Cooper as administrator, a proper indorsement by him as administrator was all the bank could require; and if, under his direction, the deposit was made to his individual credit, it was exactly the same as if he had drawn the actual currency and afterwards deposited this to his individual credit.

Gate City Bldg. & Loan Assn. v. National Bank of Commerce, 126 Mo. 82, 27 L. R. A. 401; *Benton v. German-American Nat. Bank*, 122 Mo. 332; 2 Morse, Banks & Banking, § 457.

The administrator clearly had the right to sell the exchange, the bank had the right to buy, and the sale and purchase of the paper carried no notice of misappropriation or intended misappropriation.

Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333, 94 Ga. 356; *City Bank v. Kent*, 57 Ga. 283; *Gate City Bldg. & Loan Assn. v. National Bank of Commerce*, 126 Mo. 82, 27 L. R. A. 401; *Kaiser v. United States Nat. Bank*, 99 Ga. 258.

Keeping a deposit of trust funds by the trustee, in bank to his individual credit, is not a conversion. There must be a misappropriation of such funds, and a failure to account for them.

Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333.

If the money was properly deposited, and the bank had no notice that the administrator was misapplying the funds, or intended to misapply them, then, as to such funds, the only relation that existed between the bank and Cooper was that of debtor and creditor.

Williams v. Williams, 55 Wis. 800, 42 Am. Rep. 708; *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Case v. Henderson*, 23 La. Ann. 49, 8 Am. Rep. 590; *Carr v. National Security Bank*, 107 Mass. 45, 9 Am. Rep. 6.

If Cooper, by depositing the money of his trust estate to his individual credit, became a

there are a few cases in a note to *Howard v. Howard* (Ky.) 1 L. R. A. 610; and see also *Atwell v. Jenkins* (Mass.) 28 L. R. A. 694.

As to renewal of obligations by incompetent persons, see *Memphis Nat. Bank v. Neely* (Tenn.) 84 L. R. A. 274, and *note*.

creditor only of the bank, and the bank by receiving such deposit in ignorance of any misapplication or intention to misappropriate the same, only became his debtor, then such funds were entirely subject to Cooper's check, and likewise subject to all other rights which the creditor would have against the bank, such as refusal to pay checks, etc., and also subject to all other rights which the debtor bank would have against its creditor, such as charging up indebtedness, etc.

Mount Sterling Nat. Bank v. Greene, 99 Ky. 262, 32 L. R. A. 568; *Bank of Maryland v. Windisch Muhlhauser Brewing Co.* 50 Ohio St. 151; *Re Franklin Bank*, 1 Paige, 249, 19 Am. Dec. 413, and note; *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350, 3 L. R. A. 273, 10 Am. St. Rep. 669, and note.

If funds so deposited were subject to Cooper's check, they were likewise subject to anything else equivalent to a check, and to the rights of the banker as to obligations due the bank.

Marsh v. Oneida Central Bank, 84 Barb. 298; *Ketchum v. Stevens*, 6 Duer, 463.

A promissory note payable at bank is equivalent to a check or draft of the maker upon any funds standing to his credit in the bank.

3 Randolph, Com. Paper, § 1441; 1 Dan. Neg. Inst. § 326 (a), note 3, p. 302; 2 Morse, Banks & Banking, § 557; Bolles, Banks, § 453; *Manderille v. Union Bank*, 9 Cranch, 9, 3 L. ed. 639; *Griffin v. Rice*, 1 Hilt. 184.

The bank is bound to apply all available means to the payment of a note which by its terms is payable in bank.

Georgia Seed Co. v. Talmadge, 96 Ga. 254; *German Nat. Bank v. Foreman*, 188 Pa. 474; *Commercial Nat. Bank v. Henninger*, 105 Pa. 496; *Bedford Bank v. Acoam*, 125 Ind. 584, 9 L. R. A. 560.

Where a note is by its terms made payable at a bank, upon which there is an indorser, and at the time of maturity there are sufficient funds to the credit of the maker to meet such note, and such funds have not been otherwise appropriated by the maker, the bank is bound to pay such note by charging the same up against such deposit, and its failure to do so operates as a release of the indorser.

First Nat. Bank v. Peltz, 176 Pa. 513, 36 L. R. A. 832; *German Nat. Bank v. Foreman*, 188 Pa. 474; *Commercial Nat. Bank v. Henninger*, 105 Pa. 496; *Bedford Bank v. Acoam*, 125 Ind. 584, 9 L. R. A. 560; *Mechanics' & T. Bank v. Seitz Bros.* 150 Pa. 632.

It is immaterial that the notes were for pre-existing debts. Taking funds in payment of such debts is taking for value.

Brooklyn City & N. R. Co. v. National Bank of the Republic, 102 U. S. 14, 26 L. ed. 61; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268-273; *Kaiser v. United States Sav. Bank*, 99 Ga. 258; *Colebrooke, Collateral Securities*, § 18; 1 Morse, Banks & Banking, § 600; *Gibson v. Conner*, 3 Ga. 47.

The presumption is that every person who is capable of carrying on a business is sane, and third parties have the right to act upon this presumption, unless there is some notice of some insanity.

11 Am. & Eng. Enc. Law, p. 155, and note 1, p. 159, and note 1; *Carter v. State*, 12 Tex. 40 L. R. A.

500, 62 Am. Dec. 539; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514.

Even an insane person may pay his debts, and where there was no fraud exercised, and the check was given for a legitimate purpose, such a check would be valid.

Lancaster County Nat. Bank v. Moore, 78 Pa. 407, 21 Am. Rep. 24; *Behrens v. McKenzie*, 23 Iowa, 383, 92 Am. Dec. 428; *Young v. Stevens*, 48 N. H. 183, 97 Am. Dec. 592.

If the bank had no knowledge of Cooper's insanity, it was bound to pay his checks.

Rusk v. Fenton, 14 Bush, 490, 29 Am. Rep. 413; *Wallace v. Jones*, 93 Ga. 420.

Messrs. Clay & Blair, Arnold & Arnold, W. R. Power, and King & Anderson for defendant in error.

Cobb, J., delivered the opinion of the court:

Boone, as administrator of B. F. Cooper, brought suit against the American Trust & Banking Company. The case made by the evidence was as follows: B. F. Cooper died on November 2, 1893, and J. H. Cooper, a resident of Atlanta, Georgia, was appointed administrator of his estate by the county court of Orange county, Florida. Among the assets of the estate was a policy of life insurance for the sum of \$5,000. A check for this amount, payable to J. H. Cooper, as administrator of B. F. Cooper, was received by such administrator on December 21, 1893. It was indorsed by him as administrator, and deposited to his individual credit in the defendant bank. He stated to the bank's officer that he was the sole heir of the estate. Having been in business, and having an account with the bank, he had become indebted to it in the sum of \$1,910.74, evidenced by promissory notes. The bank, claiming to act under instructions from him, charged against his account the amount of the notes. After the payment of sundry checks drawn by him, there remained to his credit the sum of \$1,810.53. About December 26, 1893, he became insane; and on the 30th day of December, 1893, he was adjudged a lunatic by the circuit court of Orange county, Florida. The fact that he was insane, and had been so adjudged, was unknown to the bank when it paid checks drawn subsequent to the judgment. He died shortly afterwards. The plaintiff was appointed administrator *de bonis non* of B. F. Cooper on April 19, 1894. B. F. Cooper left a number of heirs, and no settlement of the estate was ever made by J. H. Cooper, as administrator. The plaintiff contended that the bank received the check of \$5,000 knowing that it was an asset of the estate of B. F. Cooper, and that the crediting of the amount to the individual account of J. H. Cooper was such a misappropriation of the fund as to render it liable to the legal representatives of B. F. Cooper. The bank denied any notice or knowledge that J. H. Cooper contemplated misappropriating the money, or that the money did not in fact belong to him, and claimed to have received the deposit in the regular course of business, and to have paid upon his checks all of the sum so deposited, except \$1,810.53, which amount it has always been ready and willing to pay to the person entitled thereto. It further claimed that the deposit being general, without agree-

ment to pay interest, it was not liable to pay interest thereon. The jury returned a verdict for the plaintiff for \$3,860.27, principal, besides interest. This amount was made up of the following items: Balance admitted, as standing to the credit of the estate, \$1,810.53; amount of notes due the bank, charged to the account of J. H. Cooper, \$1,910.74; check paid on January 2, 1894, drawn by J. H. Cooper after he had been adjudged insane by the courts of Florida, \$139. The defendant made a motion for a new trial, which the court overruled, and it excepted.

1. Every person is presumed to have the intention of discharging whatever duty the law may cast upon him. It is therefore presumed that a trustee will faithfully administer the trust, and will not misappropriate the funds of the estate which are committed to his care. When a trustee deposits money in a bank, the bank has a right to assume that the money so deposited will be applied by the trustee to the proper purposes under the trust; and, acting under this assumption, it may lawfully pay the checks drawn by the person depositing the money, whether signed in his representative capacity or not. But while this is true, if it actively aids the trustee in misappropriating the fund, and especially if it participates in the misappropriation, and receives the fruits of such misappropriation by obtaining payment of a debt due it by the trustee in his individual capacity, the bank would be liable to the true owners of the fund for the amount thus wrongfully appropriated by it to its own uses. *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333; *Morse, Banks & Banking*, 3d ed. § 317. Where a debt thus paid was created before the trust funds were deposited, and the fact that such funds were impressed with the trust was known to the bank by entries upon the check which was delivered to it, the fact that the depositor made statements to the bank that he was the real owner of the fund, and the bank acted upon such statements, would not relieve the bank from its liability to the true owner of the fund when it appeared that such statements were not true.

2. Where it appeared in such a case that a demand was made upon the bank by the true owner for the amount which had been misappropriated, as well as for the amount which was admitted to be due, and the bank refused payment under such demand, it became liable for interest upon the whole amount from the date of such refusal.

3. On January 2, 1894, when the bank paid the check for \$139 drawn by J. H. Cooper, he had been adjudged to be insane by a court in Florida having jurisdiction of such matters, and there was also other evidence that he was at that time, and subsequent thereto, in fact insane. This being true, was the bank, which had no notice of the fact of insanity, or that J. H. Cooper, by a judgment of a court, had been adjudged to be insane, protected on account of such ignorance in the payment of the check? The law of this state upon such question is to be found embraced in § 3652 of the Civil Code. It is there provided that an insane person cannot contract prior to commission sued out and guardianship appointed; that a lunatic may contract during lucid in-

tervals; after guardianship, he cannot. By the terms of this section it is declared that an insane person, using this expression in the sense of a person *non compos mentis*, whether idiot, lunatic, or imbecile, has no power to enter into a contract after such insanity takes place. While there is a conflict in the authorities as to the effect to be given to a contract made by insane persons, "it may now be regarded as a general rule of universal law, that the contracts of a lunatic, idiot, or other person *non compos mentis*, from age or other infirmity, are utterly void." 1 Dan. Neg. Inst. 4th ed. § 209; *Rogers v. Blackwell*, 49 Mich. 192; *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73; *Seaver v. Phelps*, 11 Pick. 304, 22 Am. Dec. 372; *Anglo-Californian Bank v. Ames*, 27 Fed. Rep. 727. Judge Story, in his treatise on Bills of Exchange, discussing the question of the disability of insane persons to bind themselves as drawers, indorsers, or acceptors of such papers, says: "This disability flows from the most obvious principles of natural justice. Every contract presupposes, that it is founded in the free and voluntary consent of each of the parties, upon a valuable consideration, and after a deliberate knowledge of its character and obligation. Neither of these predicaments can properly belong to a lunatic, an idiot, or other person, *non compos mentis*, from age, or imbecility, or personal infirmity. Hence, it is a rule, not merely of municipal law, but of universal law, that the contracts of all such persons are utterly void. The Roman law, in expressive terms, adopted this doctrine: *Furiosus nullum negotium gerere potest, quia non intelligit, quod agit.*" Story, Bills of Exchange, § 106.

The authorities above cited establish the doctrine that a contract by an insane person, whether executory or executed, is utterly void; and this, too, when there has been no judicial determination of the fact of insanity except in the trial of the issue where the question is raised to defeat the contract which is sought to be enforced or set aside. Where there has been a judicial determination of the fact of insanity by a court having jurisdiction to inquire into and determine the mental condition of the individual concerned, it would seem that this would be simply evidence admissible for the purpose of proving the fact of insanity, and evidence of a high character, but only cumulative of other competent evidence on the subject. That an adjudication by a court having jurisdiction to determine the question is *prima facie* evidence everywhere of the fact of insanity is well established by authority. 2 Black. Judgm. § 803; *Buswell, Insanity*, §§ 197-199; *Woerner, American Law of Guardianship*, § 128. Under the law of this state above quoted, after the fact of insanity has been established by a court of competent jurisdiction in this state, and the affairs of such person vested in a guardian, the power of such person to contract is entirely gone, and such contracts are absolutely void. This part of the section is consonant with the adjudications on the same subject in other states. In the case of *Pearl v. M'Donnell*, 3 J. J. Marsh. 659, 20 Am. Dec. 199, it was held that, after office found, the contracts of idiots or lunatics were void. Judge Buckner quotes in his opinion to sustain this decision the following

extract from Bacon's Abridgment: "Yet it seems that even at law, the contracts of idiots and lunatics, after office found, and the party legally committed, are void, and it must be at the peril of him, who deals with such a one." 3 Bacon, Abr. 539. The same principle is recognized in the case of *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391. It is true that, in the cases cited, the adjudication of lunacy was had in the same jurisdiction in which it was pleaded; but this would not alter the application of the doctrine so far as the adjudication of lunacy is to be used as evidence of the fact. While it may be that, in the jurisdiction in which the person is declared to be insane, the judgment would be conclusive, still the judgment on this subject lawfully rendered in any other jurisdiction would be at least prima facie evidence of the fact of lunacy; and, in any case where it is shown either by a judgment of a court or other competent evidence that the person making the contract was at the time of its execution *non compos mentis*, such contract is void. And "the mere circumstance that, for the time being, he so deputed himself as to conceal his lunacy or imbecility, cannot alter his right to be protected against his own misfortune. And, though honest persons may be ignorant of his condition, that is their misfortune, and they should not be allowed to throw it upon one already helpless." 1 Dan. Neg. Inst. § 210. "The right of avoiding a contract exists, notwithstanding the person with whom the insane man contracted was not apprised of and had no reason to suspect the existence of such insanity, and did not overreach him by any fraud or deception." *Hovey v. Hobson*, 53 Me. 451, 453, 89 Am. Dec. 705.

There being evidence that at the time the check in question was drawn by Cooper, and at the time it was paid by the bank, Cooper had not only been adjudged insane by a court in another state, but was in fact insane, shown by other evidence than the judgment, the check was absolutely void, and the bank paid it at its peril, and must bear the loss. The judgment of the court in Florida adjudicating the question of J. H. Cooper's insanity, if not absolutely binding and conclusive upon the question of his mental condition, on account of his not having been domiciled in the state of Florida at the time the court passed upon the question, would still be admissible in evidence, and would be prima facie proof of the fact that the judgment sets up. Cooper, though a citizen of Georgia, having submitted himself to the jurisdiction of the courts in Florida by accepting an appointment as administrator of B. F. Cooper's estate, gave to the courts of that state the right to inquire into his mental condition in order to determine whether he was still able to discharge the duties he had assumed under the Florida law; and, having jurisdiction for this purpose, the judgment of the courts of that state would be prima facie evidence in the courts of this state.

4. The record discloses no error which would require the granting of a new trial, and the motion was properly overruled.

Judgment affirmed.

All the Justices concur.

40 L. R. A.

SOUTHERN RAILWAY COMPANY,
Plff. in Err.,
v.

Sherman COVENIA

(.....Ga.....)

***1. Although the declaration stated facts** showing the tortious killing of the plaintiff's child by the defendant, and alleged that the child "was a boy well formed, precocious, and of strong and robust physical powers for a child of his age; that he was physically sound in every respect, and was capable of rendering, and did render, to the plaintiff valuable services, by going upon errands to neighbors residing near to plaintiff's residence, picking up and bringing in coal and chips to make and keep burning fires in the house, bringing the broom and other articles used in house cleaning to his mother, picking up and carrying out of the house trash and litter which tended to render untidy in appearance plaintiff's home, watching and amusing plaintiff's younger child while his wife was engaged in cooking and attending to her household duties; and that these services were worth to the plaintiff the sum of \$2 per month,"—no cause of action entitling the plaintiff to recover for the child's services was set forth, it being also alleged in the declaration that the child was only one year, eight months, and ten days old. The allegations of the declaration should be construed all together, and the courts will take judicial cognizance of the fact that an infant of this age is incapable of rendering valuable services.

2. In such a case the father of the child killed is entitled to recover the expenses necessarily and reasonably incurred in the burial of the child, including compensation for the loss of such time on the father's part as was needed for this purpose.

(Atkinson, J., dissents.)

(December 17, 1896.)

ERROR to the City Court of Brunswick to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful killing of plaintiff's minor child. *Affirmed.*

The facts are stated in the opinion.

Messrs. Goodyear & Kay, for plaintiff in error:

An action is not maintainable where the child injured was of such tender years as to be then unable to render any services capable of being estimated as a monied value.

6 Bacon, Abr. ed. 1856, p. 551; Hutchinson, Carr. 2d ed. § 773; *Hall v. Hollander*, 7 Dowl. & R. 133; *Nederlandsch-Amerikaansche Stoomvaart Maatschappij v. Hollander*, 20 U. S. App. 225, 59 Fed. Rep. 419, 8 C. C. A. 169; *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491.

The English rule is of force in Georgia by the adoption of the common law, and because of no statutory change.

Shields v. Yonge, 15 Ga. 349; *Allen v. Atlanta Street R. Co.* 54 Ga. 503; *Ellison v. Georgia R. Co.* 87 Ga. 710.

One of the facts pleaded was that the

*Headnotes by SIMMONS, Ch. J.

NOTE.—For a large collection of authorities as to judicial notice, see note to *Olive v. State* (Ala.) 4 L. R. A. 33.

Covenia child was twenty months and ten days old, and this allegation, judged by human experience, shows that it was a physical impossibility for a child at that age to render any services capable of a moneted value.

The court should take judicial knowledge of the absurdity of a twenty-months-old child being capable of performing services for the loss of which a recovery could be had.

Western & A. R. Co. v. Young, 81 Ga. 416.

No recovery for any expense can be had.

See *Nederlandsch-Amerikaansche Stoomvaart Maatschappij v. Hollander*, 20 U. S. App. 225, 59 Fed. Rep. 417, 8 C. C. A. 169; Schouler, Dom. Rel. § 259; *Carey v. Berkshire R. Co.* (Mass.) 48 Am. Dec. note commencing p. 619; Wood, Mast. & S. §§ 227, 228.

Messrs. Symmes & Bennet and Johnson & Krauss, for defendant in error:

The allegations of expenses of the funeral would, in any event, sustain the court's ruling.

Ohio & M. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 260; *Cary v. Berkshire R. Co.* (Mass.) 48 Am. Dec. 628, notes; Field, Damages, p. 507.

We know of no law that authorizes this court to judicially determine that a child of any given age, and especially of an age at which it would be ordinarily capable of locomotion, and under the allegation was capable of such locomotion, and capable of ordinary conception and understanding, would be incapable of rendering services of any value whatever under any circumstances, to its parents, in spite of the admission of truth that must be conceded in considering the demurrer. Code, § 2960; *Central R. & Bkg. Co. v. Rylee*, 87 Ga. 491, 13 L. R. A. 634; *Central R. & Bkg. Co. v. Golden*, 93 Ga. 510; *Savannah, F. & W. R. Co. v. Smith*, 93 Ga. 743; *Sugarman v. Atlanta Consol. Street R. Co.* 94 Ga. 604.

In an action for causing the death of a child about three years old, proof of special pecuniary damages is not necessary to maintain the action, etc.

Ihl v. Forty-Second Street & G. Street Ferry R. Co. 47 N. Y. 317, 7 Am. Rep. 450; *Bliss v. South Hadley*, 145 Mass. 91; Schouler, Dom. Rel. § 258, p. 405; *Nederlandsch-Amerikaansche Stoomvaart Maatschappij v. Hollander*, 20 U. S. App. 225, 59 Fed. Rep. 417, 8 C. C. A. 169.

The services of the child, no more than those of the wife, are to be estimated by the merely physical and gross standard.

Cooley, Torts, 228, note; *Hartfield v. Roper* 21 Wend. 615, 34 Am. Dec. 274; *Carey v. Berkshire R. Co.* (Mass.) 48 Am. Dec. 622, 623, notes.

Simmons, Ch. J., delivered the opinion of the court:

Whatever may be the rule in other jurisdictions, it is well settled in this state that the gist of an action by a parent to recover damages for the death or injury of a minor child is the loss of services. *Shields v. Yonge*, 15 Ga. 349; *Allen v. Atlanta Street R. Co.* 54 Ga. 503. The loss of service being the cause of action, it follows that when the infant is incapable of rendering service at the time of its death or injury the parent cannot recover. This principle was recognized by the counsel of the 40 L. R. A.

plaintiff in the court below, for he alleged in the declaration that the child was capable of rendering service, and also specified what acts of service it did render, and the value thereof per month; but in the same declaration it was alleged that the child was but one year, eight months, and ten days of age. One of the grounds of the demurrer was that the plaintiff shows by his allegations in his petition that the child "was of such tender years as to be unable to have any earning capacity, and hence the defendant could not be held liable in damages for the killing of said child, even if negligently done." The question is, therefore, squarely made whether the court, on demurrer, can take judicial cognizance of the fact that a child of this tender age is incapable of rendering such service as would authorize the parent to recover, or whether, in such a case, the court is bound to submit the matter to the jury. In the case of *Minnesota v. Barber*, 186 U. S. 321, 34 L. ed. 457, Mr. Justice Harlan said: "If a fact alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice." In *Ho Ah Kow v. Nunan*, 5 Sawy. 560, Mr. Justice Field said: "We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench, we are not struck with blindness, and forbidden to know as judges what we see as men." In the case of *King v. Gallun*, 109 U. S. 99, 27 L. ed. 870, it was held that "the court will take judicial notice of matters of common knowledge, and of things in common use." "Courts will take judicial notice of facts generally known as of uniform occurrence, or the invariable action of natural laws." 12 Am. & Eng. Enc. Law, p. 196. The fact that a child of less than two years of age cannot perform any services of value to its parent is a matter of common knowledge to all men. It is as well known to the judge as it is to the jury. It being so known to the judge, why should he not act upon it, when he is called upon to do so by proper pleading? Why is he less qualified than the jury to declare a well-known fact? Why should he submit such a question to a jury, when, if they found contrary to this well-known fact, he would be compelled to set aside their verdict? Why should he go through the farce of a trial, at the expense of the country in time and money, in order to have a jury decide a fact which is already well known to everyone? There is no necessity for a jury trial when there is no issue of fact. In our opinion, there can be no issue of fact as to the ability of a child two years old to perform valuable services. Even if the parent should testify that a child of that age could render services of the value of \$2 per month, it would be so inconsistent with every person's knowledge of the incapacity of children of that age to render service that such testimony would be unworthy of credit. In the case of *Hall v. Hollander*, 4 Barn. & C. 660, Bayley, J., in discussing an injury to a child two and a half years old, said: "It is manifest that the child was incapable of performing any service." All courts of any respectability, so far as I know, decide as a matter of law that children of tender years cannot be guilty of contributory

negligence. Upon what reason are these decisions made? Upon what theory do the courts hold this as a matter of law? The answer is apparent. Because reason, experience, and common sense teach that a child of that age has not the sense or the capacity to contribute to any injury to itself. It cannot at that age be guilty of any negligence. If the courts can decide this as a matter of law, why can they not decide also, as matter of law, that such a child has no earning capacity? We see no reason why it cannot be done.

But it is contended by the demurrer in the court below that it was admitted that the child was capable of rendering service, and that therefore the court was right in overruling the demurrer. The declaration enumerated certain services of the child, which is alleged were worth \$2 per month. In passing upon a demurrer to a declaration, the court considers all the allegations therein. The demurrer admits all the facts well pleaded. If all the facts, taken together, show that the plaintiff is not entitled to recover, the court should sustain the demurrer, although some of the facts alleged would show the measure and amount of the damages. If the major premise in the declaration shows no cause of action, the minor premise will not aid in sustaining it. The controlling fact alleged in this declaration was the age of the child and consequently its incapacity to render service. We have shown that by reason of its tender age it could not perform service for the parent. Conceding, for the sake of the argument, that the fact alleged in the declaration that the child picked up chips, amused the baby, etc., was admitted by the demurrer, there was still no admission that these simple acts were of any value. The allegation in the declaration that they were valuable to the amount of \$2 per month was an opinion or conclusion of the pleader. It was necessarily an opinion or conclusion, because there was no standard by which services of this sort could be valued. We know, as matter of fact, that children of this age are not hired or employed. There can, therefore, be no criterion by which the value of such services could be estimated but that of an opinion. It is well settled that a demurrer does not admit opinions or conclusions of the pleader. If a man, in his action for personal injuries, alleges that he was damaged \$10,000, and there is a demurrer to the declaration, the demurrer does not admit the amount of damages claimed. Moreover, a demurrer does not admit facts which are in their nature improbable or impossible. In the case of *Cole v. Maunder*, 2 Rolle, Abr. 548, one person sued another for damages for throwing at and striking him with a stone. Defendant pleaded that he threw stones at him "*molliter et molli manu*," and that they fell upon him "*molliter*," and it was

held not a good justification; the judges saying that one cannot throw stones "*molliter*," although it were confessed by demurrer. Suppose this child had been only six months old, and these allegations as to service and value had been made; it could not be held that a demurrer to the declaration admitted that a child six months old could render service. The allegation would have been improbable and impossible. Suppose a boy five years old were indicted for the crime of rape, all the necessary allegations being made, certainly a demurrer to such an indictment would not admit that the boy did or could commit the offense charged. Suppose, again, that one female should sue another for the offense of seduction, and the declaration contain all the necessary allegations, would it be held that a demurrer by the defendant would admit that she did commit the act necessary to constitute the crime? These illustrations are given for the purpose of showing that a demurrer to a declaration cannot be held to admit impossible or improbable allegations of fact, so as to prevent the court from passing upon the allegations which in their nature are contrary to common experience and common knowledge as matter of law; and to compel him to submit them to a jury. We think, therefore, that the court should have sustained the demurrer in so far as to hold that the parent could not recover damages for the death of the child on account of loss of its services.

2. It is well settled that, although a parent cannot recover damages for the death or injury of his child unless the child was capable of rendering service, he can recover, in an action against the person who inflicted the injury, for his trouble and expense in caring for the child, and, if it dies from the injuries inflicted he can recover his necessary and reasonable expenses in the burial, including compensation for the loss of such time on the parent's part as was needed for this purpose. See *Dennis v. Clark*, 2 Cush. 347, 48 Am. Dec. 671, where this subject is elaborately discussed by Metcalf, J. We therefore hold that, while the father in this case cannot recover for the death of his child, he can recover for the expenses he incurred and the loss he sustained rendered necessary by the conduct of the servants of the railroad company; and on this latter ground we affirm the judgment of the court below. If it is necessary, let this part of the declaration stand, in order to try the amount of expenses necessarily incurred by the father.

Judgment affirmed, with direction.

Atkinson, J., dissenting:

I dissent from the judgment as rendered. There should be an affirmance without qualification.

ILLINOIS SUPREME COURT.

Charles ORCHARDSON, *Appt.*,
v.

Amelia T. COFIELD *et al.*

(171 Ill. 14.)

1. **A general verdict of invalidity of a will** is not inconsistent with a special verdict finding capacity to transact general business, and to understand the business in which testatrix was engaged when making the will, but also finding undue influence over her at the time.
2. **A will prompted by the testatrix's delusion induced by her belief in spiritualism** that the chief beneficiary, who was not the natural object of her bounty, was gifted with supernatural powers, is invalid for want of testamentary capacity of the testatrix, although a mere belief in spiritualism is not proof of insanity.
3. **A will is void** if procured by a stranger to be executed in his own favor by an aged and feeble woman laboring under the influences of an insane delusion brought upon her through his machinations.
4. **A morbid delusion relating to the very matter of the testamentary disposition** of one's property deprives her of testamentary capacity, notwithstanding she has capacity to transact ordinary business and knows and understands the business in which she is engaged at the time of making the will.
5. **A marriage is absolutely void** where one of the parties was insane at the time, and may be annulled by her heirs after her death where she was never in a condition to ratify the same.
6. **A woman eighty-six years old, suffering from an incurable disease and having an insane delusion** respecting the superhuman powers of a man much younger than herself, and whose character for morality is notoriously the very opposite of her own, is incapable of contracting a valid marriage with him, especially where her object was merely to enable him to obtain her money for the accomplishment of the great plans for mankind which he claimed to have conceived, and the marriage is brought about in pursuance of his fraudulent scheme to obtain her money.

(December 22, 1897.)

A PPEAL by defendant from a decree of the Circuit Court for Adams County in favor of complainants in a suit brought to set aside a pretended marriage and annul the alleged will of Minerva Merrick, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. John H. Williams and Jesse B. Barton, for appellant:

Decedent was not an insane person in the purview of the statutes at the time of her marriage with appellant, and was therefore not incapable of contracting a marriage.

NOTE.—For belief in spiritualism as affecting testamentary capacity, see *note* to *Lewis v. Arbuckle* (Iowa) 16 L. R. A. 677.

For such belief as an insane delusion, see also *note* to *Kimberly's Appeal* (Conn.) 37 L. R. A. 261. 40 L. R. A.

Whipple v. Eddy, 161 Ill. 114; *Burt v. Quisenberry*, 132 Ill. 385; *Taylor v. Pegram*, 151 Ill. 106; *Re Halbert*, 15 Misc. 308; *Smith's Will*, 52 Wis. 543, 38 Am. Rep. 756; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *Guild v. Warrn*, 149 Ill. 105.

A marriage voidable only cannot be avoided after the death of either party.

Bonham v. Badgley, 7 Ill. 622; *Schouler*, Dom. Rel. p. 24.

Undue influence to avoid an act or nullify a will must be a wrongful influence, and must have the effect of completely subjugating the mind of the actor or testator, so that he or she was incapable of withholding it or of acting independently of it.

Re Williams, 2 Connoly, 579; 1 Bishop, Mar. Div. & Sep. §§ 595-601; *Kern v. Kern*, 51 N. J. Eq. 574; *Massey v. Huntington*, 115 Ill. 80; *Hill v. Bahrens*, 158 Ill. 314; *Becket v. Lestrade*, 153 Ill. 625; *Wilbur v. Wilbur*, 129 Ill. 393, 138 Ill. 446; *Guild v. Hull*, 127 Ill. 523; *Rutherford v. Morris*, 77 Ill. 412; *Pooler v. Cristman*, 145 Ill. 405; *Sturtevant v. Sturtevant*, 116 Ill. 340; *Dickie v. Carter*, 42 Ill. 379; *Yoe v. McCord*, 74 Ill. 44; *Kimball v. Cuddy*, 117 Ill. 213; *Mitchell v. Mitchell*, 43 Minn. 73; *Re Snelling*, 136 N. Y. 515; *Mackall v. Mackall*, 135 U. S. 167, 34 L. ed. 84; *Norton v. Par-ton*, 10 Mo. 456; *Knorr v. Knorr*, 95 Ala. 495; *Berberet v. Berberet*, 131 Mo. 399; *Delgado v. Gonzales* (Tex. Civ. App.) 28 S. W. 459; *Salisbury v. Aldrich*, 118 Ill. 99; *Brown v. Mitchell*, 75 Tex. 9; *Re Storey*, 20 Ill. App. 183; *Carpenter v. Bailey*, 94 Cal. 406; *Re Sheldon*, 40 N. Y. S. R. 369; *Schmidt v. Schmidt*, 47 Minn. 451.

Influence acquired through affection or by honest argument or persuasion is not undue, and will not invalidate a will.

Becket v. Lestrade, 153 Ill. 625; *Sturtevant v. Sturtevant*, 116 Ill. 340; *Dickie v. Carter*, 42 Ill. 379; *Yoe v. McCord*, 74 Ill. 44; *Kimball v. Cuddy*, 117 Ill. 213; *Mitchell v. Mitchell*, 43 Minn. 73; *Re Snelling*, 136 N. Y. 515; *Mackall v. Mackall*, 135 U. S. 167, 34 L. ed. 84; *Norton v. Par-ton*, 110 Mo. 456; *Knorr v. Knorr*, 95 Ala. 495; *Re Halbert*, 15 Misc. 308.

Nor do close relationships, or the charge and control of decedent's business affairs, or the presence of the chief beneficiary when the will was executed, raise a presumption of undue influence.

Berberet v. Berberet, 131 Mo. 399; *Delgado v. Gonzales* (Tex. Civ. App.) 28 S. W. 459; *Mackall v. Mackall*, 135 U. S. 167, 34 L. ed. 84.

Nor does the fact that a testator discriminates against relatives and in favor of a stranger to the blood raise a presumption of undue influence.

Salisbury v. Aldrich, 118 Ill. 99; *Mitchell v. Mitchell*, 43 Minn. 73; *Re Snelling's Will*, 136 N. Y. 515.

Nor will the probate of a will be set aside on proof of facts which at most do no more than show that opportunity to exercise undue influence may have existed, or raise a bare suspicion that such influence may have been used.

Brown v. Mitchell, 75 Tex. 9; *Knorr v. Knorr*,

95 Ala. 495; *Berberet v. Berberet*, 181 Mo. 399.

Messrs. James N. Sprigg and Govert & Pape, for appellees:

A void marriage is good for no legal purpose, and its invalidity may be shown in any court, between any parties, either in the lifetime of the parties thereto, or after their death.

Cartwright v. McGown, 121 Ill. 393; *Gathings v. Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 54; *Unity v. Belgrade*, 76 Me. 419; *Bell v. Bennett*, 73 Ga. 784; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; 14 Am. & Eng. Enc. Law, p. 487; *Rawdon v. Rawdon*, 28 Ala. 565; *Finster v. Means*, Speers, Eq. 569, 42 Am. Dec. 332; *Crump v. Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447; *Browning v. Reane*, 2 Phillim. Eccl. Rep. 69; *Parker v. Parker*, 2 Lee, Eccl. Rep. 382; *Ex parte Turing*, 1 Ves. & B. 140; *Waymire v. Jetmore*, 23 Ohio St. 271; *Harrod v. Harrod*, 1 Kay & J. 4; *Clement v. Mattison*, 3 Rich. L. 93; *Jagues v. Public Administrator*, 1 Bradf. 499; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Middleborough v. Rochester*, 12 Mass. 363; *Jenkins v. Jenkins*, 2 Dana, 102, 28 Am. Dec. 437; 4 Bl. Com. Wendell's ed. 458; *Ward v. Dulaney*, 23 Miss. 410; *Keyes v. Keyes*, 22 N. H. 553; *Christy v. Clarke*, 45 Barb. 529; 1 Scribner, Dower, 2d ed. §§ 18, 19, pp. 123, 124; 1 Bishop, Mar. Div. & Sep. §§ 258, 548, 600, 622, 645.

One not competent to carry on ordinary transactions of life is not competent to contract marriage.

3 Wait, Act. & Def. 629; *Ward v. Dulaney*, 23 Miss. 410; *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Rawdon v. Rawdon*, 28 Ala. 565; *Re Spencer*, 96 Cal. 448.

A simple marriage ceremony will not make a man and woman husband and wife. Capacity and consent are absolutely essential, but celebration only contingently so.

Cartwright v. McGown, 121 Ill. 397; 1 Bishop, Mar. Div. & Sep. §§ 327, 588, 645.

In the case at bar the essentials, capacity and consent by Mrs. Merrick are absent.

Cohabitation itself, if inferred, which appellant knew to be contrary to law, could not be an element of marriage available in his behalf.

Jenkins v. Jenkins, 2 Dana, 102, 28 Am. Dec. 437; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774.

Monomania, or partial insanity, made the pretended marriage and relation between appellant, Charles Orchardson, and Minerva Merrick and the pretended will, void.

American Bible Soc. v. Price, 115 Ill. 643; *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Connor v. Stanley*, 72 Cal. 556; *Banks v. Goodfellow*, 22 L. T. N. S. 818; *Taylor v. Trich*, 165 Pa. 586; *Thomas v. Carter*, 170 Pa. 272; *Houghton v. Knight*, L. R. 3 Prob. & Div. 64; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Smith's Will*, 52 Wis. 543, 38 Am. Rep. 756; *Woodbury v. Obeart*, 7 Gray, 467; *American Seaman's Friend Soc. v. Hopper*, 33 N. Y. 624; *Lathrop v. American Bd. of Foreign Missions*, 67 Barb. 590; *Re White*, 121 N. Y. 406; *Stanton v. Wetherbar*, 16 Barb. 259; 14 Am. & Eng. Enc. Law, p. 483.

This monomania was present with and operative upon Minerva Merrick at the time of
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the pretended marriage, and continuously thereafter until her death, and was itself the present and continuous occasion of the entire relation between Minerva Merrick and Charles Orchardson, including both the pretended marriage and will.

A mere belief in spiritualism, or other religious opinions, does not constitute monomania. But when from such or any other cause the mind assumes a chronic condition of delusion, which controls and dictates conduct, and subverts and sets aside individual judgment, will, and conscience, then the victim of such condition is a monomaniac, and unable to marry or make a will.

Rice, American Probate Law & Practice, pp. 224-227; *Boyd v. Eby*, 8 Watts, 66; *Balantine v. Proudfoot*, 62 Wis. 217; *Re Dorman*, 5 Dem. 112; *McClary v. Stull*, 44 Neb. 175; *Cassoday*, Wills, 478; *Beach*, Wills, § 102; *Spratt v. Spratt*, 76 Mich. 384; *Fraser v. Jenkinson*, 42 Mich. 206; *Rice v. Rice*, 50 Mich. 448; *Smith v. James*, 72 Iowa, 515; *Lee v. Scudder*, 31 N. J. Eq. 633; *Middleditch v. Williams*, 45 N. J. Eq. 726, 4 L. R. A. 738; *Potter v. Jones*, 20 Or. 289, 12 L. R. A. 161; 1 Redf. Wills, p. 90; *Taylor v. Trich*, 165 Pa. 586; 1 Wharton & Stillé, Med. Jur. p. 65; *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 398, decided in 1867 by Sir J. P. Wilde cited in Wharton & Stillé, Med. Jur. § 45; *Taylor*, Med. Jur. p. 638; 1 Bishop, Mar. Div. & Sep. ed. 1891, §§ 591, 592.

Where there is insane delusion in regard to one who is an object of the testator's bounty, which causes him to make a will which he would not have made but for that delusion, such will cannot be sustained.

1 Redf. Wills, 3d ed. 72, 74 *et seq.* and notes; 1 Jarman, Wills, 5th ed. 83 *et seq.* and notes; *Buswell*, Insanity, §§ 13, 381; *American Bible Soc. v. Price*, 115 Ill. 638.

The marriage in question was also void, not only because of monomania, but because not consummated and on account of wilful fraud and deception.

Lyndon v. Lyndon, 69 Ill. 43; 2 Kent, Com. 9th ed. p. 41; 1 Scribner, Dower, §§ 22, 25, p. 125; *Reeve*, Dom. Rel. 206, 207; *Cartwright v. McGown*, 121 Ill. 397; 2 Greenl. Ev. § 464; 1 Bishop, Mar. Div. & Sep. § 543.

There were undue influence and fraud by appellant through his entire relation with deceased; all with one continuing purpose to obtain her property, and the verdict and decree were fully warranted by the evidence.

Thompson v. Hawks, 14 Fed. Rep. 903; *Primmer v. Primmer*, 75 Iowa, 415; *Hugenin v. Baseley*, 14 Ves. Jr. 299; *Cassoday*, Wills, §§ 484, 506.

Where one person is in relation of mastery of another as to property, support, or as religious adviser or counsel, and writes a will in his own favor, causing the dependent to sign it, it is presumed fraudulent.

Thompson v. Hawks, 14 Fed. Rep. 902; *Lyon v. Home*, L. R. 6 Eq. 655; 1 Redf. Wills, §§ 12, 13, p. 415; *Marx v. McGlynn*, 88 N. Y. 357; *St. Leger's Appeal*, 34 Conn. 450, 91 Am. Dec. 735; *Middleton v. Sherburne*, 4 Younge & C. Exch. 358; 27 Am. & Eng. Enc. Law, pp. 508 *et seq.*; *Drake's Appeal*, 45 Conn. 9.

Mr. William L. Vandeventer, also for appellees:

There is a form of insanity known as monomania, which is characterized by a perversion of the understanding in regard to a single object or series of objects. It is especially a symptom of monomania to imbibe delusions which exercise a governing influence over the mind of the affected individual and force him to the commission of acts which in a state of sanity he would not perpetrate.

1 Wharton & Stillé, Med. Jur. p. 65.

A true monomaniac cannot be convinced of his error, and he thinks that his acts are consistent with reason and the general conduct of mankind.

Smith v. Tebbitts, L. R. Prob. & Div. 398; referred to in Wharton & Stillé, Med. Jur. § 45; Taylor, Med. Jur. p. 638.

It is immaterial what is the form of the defect of reason, or by what distinctive name—such as idiocy, lunacy, mental weakness, or the like—it is known. For those who have not sufficient understanding to deal with a particular affair of life, whether from derangement of the intellect or from its equivalent in feebleness, cannot bind themselves by a contract relating to such affairs.

1 Bishop, Mar. Div. & Sep. ed. 1891, §§ 591, 592; Redf. Wills, 123, 124; *Campbell v. Campbell*, 130 Ill. 481, 6 L. R. A. 167; *Greene v. Greene*, 145 Ill. 265; *Den, Stevens, v. Vanclee*, 4 Wash. C. C. 262; *Harrison v. Rowan*, 8 Wash. C. C. 580; *Craig v. Southard*, 148 Ill. 37.

The question does not depend upon the soundness of the views entertained by the testatrix, but, Was she "guided by insane delusions which so impressed her mind as to control her judgment in the disposition of her property, so as to prevent her from appreciating the duty she owed to her family?"

Taylor v. Trich, 165 Pa. 586; *Woodbury v. Obeart*, 7 Gray, 467.

The widest possible range of evidence is permitted to show fraud or undue influence.

Schouler, Wills, §§ 240, 242; 1 Redf. Wills, § 51, p. 586; *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 294; *Jackson, Coe, v. Kniffen*, 2 Johns. 31, 3 Am. Dec. 390; *Reynolds v. Adams*, 90 Ill. 134, 32 Am. Rep. 15; *Beaubien v. Cicotte*, 12 Mich. 459.

Where there are unreasonable changes of disposition, especially in superseding the natural objects of bounty in favor of others who give casual attention, where no relative is at hand, and mental incapacity is shown, it is immaterial whether undue influence is exerted or not, the will is sufficiently vitiated.

Van Kleeck v. Phipps, 4 Redf. 99; Schouler, Wills, p. 247, note 9.

Undue influence has always something sinister, corrupt, and selfish about it, when properly viewed, however sly and secret in its workings, or varnished over with hypocrisy, and hence difficult to be traced except in the effect it has produced.

Schouler, Wills, § 226; *Rollwagen v. Rollwagen*, 63 N. Y. 504.

The declarations of the alleged testatrix, Mrs. Merrick, made before and after the execution of the will, are proper to be proved, so 40 L. R. A.

far as they tend to show her mental condition at the time the will was executed.

1 Redf. Wills, p. 542; Schouler, Wills, § 243; *Massey v. Huntington*, 118 Ill. 80; *Reynolds v. Adams*, 90 Ill. 134, 32 Am. Rep. 15; *Moore v. Gubbins*, 54 Ill. App. 164; *Hill v. Bahns*, 158 Ill. 315; *Berelot v. Lestrade*, 153 Ill. 625; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Craig v. Southard*, 148 Ill. 37; *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282.

Where the testator is not claimed to have been generally insane, but controlled by insane notions, the question to be determined is whether he was the victim of such delusions as controlled his action and rendered him insensible to the ties of blood and kindred.

McClary v. Stull, 44 Neb. 175; *Cassoday*, Wills, 478; *Beach*, Wills, § 102; *Spratt v. Spratt*, 76 Mich. 384; *Fraser v. Jennison*, 42 Mich. 206; *Rice v. Rice*, 50 Mich. 448; *Smith v. James*, 72 Iowa, 515; *Lee v. Scudder*, 31 N. J. Eq. 633; *Middleditch v. Williams*, 45 N. J. Eq. 726, 4 L. R. A. 738; *Potter v. Jones*, 20 Or. 239, 12 L. R. A. 161; 1 Redf. Wills, p. 90; *Taylor v. Trich*, 165 Pa. 586; *Foster v. Means*, Speers, Eq. 569, 42 Am. Dec. 332; *Campbell v. Campbell*, 130 Ill. 475, 6 L. R. A. 167; *Converse v. Converse*, 21 Vt. 168, 52 Am. Dec. 58; *American Bible Soc. v. Price*, 115 Ill. 638; *Brownfield v. Brownfield*, 43 Ill. 147; *Rutherford v. Morris*, 77 Ill. 397; *Guild v. Hull*, 127 Ill. 523; *Yoe v. McCord*, 74 Ill. 38; *Pooler v. Cristman*, 145 Ill. 405; *Wilbur v. Wilbur*, 138 Ill. 446; *Taylor v. Pegram*, 151 Ill. 106; *Roe v. Taylor*, 45 Ill. 485; *Re Storey*, 20 Ill. App. 188.

In the absence of any affirmance on return of mental capacity, the marriage of an insane person is in such sense void that its invalidity may be relied upon in avoidance of it, not only in a suit between the parties to set it aside, but in any cause between the same parties, or any other, wherein, either during the life of the married persons, or afterward, it is judicially called in question.

1 Bishop, Mar. Div. & Sep. § 622; 14 Am. & Eng. Enc. Law, p. 487; *Rawdon v. Rawdon*, 28 Ala. 565; *Foster v. Means*, Speers, Eq. 569, 42 Am. Dec. 332; *Powell v. Powell*, 18 Kan. 871, 26 Am. Rep. 774; *Cole v. Cole*, 5 Ga. 57, 70 Am. Dec. 275; *Crump v. Morgan*, 88 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447; *Browning v. Reane*, 2 Phillim. Eccl. Rep. 69; *Parker v. Parker*, 2 Lee, Eccl. Rep. 382; *Ex parte Turing*, 1 Ves. & B. 140; *Unity v. Belgrade*, 76 Me. 419; *Waymire v. Jetmore*, 22 Ohio St. 271; *Harrod v. Harrod*, 1 Kay & J. 4; *Clement v. Mattison*, 3 Rich. L. 93; *Jacques v. Public Administrator*, 1 Bradf. 499; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Middleborough v. Rochester*, 12 Mass. 363; *Jenkins v. Jenkins*, 2 Dana, 102, 26 Am. Dec. 437; 4 Bl. Com. Wendell's ed. 438; *Ward v. Dulaney*, 23 Miss. 410; *Keyes v. Keyes*, 23 N. H. 553; *Christy v. Clarke*, 45 Barb. 529; 1 Scribner, Dower, 2d ed. §§ 18, 19, pp. 123, 124; *Cartwright v. McGown*, 121 Ill. 396.

The influences to avoid a will must be such as destroy the free agency of the testator's will, and thus render his act obviously more the offspring of the will of others than his own

This is far from "completely subjugating" the mind of the testator.

Massey v. Huntington, 118 Ill. 80; *Rutherford v. Morris*, 77 Ill. 418; *Sturtevant v. Sturtevant*, 116 Ill. 354; *Yoe v. McCord*, 74 Ill. 44; *American Bible Soc. v. Price*, 115 Ill. 623.

Wilkin, J., delivered the opinion of the court:

To the October term, 1894, of the circuit court of Adams county, appellees, two of the heirs of Minerva Orchardson (or, as appellees insist, Minerva Merrick), deceased, filed their bill in chancery against appellant and others to contest the validity of the last will and testament of said Minerva upon the ground of mental incapacity, and that its execution was procured by the said Charles Orchardson through fraud and undue influence, and also to set aside and have declared null and void a marriage which appellant, Orchardson, claimed existed between himself and the said Minerva at the date of her death, on the ground of her mental incapacity to enter into a marriage contract at the time of the alleged marriage, and the fraud of said Orchardson. The defendants, except Orchardson and one William H. Boyer, were also heirs of the testatrix. Orchardson alone answered the bill, and he denied each of its material allegations. Replication being duly filed, the trial and hearing below were upon the issue thus formed. On that branch of the case involving the validity of the will an issue at law was made up whether the writing produced was the will of the testatrix or not, and tried by a jury, resulting in a verdict that it was not. The court also submitted to the jury certain interrogatories for special findings, which it returned with a general verdict, as follows: "First. Did Minerva Merrick Orchardson, at the time said will purports to have been signed, possess sufficient mental capacity to transact ordinary business?—Yes. Second. Did said Minerva Merrick Orchardson, at the time said will was signed by her (if it was so signed), have sufficient mental capacity to know and understand the business in which she was then engaged?—Yes. Third. Was there any undue influence exercised over Minerva Merrick Orchardson, connected with or operating upon her at the time she executed the will in question (if she did execute it)?—Yes." A motion for new trial was overruled, and a decree entered upon the general verdict, setting aside the will and probate thereof. By agreement of the parties the issue as to the validity of the marriage was submitted to the chancellor on the same evidence produced before the jury, with such additional testimony as either party saw fit to introduce, and that issue was also found for the complainants, and a decree entered that the "alleged marriage of Minerva Merrick to the said Charles Orchardson, of date April 9, 1893, was and remained, at and from the time thereof, and is, null and void." From both these decrees Orchardson has prosecuted this appeal. Several errors are assigned upon the record, but the only grounds of reversal insisted upon are that the evidence is insufficient to authorize either decree, and that on the issue as to the will the special findings of the jury are conclusive.

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The facts found by the chancellor, material to a consideration of the first position, are as follows:

"That Minerva Merrick, at the time of her alleged marriage with Charles Orchardson, of date April 12, 1893, was of age about eighty-three years; that she had been for several years afflicted with cancer, and her physical health had become poor; that her mind and memory had become greatly weakened and impaired; that she had been a widow since the year 1876, and lived in her own home, with her servants, in Quincy, Illinois. That she was possessed of a considerable fortune. That from a time shortly after her husband's death, in 1876, she had believed in what was commonly known as spiritualism, and her views concerning spiritualism had grown upon her of later years, and she had been for some time last preceding her alleged marriage to Charles Orchardson, and was at the time of such alleged marriage, and remained continuously thereafter until her death, on June 11, 1894, a monomaniac on the subject of spiritualism, and insane upon all matters into which the subject of spiritualism entered, or which were connected therewith, and was and remained during all that time wholly dominated and controlled by insane delusions; among other things believing she could receive and did receive, through the intervention of other persons as mediums,—not claiming to be in any sense a medium herself,—communications, advice, and directions concerning the conduct of her affairs and business from disembodied spirits generally, and particularly from the spirit of her deceased husband, Dr. Marcus Merrick; and was and remained so controlled thereby, and by such communications, advice, and directions, and insanely believed it to be her religious and conscientious duty to obey such directions, without heeding the advice of her formerly trusted friends or her counsel, and without consulting or relying upon her own mind and will she followed, obeyed, and acted upon such supposed spirit communications, advice, and directions concerning any matter or matters, and in all matters requiring her attention and action during that time she first submitted, and considered it her duty to submit, to the same, through medium or mediums, for advice and direction of such supposed spirits, as to what her actions should be, as to such supposed advice which had been received by her. That preceding said alleged marriage, and during the month of October, 1892, the said Charles Orchardson, then about the age of fifty-seven years, a person substantially without means or property, and a stranger to Mrs. Merrick and to the community in which she lived in Quincy, appeared in Quincy, and within a few days of his arrival inquired for Mrs. Merrick's place of residence, and evinced a knowledge that she was a spiritualist, and the wealthy widow of Dr. Marcus Merrick, deceased. That the said Orchardson was then a married man, having a wife living in the state of Michigan, and who, some two months thereafter, procured a divorce from the said Charles Orchardson on account of cruelty. That the said Minerva Merrick was informed of these facts concerning said Charles Orchardson, and also informed that such application

had been made also upon the charge that said Orchardson had consorted with a woman notoriously lewd, which woman came with said Orchardson to Quincy, Illinois, and that said information came to said Minerva Merrick some time preceding her alleged marriage to him; and at said time she was also informed that he had consorted in a lewd manner with women after coming to Quincy, and during the time as hereafter mentioned, in which he was engaged in writing a book at said Mrs. Merrick's house; and said Minerva Merrick admitted and believed said information to be true. That, beginning within a few days after he, said Orchardson, so first came to Quincy, he made the acquaintance of said Minerva Merrick, and from that time until the alleged marriage spent much of his time at her house. That he had with him, and said Minerva Merrick read, a number of what he falsely and fraudulently alleged to be the writings from the spirits or persons distinguished in history, and long since dead, which writings he falsely and fraudulently professed to have seen written in a miraculous manner without human hands. That in these supposed communications the said Orchardson professed to be directly addressed by the spirits as 'The Son of Wisdom,' and by other laudatory titles. That they purported to speak at considerable length in exalted terms of the powers of the person addressed, defining them as like unto those of Jesus Christ; referring to said Orchardson as destined to be the savior of the human race, and as commissioned by the spirits to reform and regenerate mankind. That they also indicated that these communications and other phenomena, supposed to be in the possession of said Orchardson, of like character, should be prepared and published as a book, the sales of which should net a very large sum of money. That some of them referred to the want of means on the part of said Orchardson to carry out the supposed commission, and intimated that this want should be supplied, and that he should persevere. That said Orchardson also referred in credulous terms to his confidence in the statement that he had been on the planet some centuries prior to his present nativity, to the fact that many most important communications from the spirit world had come to him directly without the intervention of any other medium, and under conditions which he stated as, from his personal knowledge, they could not possibly be untrue or unreal. That within a few days after the said Orchardson commenced to visit at said Mrs. Merrick's house, he commenced to write said book, wrote the same at her house, spending most of his time there, and finished the book, and had it printed and issued from the bindery, at Mrs. Merrick's expense, a few days before the alleged marriage, the book being entitled 'The Light of the Ages and Deathblow to Poverty.' That it was by dedication addressed to Mrs. Merrick, contained numerous flattering references to her, represented that his opinion and hers on the subject treated were in accord, also represented that Mrs. Merrick had become the financial support of the book and of Orchardson in carrying out the commission referred to in the spirit writing. That a considerable part of

the book was occupied with a reproduction of the said supposed spirit communications, and a recital of extravagant spirit phenomena, supposed to have come within said Orchardson's personal observations and experience. That the said Minerva Merrick was informed of the contents of said book and the matters referred to, and by reason of her said weakness and delusion of mind and monomania, and the false and fraudulent representations of said Charles Orchardson, believed the same implicitly to be true, and believed the said Orchardson to possess the attributes, and to be charged with the commissions, referred in the alleged spirit writings; and that in so believing she refused to consider the advice and caution of her formerly trusted friends and counsel, or to be influenced by her own mind and will, and was in that respect controlled wholly by her said weakness and insane delusions of mind, and was not possessed of sufficient mental capacity to free her mind from that belief and delusion. That the said pretences and representations of the said Charles Orchardson were made by him falsely, and with a design and purpose by fraud and falsehood to obtain the confidence of the said Minerva Merrick, to obtain control of her person, and bring about the alleged marriage, and with a fraudulent scheme and purpose of obtaining her property. That a short time prior to the time when said alleged marriage occurred the said Charles Orchardson, together with one William H. Boyer, who also claimed to be a spirit medium, knowing of the aforesaid weakness and insane delusion of mind of the said Minerva Merrick, and by further fraud, artifice, and deceit, and in furtherance of said scheme and the design of the said Charles Orchardson, and with intent to defraud and entrap the said Minerva Merrick into the relation and state of marriage with the said Charles Orchardson, falsely and fraudulently caused the said Minerva Merrick to believe, through the medium of the said William H. Boyer, that he (said Boyer) was in communication with the spirit of her said deceased husband, Dr. Marcus Merrick, and it was the will and direction of her said deceased husband, who was represented to be then and there present, and addressing her, that she should marry said Charles Orchardson. That the said Minerva Merrick then insanely believing such communications and directions to come from her said deceased husband, and that he was then so present as represented, and that it was her duty to obey his said supposed directions, and then laboring under her aforesaid weakness and insane delusion of mind, and without the intervention and exercise of her own mind and will, and without having sufficient mental capacity to disenthral herself from said belief and delusion, and by means aforesaid, and not otherwise, shortly thereafter was procured by the said Charles Orchardson, and through his said falsehood and fraud, to submit with him to a ceremony of marriage, and did submit to such form and ceremony of marriage. That the said alleged marriage ceremony was procured and brought about wholly by the fraud, artifice, imposition, and deceit of the said Charles Orchardson, acting in person and through others, practised upon her

while she was in the condition of mind aforesaid. That the said Minerva Merrick, at the time of said marriage, was, and from the time of said marriage down to her death, enthralled, dominated, and controlled by the said weakness and insane delusions on her part, and by her belief in said pretended spiritualistic communications and directions, and representations, and by the fraud of the said Charles Orchardson, and by her said belief and insane delusions that it was and continued the wish and direction of her said deceased husband that she should become and remain the wife of the said Charles Orchardson, and that it was her duty so to do. That there was no time at or after said marriage when she was released from said insane delusions and weakness of mind, or was able to exercise her own mind, will, or judgment in regard to said marriage, or knew or realized in her own mind the fraud so practised upon her, or when she was possessed of the mental capacity to ratify or consent to said alleged marriage, or to consider in and by the exercise of her own mind and will the situation in which she had been placed, or which she occupied, by reason of the said pretended marriage, and the aforesaid fraudulent representations and conduct of the said Charles Orchardson. That said alleged marriage was never consummated by coition between the parties thereto as husband and wife, and that it was never consented to or ratified by the free will and consent of the said Minerva Merrick. That no issue was born of said alleged marriage. That said Minerva Merrick did not, at the time of said marriage, or thereafter discover said fraud so practised upon her by said Orchardson or said Boyer, and did not, at any time after said marriage, possess sufficient mental capacity to ratify or disaffirm the said marriage, or to assume relation of wife to the said Charles Orchardson.

"Concerning the mental condition of the said Minerva Merrick, the court found from the evidence that for a number of years last preceding her said alleged marriage to Charles Orchardson she had in numerous instances invested large sums of money unprofitably, wastefully, and irrationally, wholly at the dictation of what she supposed to be disembodied spirits, deeming it to be her duty to do so, and without the exercise of her own mind and will in so doing. That she had also at times, under the advice of the so-called spirits, been greatly suspicious and troubled concerning her business matters where no ground of suspicion existed, and where to a rational mind the security of her business, in the matters about which she was so suspicious, would have been readily perceived, and in such matters she was incapable of receiving rational advice and acting thereon; and her suspicion could only be allayed by following the course mapped out by the spirits, and then at a wholly unnecessary cost and waste of her property, to which cost and waste she readily yielded, and without sufficient mind to realize the imposition to which she had been subjected. That she had, during all her life, been a woman of chaste and pure thought and morals, but, owing to the domination and influence of her said mental delusions and her infatuation therewith, she had, at the time of said alleged mar-

riage, become an apologist for the debauchery of others, and insensible to the immoral contamination surrounding her; and from that time to her death she so acted as to belie the purity and womanhood of her former life. That during the many years of her widowhood, and down to a very short time preceding said alleged marriage, she often expressed her aversion to a second marriage, and had steadily adhered thereto until the pretended message from her departed husband came, as she believed, when, under the irresistible influences of her insane delusions, and particularly under the belief and delusion that her husband had so directed, and that it was her duty to obey such directions, and to disregard her own inclination, will, and judgment, and under the delusion that alleged spirits had commissioned the said Charles Orchardson as aforesaid, and that he was possessed of the powers and functions aforesaid, by and through such spirits, and that she was assisting him therein, she was taken possession of, dominated and controlled by said delusions and beliefs, and wholly unable to exercise her own judgment, and took part in and became party to said alleged marriage, and in doing so believed and felt concerning said Charles Orchardson that she had found one who espoused the doctrines so near to her heart and who would revolutionize the world, and eliminate the misery and sorrows from the conditions of men. That the said Minerva Merrick was at the time of said alleged marriage, and from that time continuously down to the time of her death remained, insane upon the subject of spiritualism, and that insane delusions arising from her monomania were and continued during all that time officious, operative, controlling, and influential in producing an insane consent to the said alleged marriage, and that, but for such insane delusions, she would never have married the defendant Orchardson, or have continued thereafter during her life to be known as his wife; and that by reason of such insane delusions she was not at or at any time after said marriage of sufficiently sound mind to consent to become or be the wife of the said Charles Orchardson, and that the alleged marriage of Minerva Merrick and said Charles Orchardson was, and remained until the death of the said Minerva Merrick, null and void."

The will was executed February 3, 1894, about ten months after the marriage. It gives to the defendant George H. Turner, \$3,000, and to Minerva Merrick Sales, a grandniece, another of the defendants, \$2,000. All the remainder of her estate, real and personal, she willed to Charles Orchardson, and appointed him executor of the will, without bond. She died June 11, 1894. The contention that the special verdicts of the jury on the issues submitted to it should be held conclusive as to the validity of the will could only be sustained upon the ground that they are so inconsistent with the general verdict that the latter cannot stand. The testatrix may have "possessed sufficient mental capacity to transact ordinary business," and at the time that she signed the will "had sufficient mental capacity to know and understand the business in which she was engaged," and still under the issues in this case, have been wholly inca-

pable of making a will. Complainants do not allege in their bill, nor is it the theory of their case, that she was insane or of unsound mind generally, but that she was the victim of an insane delusion, under which she labored at the time she made the will. Capacity to transact ordinary business, and to know and understand the business in which one is engaged at the time of making a will, are evidence of testamentary capacity, unless the testator was at the time affected with some morbid delusions which influenced his action. *American Bible Soc. v. Price*, 115 Ill. 623, and authorities there cited. The question here is, "Was her natural 'mental capacity' exercised in the making of her will, or was she at the time influenced and controlled by the alleged insane delusion?" The special findings of the jury were not, therefore, irreconcilable with the general verdict. The question on this branch of the case, then, is: "Does the evidence sustain the general verdict of the jury? And, first, was the testatrix the victim of an insane delusion to the extent of destroying her testamentary capacity when influenced or controlled by that delusion? And, second, was she so influenced in making this will?" We said, in *American Bible Soc. v. Price*, 115 Ill. 638: "Beyond all question it is within the previous rulings of this court, and abundantly sustained by the rulings of other courts of the highest respectability, that where there is insane delusion in regard to one who is an object of testator's bounty, which causes him to make a will which he would not have made but for that delusion, such will cannot be sustained, and so also, where there is insane delusion in regard to the duty or moral obligation of a party to make a will in favor of a particular individual, corporation, or society and a will is made as the result of that insane delusion, it cannot be sustained. 1 Redf. Wills, 3d ed. 72-74 *et seq.*, and notes; 1 Jarman, Wills, 5th ed. 38 *et seq.*, and notes; Buswell, Insanity, §§ 13, 381." The testimony in the record is so voluminous as to forbid an attempt to review it here. Much of it on either side is of very little or no relevancy to the issues in the case. Our examination of it, taken as a whole, has led us to the conclusion that it sustains, in substance, the findings of the chancellor as recited in the decree.

It thus appears that Orchardson represented to Mrs. Merrick that he had in certain communications from spirits been addressed as "The Son of Wisdom," speaking of his powers as like unto those of Jesus Christ, referring to him as destined to be the savior of the human race, and as commissioned by the spirits to reform and regenerate mankind; that it was indicated that these communications should be published in a book, the sales of which would yield large sums of money, etc.; that Orchardson shortly thereafter commenced to write such a book at her house, where he completed the same, and had it printed at her expense a few days before the marriage, and dedicated to her; that the book contained numerous flattering references to her, representing that her opinions on the subject treated were in accord with those of Orchardson; that she had become the financial support of the book and of Orchardson in carrying out the commission referred to in the spirit writings, a considerable part of

the book being occupied with a reproduction of the supposed spirit communications, claimed to have been made to him. And the court found from the evidence that she was informed of the contents of said book and the matters referred to, "and by reason of her said weakness and delusion of mind and monomania, and the false and fraudulent representations of said Charles Orchardson, believed the same implicitly to be true, and believed the said Charles Orchardson to possess the attributes and to be charged with the commission referred to in the alleged spirit writings." From these recitals of facts, as well as from a careful reading of the testimony, we are forced to the conclusion that from a time prior to the marriage to the making of the will, and until her death, Mrs. Merrick was the victim of a morbid and insane delusion as to the character, powers, and mission of Orchardson, believing him to be possessed with superhuman attributes and powers, and charged with a commission beyond that committed to ordinary men; and that in making him the principal recipient of her bounty she was influenced by that delusion. There is not in this voluminous record, a particle of proof that she entertained for him the remotest sentiment of affection, gratitude, or admiration except as she was controlled by the delusion that he was more than a mere man, and that he was, under the influence of spirits, commissioned to do and perform superhuman acts. He was in no rational sense the object of her bounty, nor can we believe from this evidence that she was influenced to so treat him, except through the delusion referred to. The gifts to him were not prompted by a desire or sense of duty to provide for him as a man, but because she had been, by reason of her diseased mind, and through the influence and desire of Orchardson, made to believe that he was more than a man,—gifted with superhuman faculties. She believed it her duty to bestow her property upon him because of her morbid insane delusion as to him; and we repeat, as said in the *Price Case*, it appearing that such insane delusion in regard to her duty or obligation to make the will in his favor was the result of that insane delusion, the will cannot be sustained. On this ground the general verdict was warranted by the testimony. In reaching this conclusion we do not hold that a mere belief in spiritualism is proof of insanity. A charge of general insanity is not supported by proof of mere belief on questions of opinion, however absurd; but when, as here shown, an act was done under the promptings of an insane delusion, and the proof shows that it was the result of belief in facts the existence of which no rational person would believe, insanity is proved. Belief in spiritualism, though not proof of insanity, if through that belief one is led into a delusion that another is a God, a Christ, or gifted with powers and faculties belonging only to supernatural persons, the believer of the delusion is insane on that subject; and, if he is prompted to make a will by that delusion, his will cannot be sustained.

Counsel for appellant cite and rely upon *Whipple v. Eddy*, 161 Ill. 114, as an authority sustaining the validity of this will. The contestant in that case was the adopted daughter and sole legatee of the intestate. She sought

to have the will set aside, so that she might come into immediate possession of the estate, instead of being prevented from doing so until she reached a certain age, as provided by the will. There was nothing in the bill or proof in that case to the effect that the testator was influenced in making his will by a belief in spiritualism, or any other delusion. The charge was that he was insane, and it was shown he had been a believer in spiritualism, and had been influenced by that belief to do many irrational things. But there was an absolute absence of testimony to the effect, or even tending in the slightest degree to show, that he was prompted to make his will by his belief in spiritualism. What we there said as to the effect of belief in spiritual influences, etc., was thought to be applicable to the issues and facts of that case; but the statement in the opinion, "The record is barren of proof even tending to show that the subject of spiritualism ever entered his mind in connection with his will," sufficiently distinguishes that case from this.

We also think the verdict of the jury is abundantly sustained on the ground of undue influence. The third special interrogatory propounded to the jury was answered in the affirmative; that is, that there was undue influence exercised over the testatrix, connected with or operating upon her at the time she executed the will. That appellant sought out Mrs. Merrick at her home in Quincy, and took advantage of her extreme views on the subject of spiritualism, with the design and for the purpose of obtaining her property, is morally certain. That he obtained complete mastery over her will is equally certain. He procured the will to be written; and, while it is claimed he acted under her directions, we are satisfied that the directions were of his own procurement. There is every reason for believing from the evidence that he brought about its execution in privacy, himself selecting and procuring the attendance of witnesses in whom he could confide. He it was who prompted her, when the witnesses and parties selected to be present had assembled in her room, to declare that the paper was her will. While there was not little skill and ingenuity displayed by him in concealing the fact, we cannot doubt that he was the real, active moving agency in having the will executed, and that she was induced to make it through his influence and procurement. Certainly, there was sufficient evidence of that fact to justify the special finding of the jury that there was undue influence.

We do not overlook the fact that it is not every influence exercised over a testator or testatrix by the beneficiary under a will which will justify a decree setting it aside; but, when the relative positions of these parties are considered, she being an aged and feeble woman, laboring under the influences of an insane delusion brought upon her through his machinations, the rule can have no proper application. The verdict of the jury that the alleged will was not the last will and testament of the testatrix was, we think, fully authorized by the testimony on both grounds alleged.

On the issue as to whether the marriage between Mrs. Merrick and Charles Orchardson was void because of her want of mental capacity to enter into the marital relation, we think

the court below decided correctly. Section 2, chap. 89, of our statute provides: "No insane person or idiot shall be capable of contracting marriage." Section 1, cl. 6, chap. 181, says: "The words 'insane person' and 'lunatic' shall include every idiot, *non compos*, lunatic, insane or distracted person." These provisions are declaratory of the common law. 1 Bishop, Mar. & Div. § 136; 1 Kent, Com. 76; *Jenkins v. Jenkins*, 2 Dana, 102, 26 Am. Dec. 437; *Crump v. Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447. In the latter case it was said: "We have no doubt that by the common law of England, . . . as far as can be traced for four or five centuries, a marriage of a lunatic is void, and must be so pronounced by every court to each and every form in which the subject can be presented." And we said in *Carterright v. McGowan*, 121 Ill. 388: "A void marriage is good for no legal purpose, and its invalidity may be shown in any court, between any parties, either in the lifetime of the parties thereto, or after their death." Also: "A simple marriage ceremony will not make a man and woman husband and wife. Capacity and consent are absolutely essential, but celebration only contingently so." It is clear from all the evidence that the mental condition of Mrs. Merrick did not materially change after the marriage,—certainly not for the better,—and therefore, if void when entered into, the marriage continued so to her death, and her heirs may have it annulled. The controlling question, therefore, now is, "Was she mentally capable of entering into the marriage relation on April 12, 1893, the date of the marriage?" It is impossible to prescribe a definite rule by which the mental condition as to sanity or insanity can in every case be tested. That laid down by Mr. Bishop in his work on Marriage, Divorce, and Separation (vol. 1, § 600) is generally approved. After referring to the decisions of the different courts on the subject, he says (§ 599): "Marriage is the legal band around affections assumed to be already united, and the blending in law of two lives into one. And while it is in some degree of the head, it is primarily and chiefly of the heart. Hence, in reason, the test question should be, whether or not the parties have the capability of mind required for duly comprehending this union." He then states in the following section (600) the "true doctrine" as follows: "Assuming this to be the correct idea of the subject-matter of the contract; none of the foregoing enunciations from the bench are precisely accurate; but the true view, in principle, is as follows: The mental incapacity which disqualifies one for crime is such as renders it impossible he should entertain the criminal intent. The disqualifying incapacity for making a deed, a will, or a bill of sale of personal property, is such as puts it out of the power of the person to exercise a disposing mind in respect of the particular thing. The question is not altogether of brain quantity, or of brain quality, in the abstract; but it is whether or not the mind could and did act rationally regarding the precise thing in contemplation,—[marriage]. In a marriage case it is whether the alleged insane person acted rationally regarding marriage, and the particular one in dispute, not, indeed, whether his conduct was

wise, but whether it proceeded from a mind sane as respects the thing done," etc. It would be hard to conceive of a more irrational act than that of Mrs. Merrick in becoming the wife of Charles Orchardson. She had reached an extreme old age; was afflicted with an incurable disease; was possessed of a comfortable home, and an abundance of money and property with which to satisfy her every want and taste. She had many attentive and devoted friends and neighbors, with whom she had been associated for years. Her tastes were refined and her moral sense unperverted, disapproving of immorality, intemperance, and other like sins. She held in the highest esteem the memory of her husband, who had been a man of superior character and intelligence. The uncontradicted evidence produced upon the trial before the jury, and upon which the decree of the chancellor voiding the marriage was based, shows that as to each of these ennobling characteristics and virtues in Mrs. Merrick, Charles Orchardson was as completely her antithesis as it is possible for one person to be unlike another. Especially must his debaucheries and associations with lewd women have shocked her sense of virtue and morality, and repelled her from coming in contact with him, had she been in the exercise of her normal faculties. It is true that many strange and unnatural marriages are contracted, and the sanity of the parties not questioned. But it is also true that, when the question is raised, it not infrequently appears that some insane delusion prompted one or the other of the parties in contracting such unnatural marriages. Certainly, in so extreme a case as this, the mind naturally attributes the act to some unusual motive or influence; and we think it is found here both in Mrs. Merrick's belief in the superhuman powers and attributes of Orchardson and the insane delusion that the spirit of her dead husband dictated and approved of the marriage. All the evidence shows that she never conceived the idea of assuming the relation and the duty of a wife by the marriage as ordinarily understood. Whether she should marry the man, or adopt him as her son, was a matter of indifference, her sole object and purpose being to place herself and her property in such relation to him that they might be used by him through his extraordinary powers in the accomplishment of his wonderful mission.

Counsel for appellant reiterate the proposition that the fact that a person believes in spiritualism, ghosts, dreams, etc., is not proof of his or her insanity, and cases are cited holding, where general insanity is charged, and without proof that the belief led the believer into some insane delusion which prompted the act sought to be set aside, the act was valid, however extreme or unreasonable the belief in spiritualism or other like beliefs. We have no criticisms to make upon those authorities. They are not in conflict with that other class of cases which hold, that if a person labors under a mental delusion on a subject at the time of making a will or entering into a contract, and the will or agreement is the result of such delusion, then the will or contract is void, notwithstanding the person may have been sane on all other subjects. In *American*

Bible Soc. v. Price, 115 Ill. 632, the circuit court instructed the jury: "If the jury believe, from the evidence, that although Isaac Foreman had sufficient capacity to attend to the ordinary business affairs of life, yet that with regard to subjects connected with the testamentary disposition and distribution of his property and the natural objects of his bounty he was insane, and that while laboring under such insanity, he made the will in question, and that in making it he was so far influenced or controlled by such insanity as to be unable rationally to comprehend the nature and effect of the provisions of the will, and was thereby led to make the will as he did, then the jury must find the will not to be the will of the said Isaac Foreman. An insane delusion is a fixed and settled belief in facts not existing, which no rational person would believe. Such delusion may sometimes exist as to one or more subjects and if the jury believe from the evidence in this case, that Isaac Foreman was laboring under such insane delusions upon subjects connected with the testamentary disposition of his property and the natural objects of his bounty when he made the will in question, and was thereby rendered incompetent to comprehend, rationally, the nature and effect of the act, and that, but for such delusions he would not have made the will as he did, then the jury should find against the validity of the will." And it was insisted upon appeal to this court that the giving of that instruction was error, but we held otherwise, and sustained the ruling of the court below upon the ground that it announced the correct rule of law. It was also held in that case that the belief of the testator, Foreman, that by placing his property in religious institutions for charitable purposes it would continue to increase until the day of judgment, to work for him, was evidence of a morbid delusion sufficient to sustain the verdict of the jury holding his will to be invalid. It cannot be said that the law is different as to marriage or other contracts. Judge Bonney, who heard the case below, in his able and elaborate written opinion filed with his decision, on this branch of the case, after summing up the evidence tending to show that Mrs. Merrick was the victim of an insane delusion growing out of and resulting from her belief in spiritualism, said: "Numerous witnesses who knew her well, who were her immediate neighbors, and who saw her frequently, declare her insane upon the subject of spiritualism; and to four physicians were put hypothetical questions, every element of which was abundantly proved by the testimony in the case, who gave the opinion, as experts, that she was insane. She built Merrick Hall at a place which rendered the construction of the building unusually expensive, because she was under the delusion that the spirit of her dead husband directed her to build it, and to build it at that particular place. She sent to Washington, and brought hither an attorney to collect a claim against an estate perfectly solvent, and paid him the sum of \$500 therefor, because she had been advised by the spirits, and was under the insane delusion that she was about to lose her money or some of it, and it must be the Buckley money; and this, too, when she had an at-

torney here who had attended to her business affairs for several years, and whom she had known much longer, and against whose honesty and integrity the finger of suspicion had never turned. So strong was the delusion that she offered him \$500 to collect the same moneys and when he assured her that the claim was safe, and refused her exorbitant offering, instead of listening to his advice and the voice of reason, she blindly followed the behests of her delusion in the manner so characteristic with persons afflicted with this form of insanity, and brought the Washington lawyer to her aid. The surrender of the mortgage to Clara Robinson, her dealings with Hainer, — both of whom were mediums, — evince her deranged condition whenever the circumstances offered an opportunity for her belief in spiritualism to become influential. Though highly moral, and absolutely pure in every thought and deed that sprang from her long life, through the influence of spiritualism she became an apologist for the debauchery of others, and so acted as to belie every element of her purity and womanhood. A radical change takes place in the very essentials of her character. She had frequently expressed her aversion to a second marriage, and steadfastly adhered to her resolution until the pretended message from her husband came; and then under the irresistible influence of her insane delusion, she assented, believing she had found one who espoused the doctrine so near to her heart, and who could revolutionize the world, eliminate misery and sorrow from the conditions of men, and, as it were, make earth a paradise." It is also to be kept in mind that in the view we have already expressed, the marriage in question was brought about and procured by Charles Orchardson in the accomplishment of his scheme and purpose to obtain possession of the property of Mrs. Merrick, and this fraud is to be taken into consideration in connection with the evidence of the mental incapacity of Mrs. Merrick at the time of the alleged marriage. Bishop, in his work on Marriage, Divorce, and Separation (vol. 1, § 611), says: "The intellect may be very weak, not absolutely free from derangement, while yet not to an extent disqualifying the person to contract matrimony; for the disorder or feebleness, to have this effect, must have reached a standard magnitude." And he adds, in § 612: "The cases oftenest occurring are where partial insanity or great weakness of intellect, is circumvented by fraud. Such a case was the Earl of Portsmouth's who, being of weak and somewhat disordered mind, was led by the artifice of his trustee and solicitor, whose influence over him was great, into a marriage with the latter's own daughter. The marriage was declared void. And in another case of the like nature, a man of forty contrived to bring about between himself and a woman of seventy—a drunkard with considerable property, which he sought to secure—a marriage, without a settlement, or the knowledge of her friends. It also was adjudged void." And again in § 613: "The two ingredients of fraud and insanity, thus blending, often, in matrimonial causes, produce by their united action a nullity which neither could alone effect." *Lyndon v. Lyn-*

don, 69 Ill. 48, is in harmony with this principle. In the case of the man of forty intermarrying with the woman of seventy, referred to above, which is the case of *Browning v. Reane*, 2 Phillim. Eccl. Rep. 69, 1 Eng. Eccl. Rep. 190, the evidence was to the effect that the woman was not only addicted to the excessive use of intoxicating liquors, but that she had been from childhood of very weak intellect. But the court does attach importance to the fact that the evidence disclosed that the marriage was procured by the man for the purpose of obtaining the estate of the woman, and in speaking of the weight to be given to the alleged fact of marriage it is said: From "merely pleading the fact of marriage, the court could not expect much that was satisfactory. If the marriage was brought about by a fraudulent confederacy, there would be two descriptions of persons present at it,—the parties confederating and those whose presence was necessary, and who might be deceived and imposed upon." This language we think, is peculiarly applicable to the facts in this case as to the manner in which the empty ceremony of marriage was pretended to be celebrated. In *Foster v. Means*, Speers, Eq. 569, 43 Am. Dec. 332, a marriage was held null and void between a man and a woman on the ground of the mental incapacity of the man, and fraudulent procurement of the woman. In that case, as in the *Browning Case*, 2 Phillim. Eccl. Rep. 69, 1 Eng. Eccl. Rep. 190, the mental defect was from childhood; and, while there was some evidence to the effect that the man was capable of reasoning to a limited extent, and comprehending some of the ordinary matters of life, the judgment avoiding the marriage was based upon the mental weakness together with the undue influence exercised by the woman in the procurement of the marriage. In rendering the opinion the court says, after speaking of the mental infirmity: "I have no doubt but that the complainant availed herself of this imbecility of mind and the natural instincts which might prompt him to marry, either to induce him to propose marriage, or to propose it herself, with the expectation of securing his property to herself. There could have been no other motive on her part to enter into such a contract with such a man." So here it appears beyond cavil that Charles Orchardson entertained for this deluded old lady no single sentiment of affection or esteem, which must prompt every honorable marriage; and that he married her for her money and nothing else. "There could have been no other motive on his part to enter into such a contract with such a woman." Still less could Mrs. Merrick have entered into such a contract with such a man, had not her reason been dethroned. No one will suffer by the decree below, unless it be the wrongdoer himself. No right or interest of society demands that such a marriage should be upheld.

We think the chancellor rendered his decree in accordance with the law and the evidence upon both branches of the case, and it will accordingly be affirmed.

Carter, J., took no part.

Rehearing denied February 4, 1898.

OHIO SUPREME COURT.

William E. DETLOR *et al.*, *Plffs. in Err.*,
v.

Upton HOLLAND.

(.....Ohio.....)

***1. A conveyance of a mining right in lands** was made as follows: "Do hereby grant, bargain, sell, and convey to the said Michael L. Deaver, his heirs and assigns, forever, all the coal of every variety, and all the iron ore, fire clay, and other valuable minerals, in, on, or under the following described premises: . . . together with the right in perpetuity to the said Michael L. Deaver, or his assigns, of mining and removing such coal, ore, or other minerals; and the said Michael L. Deaver, or his assigns, shall also have the right to the use of so much of the surface of the land as may be necessary for pits, shafts, platforms, drains, railroads, switches, sidetracks, etc., to facilitate the mining and removal of such coal, ore, or other minerals, and no more." *Held*, that such deed did not convey title to the petroleum oil and natural gas in the lands described in the deed.

2. A person in peaceable possession of real estate, under a defective deed, may have his title quieted by action, as against a stranger who makes claim to such real estate, but has no right or title thereto.

3. A written instrument was duly executed as follows: "Do hereby grant unto second party, their heirs and assigns, the sole right to produce petroleum and natural gas from the following named tract of land: . . . specifically granting to said second party, for and during the term of ninety (90) days from this date, and as much longer as oil or gas is found, operated, and produced in paying quantities, with the exclusive right to drill and operate oil and gas wells." *Held*, that such written instrument is not a lease of the lands, but only a grant of the sole right to produce petroleum and natural gas for the term mentioned; that the grant expired by its own limitation at the end of ninety days, unless within that time at least one well was drilled which produced oil or gas in paying quantities; and that, upon failure to drill one paying well within ninety days, there was no right to drill thereafter.

4. The term of the grant in such instrument having expired, and the grantees still claiming a right to drill under such grant, the grantor has a right to have his title quieted as against such claim, on the ground that the term of the grant has expired, without resorting to the law of forfeitures.

5. Under such an instrument, the sum paid as a consideration for the grant need not be returned in order to maintain an action to quiet title.

6. Expenses incurred by the grantees in drilling wells on the lands after the expiration of the grant, and after notice not to drill such wells, cannot be recovered from the grantor.

7. Such grant being made to four persons jointly, a notice addressed to all of them, to the effect that the grant has expired, and to

keep off the premises, and served on one of them, is sufficient. In such case notice to one is notice to all.

(February 1, 1893.)

ERROR to the Circuit Court for Perry County to review a judgment in favor of plaintiff in an action brought to quiet title to certain real estate. *Affirmed.*

Statement by **Burket**, Ch. J.:

The action in the courts below was brought by Upton Holland, defendant in error, against William E. Detlor and others, plaintiffs in error, seeking to quiet title to 80 acres of land, the possession of which was in the plaintiff below, and the defendants below claimed some interest therein under two several oil and gas leases. The validity of one of the leases depends upon the construction to be placed upon a conveyance of a mining right in the same lands. Issues were joined involving the questions disposed of in the opinion. The material facts of the case, as shown by the record, are as follows:

Francis G. Deaver made a conveyance of a mining right in said lands to Michael L. Deaver, as follows: "Do hereby grant, bargain, sell, and convey to the said Michael L. Deaver, his heirs and assigns, forever, all the coal of every variety, and all the iron ore, fire clay, and other valuable minerals in, on, or under the following described premises: . . . together with the right in perpetuity to the said Michael L. Deaver, or his assigns, of mining and removing such coal, ore, or other minerals; and the said Michael L. Deaver, or his assigns, shall also have the right to the use of so much of the surface of the land as may be necessary for pits, shafts, platforms, drains, railroads, switches, side tracks, etc., to facilitate the mining and removing of such coal, ore, or other minerals, and no more." Afterwards Michael L. Deaver made and delivered an oil and gas lease of these lands to one James W. Taylor, claiming that he had title to the oil by virtue of the said mining right. James W. Taylor assigned this oil and gas lease to one of the defendants below, and said lease had not expired by limitation at the commencement of this action. After granting said mining right, Francis G. Deaver died, leaving two sons, one of full age and the other a minor, for whom a guardian was appointed in the state of Wisconsin, where they both resided. After the death of the father, the two sons, by separate deeds, conveyed the lands to Upton Holland, the plaintiff below. The deed from the son, who was a minor, is signed by himself and his guardian, but there is nothing to show any proceedings in any court authorizing the making of the deed, but Mr. Holland went into possession of the lands under said deeds, and has held the same ever since. The said conveyances and lease were all properly recorded. On the 26th day of May, 1893, Upton Holland and wife, and William E. Detlor and his associates, executed and entered into a written instrument as follows: "This said lease, made and entered into this 26th day of May, A. D. 1893, by and between Upton Hol-

*Headnotes by the COURT.

NOTE.—As to forfeiture of oil and gas lease, see note to Evans v. Consumers' Gas Trust Co. (Ind.) 31 L. R. A. 673.

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land, party of the first part, and W. E. Detlor, James P. Lang, Henry Rosier, and William Rosier, parties of the second part, witnesseth that, in consideration of the covenants herein contained and by said second parties to be performed, do hereby grant unto second party, their heirs and assigns, the sole right to produce petroleum and natural gas from the following named tract of land situate in Monroe township, Perry county, Ohio, to wit: The northeast quarter of the northeast quarter of section twenty-seven (27), township twelve (12), range fourteen (14), in said county, containing about forty acres (40), reserving five acres (5) around the buildings to be located by first party, and whereon there shall be no wells drilled by either party; specifically granting to said second party, for and during the term of ninety (90) days from this date, and as much longer as oil or gas is found, operated, and produced in paying quantities, with the exclusive right to drill and operate oil and gas wells, to lay and operate pipe line, the necessary rights of way over premises, the use of enough land on which to preserve the products of such wells, to erect such buildings as may be necessary to carry on such work, the right of sufficient gas and water from the premises to run the necessary engine, reserving to first party all wells now on said premises, the right to remove all machinery, buildings, and fixtures belonging to them, and the full rights to release and subdivide said premises. In consideration for which the second party covenants and agrees as follows: To use and occupy only so much of said lands as may be actually necessary for the purpose herein granted. (2) To complete one well in addition to the one already on the said premises in ninety (90) days from said date, unavoidable casualties excepted, and to continue to complete one well each succeeding ninety (90) days thereafter, until four (4) wells have been completed on said premises, provided that oil is found in paying quantities in such succeeding wells. (3) To pay said party of the first part one hundred dollars (\$100) upon the delivery of this lease, and to pay said first party his attorney fees herein. (4) To pay all increase taxes by reason of such oil operations, and all damages to fences and growing crops. (5) To deliver to first party in pipe lines, free of charge, the one-eighth part of all the oil they may produce and save from said premises. (6) To pay first party for each well from which gas is obtained and marketed the sum of two hundred dollars (\$200) per year, first payment to be made at Corning, Ohio, thirty (30) days after the sale of said gas; and thereafter yearly in advance at the same place, so long as sale of gas continues. Provided that, if second party shall violate any of the conditions of this lease on their part to be kept and performed, then this lease shall cease, terminate, and be void at the option of the first party, and all moneys paid hereon be forfeited to the party of the first part. It is understood by the second party hereto that one M. L. Deaver, claiming the oil and gas under premises prior to this date, leased the oil and gas to one J. W. Taylor. Said second party accepts this lease knowing said fact, and agrees to operate this land, and not to recognize said Deaver claim, and to pay all royalty

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to said first party as herein stipulated, and to protect said first party against any loss by reason of any litigation upon the part of said Deaver. In witness whereof we, the first and second parties, have hereunto set our hands the day and year above written." Said instrument was signed by all the parties, and was duly attested, and was acknowledged by the grantors, but was never recorded.

After the expiration of ninety days, and after Mr. Holland had notified the grantees that the term of the grant had expired, they drilled one well on said lands, and thereafter drilled another well, but always refused to pay plaintiff below any royalty for oil produced, and denied his right to royalty, and claimed all the oil themselves under the James W. Taylor lease. All the wells were drilled without the consent of plaintiff below, and against his protest, both in writing and verbally. The grantees paid the \$100 at the time the grant was delivered, and did not comply with any other condition of the lease. At the time said mining right was granted petroleum oil was produced in small quantities within 10 or 20 miles of these lands. The cause was tried in the circuit court on appeal, and the court stated its findings of facts and conclusions of law separately, and rendered a decree in favor of the plaintiff below, quieting his title to the lands as against the defendants below, and sustaining the right of the plaintiff below to the oil and gas in said lands. A motion for a new trial was made and overruled, and exceptions taken, and a bill of exceptions containing all the evidence was also allowed and made part of the record. Thereupon the defendants below filed their petition in this court, seeking the reversal of the judgment of the circuit court.

Messrs. Elwood Newberry, L. Tussing, and W. B. Loomis for plaintiffs in error.

Messrs. T. M. Potter and Donahue, Spencer, & Donahue, for defendant in error:

A tenant is not permitted to dispute the title of his landlord, and when the relation of landlord and tenant is once established by an express act of the parties, the only objection that a tenant can make to his landlord's title is that it expired since the making of the lease, or had been transferred by sale on execution, or by operation of law.

Devacht v. Newsam, 3 Ohio, 59; *Moore v. Bensley*, 3 Ohio, 295; *Merchants Nat. Bank v. Pomeroy Flour Co.* 41 Ohio St. 552; *Ensel v. Levy*, 46 Ohio St. 255; *Pennsylvania Co. v. Platt*, 47 Ohio St. 366; *Brown v. Dysinger*, 1 Rawle, 408; *Jackson, Brown, v. Ayers*, 14 Johns. 224; *Bertram v. Cook*, 32 Mich. 518; *Hughes v. Watt*, 28 Ark. 153; *Cook v. Creswell*, 44 Md. 581; *Hardy v. Akerly*, 57 Barb. 148; *Bedford v. Kelly*, 61 Pa. 491; *Bigler v. Furman*, 58 Barb. 545.

If a person having a mere naked possession accepts a lease from one claiming ownership in order to save litigation, he cannot afterwards dispute the title of his lessor.

Bowditch v. Dubuque, 38 Iowa, 341; *Lucas v. Brooks*, 18 Wall. 436, 21 L. ed. 779.

Plaintiffs in error expressly agreed to protect Holland against Deaver's claim.

This provision of the contract, even if the general law upon the subject did not apply, would forever estop plaintiffs in error from making any claim under Deaver's lease, or in any way object to Holland's title, unless they could show that his title had expired after the making of the lease, or had been transferred by sale on execution or operation of law.

Saltus v. Belford Co. 133 N. Y. 499; *Hyatt v. Ingalls*, 124 N. Y. 93.

A reservation by the grantors of a deed of "all minerals" does not include petroleum oil.

Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696; *Schuykill Navigation Co. v. Moore*, 2 Whart. 477; *Gibson v. Tyson*, 5 Watts, 34; *Armstrong v. Lake Champlain Granite Co.* 147 N. Y. 495.

If the plaintiffs in error failed to perform their covenants within a certain time, the defendant in error had a right at his option to end the term and determine their rights under it.

Wills v. Manufacturers' Natural Gas Co. 180 Pa. 232, 5 L. R. A. 603; *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 34 L. R. A. 62; *Edmonds v. Mounsey*, 15 Ind. App. 399.

The \$100 was paid for the privilege of drilling, which was granted them for ninety days from date of the instrument. If they did not drill then they were required to perform other conditions for such extra time, and they could not expect or require Holland to return the \$100.

Phillips v. Coast, 130 Pa. 572; *Ewalt v. Gray*, 6 Watts, 427; 2 Story, Eq. Jur. § 779; 2 Kent, Com. 834-833; *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547; 2 Pom. Eq. Jur. §§ 592, 745, 758, 762.

Burket, Ch. J., delivered the opinion of the court:

If the title to the oil in the land in dispute passed to Michael L. Deaver under the conveyance of the mining right from Francis G. Deaver, it is clear that plaintiffs in error acquired a right to the oil under the James W. Taylor lease, but, if the title to the oil did not vest in Michael L. Deaver under that conveyance, the James W. Taylor oil lease vested no right to the oil in plaintiffs in error, and they would be driven to some other defense.

The conveyance in question is what is usually known as a mining right, and grants and conveys all the coal of every variety, and all the iron ore, fire clay, and other valuable minerals in, on, or under the said lands. Do the words "other valuable minerals" include petroleum oil? The deed of the mining right was made in February, 1890, and it must be construed in the light of the oil developments as they then existed in the vicinity of the lands. Francis G. Deaver, the grantor in the mining right, resided in Wisconsin, and there is nothing to show that he had any knowledge of the existence of oil in or near these lands. Oil was then produced in small quantities within from 10 to 20 miles of the lands, but there is nothing to show that the parties to the conveyance had any knowledge thereof. Said mining right grants in perpetuity the right "of mining and removing such coal, ore or other minerals, . . . with the right to the use of so much of the surface of the land

as may be necessary for pits, shafts, platforms, drains, railroads, switches, sidetracks, etc., to facilitate the mining and removal of such coal, ore, or other minerals, and no more." The incidents here granted are all such as peculiarly applicable to the mining of minerals in place, and not to such as are in their nature of a migratory character, such as oil or gas. Nothing is said about derricks, pipe lines, tanks, the use of water for drilling, or the removal of machinery used in drilling or operating oil or gas wells.

A rule of construction in such cases, which seems correct, is found in the following from the Law of Mines and Mining in the United States, by Barringer and Adams (p. 181): "In determining what is included in a lease, the familiar rules of construction are applied. The grant is construed most strongly against the grantor. The whole contract must be considered in arriving at the meaning of any of its parts. Terms are to be understood in their plain, ordinary, and popular sense, unless they have acquired a particular technical sense by the known usage of the trade. They are to be construed with reference to their commercial and their scientific import. This rule is of special importance when the question arises whether a specific mineral is included in a general designation." The words "other minerals," or "other valuable minerals," taken in their broadest sense, would include petroleum oil; but the question here is, Did the parties intend to include such oil in the mining right? Taking all the terms of the conveyance in the light of the surrounding circumstances, and in view of the above rule of construction, and upon authority of the case of *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696, we conclude that the title to the oil did not pass under said conveyance, but remained in the owner of the soil, and upon his death passed to his heirs. There is nothing to show that it was the intention of the parties that oil should be included in the word "minerals," and the easements granted, in connection with the mining right, are not applicable to producing oil, and show that oil was not intended to be included in the conveyance. If it had been, apt words would have been used to express such intention.

In the next place, it is urged by plaintiffs in error that the deed from the minor son and his guardian is not sufficient to pass title to one half of the land to defendant in error, and that therefore he is not the owner of that half, and has no right to have his title quieted thereto. This might possibly be so as between the minor son and the defendant in error, but, as between defendant in error and a stranger, such title, when strengthened with possession, is sufficient to support an action for the quieting of the title he has, even though such title should be only possessory. In an action to quiet title, if the plaintiff shows peaceable possession under a conveyance, even though defective, and the defendant shows no title or right, the plaintiff is entitled to have his title quieted as against such defendant and those claiming under him. It is also urged that the remedy sought by plaintiff below was by way of forfeiture of the rights of the defendants below under the

written instrument, and that a forfeiture should be first established by action at law, and not by an equitable action to quiet title. The contract between the parties in this case was not a lease of the lands, but only a grant of the sole right to produce petroleum and natural gas for and during the term of ninety days from that date, and as much longer as oil or gas should be found, operated, and produced in paying quantities; and the parties to whom the grant was made covenanted to complete one well, in addition to the one already on said premises, in ninety days from said date, unavoidable casualties excepted. There were no casualties; hence the covenant was to complete one additional well in ninety days, the term of the grant. No additional well was drilled, or attempted to be drilled, within ninety days, and therefore, at the expiration of that time, the grant terminated by its own limitation. If one paying well had been completed within the ninety days, the grant would have been extended "as much longer as oil or gas is found, operated, and produced in paying quantities." But, where no well is drilled within the time limited by the grant, the period of the grant is not extended by the words, "and as much longer as oil or gas is found, operated, and produced in paying quantities," and in such cases all rights to drill cease at the expiration of the time limited in the grant, in this case at the expiration of ninety days. The plaintiffs in error having acquired no right to the oil under the James W. Taylor lease, and the grant to them for the production of oil having expired by its own limitation at the end of ninety days, they had no right whatever, as against the defendant in error; and, as they claimed some right, he was entitled to have his title quieted as against such unfounded claim, not by way of forfeiting the grant, but by reason of the expiration thereof by its own limitation. With this view of the case, the petition is broad enough to entitle the plaintiff below to have

his title quieted without a resort to the law of forfeiture, although it would seem that, under the terms of the instrument, all the rights of the plaintiffs in error were forfeited by reason of the nonperformance of the covenants and conditions contained in the instrument.

It is further urged that the plaintiff below should pay back the \$100 paid to him when the grant or lease was delivered. This sum was paid for the grant for the term of ninety days, and the grantees enjoyed the term without interruption, and the grantor has the right to retain and enjoy the price he received therefor. It is not a case of rescission or forfeiture, but of expiration of the term of the grant.

Again, it is urged that the plaintiff below should be compelled to pay to the defendants below the amounts expended by them in drilling wells on the land after the expiration of the grant, and after notice to them not to drill any wells on the land. The defendants below drilled the wells on the lands of the plaintiff against his will, and after full notice from him not to drill, and in such case they drilled at their peril, and at their own expense, and are not entitled to be reimbursed by the owner of the land.

Some objection is made to the form of the notice and its service. The notice was addressed to all the defendants below, and was served by delivery to one of them on the premises at the well which had been drilled at the time the grant was made, and informed them that the lease expired that day, and notified them to keep off the premises. This was sufficient, and showed that he relied upon expiration of term, and not upon forfeiture. The grant was to all four of the defendants below jointly, and a notice to one joint contractor is binding upon all. *Baker v. Kellogg*, 29 Ohio St. 663.

There is no error in the record, and the judgment should therefore be affirmed.

CALIFORNIA SUPREME COURT (In Banc).

PEOPLE of the State of California, *Resp't.*,

Joseph J. EBANKS, *Appt.*

(117 Cal. 652.)

1. The mere fact that the order holding the accused to answer for a crime was

dated October 4, when the arrest was made September 17, does not show that the committing magistrate had lost jurisdiction of the case by delay, for the examination may have been proceeded with immediately after the arrest and continued until the order was made.

2. Failure to show that a designated person was regularly appointed short-

NOTE.—*Hypnotism.*

- I. Nature of subject.
- II. Definitions.
- III. Its existence and effect generally.
- IV. Its use in procuring the commission of crime.
- V. Its use in procuring submission to criminal acts or attacks.
- VI. Its use as an inquisitorial agent.
- VII. Its curative uses—propriety of restraint.

I. Nature of subject.

Hypnotism and its effect in law, though a question which has been much discussed, is one which has been but slightly considered by the courts, it having found its way into the reports of cases in 40 L. R. A.

the higher courts, so far as has been ascertained, in but two instances, one of which was the principal case and the other the case of *People v. Worthington*, 105 Cal. 168, set forth *infra*, at the end of VI. In this condition of affairs, therefore, it has been deemed permissible to look to the expressions of opinion by jurists, physicians, and scientists who have spoken on the subject to ascertain its legal effect, and, so far as may be, to supply the deficiency of judicial opinion thereon.

II. Definitions.

Hypnotism is defined to be artificial catalepsy; induced somnambulism; a method of artificially inducing sleep; artificial somnambulism. *Bouvier's Law Dictionary*, Rawle's edition, title, *Hypnotism*.

hand reporter to take the testimony of an accused before a committing magistrate will not support an assignment of error if it does not appear that he acted or reported the testimony or certified to it.

3. Addition of the state to the name of the district attorney who signs an information charging one with crime is not necessary.

4. California courts will take judicial notice that the county of San Diego is in that state.

5. Filing the sheriff's affidavit that he was biased, taken upon a challenge to a special venire summoned by him embodying facts brought out while the jury were excluded from the room, is not reversible error.

6. Separation of the jurors during the trial of a murder case may be permitted by the trial court in its discretion.

7. An elisor may be appointed to take charge of the jury when the sheriff and his deputies are disqualified, and the coroner is disabled by sickness from performing the duty.

8. Evidence is admissible in a prosecution for murder that two days before the murder the accused was found under the bed in a stranger's house having with him a bag which was afterwards found near the place of the crime, and which he had denied ever having in his possession, as tending to throw light upon his actions, appearance, and belongings at a period not remote from the day of the crime.

Hypnotism is defined by W. Xavier Sudduth, A.M. M. D., of Chicago in an article on "Hypnotism and Crime," in 18 *Medico-Legal Journal*, 239, to be in its simpler manifestations a modified form of natural sleep artificially induced, but in its more complex form it compares with the abnormal condition of natural sleep known as somnambulism.

And in the Case of Czyski reported in 14 *Medico-Legal Journal*, 150, Professor Dr. Grashey of Munich, called as an expert witness, said that a person can be suggested to go to sleep, and that such a sleep induced by suggestion is called "hypnosis," and the inducement of hypnosis is called "hypnotism," and the person who hypnotizes another is called a "hypnotizer."

In 51 *Alb. L. J.* 87, H. M. Bannister, M. D., of Chicago, in an article on "Hypnotic Influence in Criminal Cases," said that "conditions distantly related to or approaching it [hypnosis], but within physiological limits that may be manifested by anyone, ought not to be called hypnotism, or at least for legal purposes should be clearly distinguished from it."

III. Its existence and effect generally.

In Bouvier's Law Dictionary, Rawle's Revision, title, *Hypnotism*, it was said that there is a very decided difference of opinion among American scientific men who have given special attention to the subject as to the effect of hypnotism, and the same difference appears to exist in a marked degree in European thought, and that it is impossible as yet to state any satisfactory conclusion from this diversity of opinion; and that there has as yet been no recognition of the subject of hypnotism by the courts notwithstanding the amount of discussion concerning it in the press.

And in the Case of Czyski, reported in 14 *Medico-Legal Journal*, 150, Doctor Fuchs of Bonn, called as an expert witness, totally denied the power of hypnotism, and said that he did not consider it an instrument by which the human will could be controlled in a permanent or irresistible way.

And in 8 *American Lawyer*, 534, H. Gerald Chapin, LL. B., in an article on "The Forensic Aspect of Hypnotism" arrived at the conclusion that hypnotism has no place in civil or criminal law, and that it should not be made use of for the purpose of eliciting testimony, and that laws need not be passed to restrain its exercise.

And he expressed the further opinion in the same article, that in cases in which documents have been set aside by the courts where hypnotism has been alleged to have been employed, it is thought that the case in each instance was decided upon a theory of a wholly different character; and said that the case brought before the civil tribunal of Lyons, France, in June, 1863, in which a widow died leaving a will in favor of a professional magnetist, who together with his wife had been harbored by her at her home for some time, in which it was

claimed that they magnetized her, and in which it was reported that it was evident that the magnetist had complete control over her mind, and that he was able to suggest to her to make a will in his favor, there was nothing which would not permit the decision setting aside the instrument in question to be placed upon the theory of undue influence.

In 2 *Witthaus & Becker, Med. Jur.* 452, however, it is said that like other theories and investigations received at first with ridicule, hypnotism has been placed on a sure scientific basis, thanks to the labors of Charcot and his successors; and that the great French experts in legal medicine, so far as known without an exception, Tardieu, Devergie, Brouardel, Vibert, Tourdes, and Tourette recognize the possibility that the will may be entirely abolished under hypnotic influence; and that hypnotism had found a place in French, Austrian, and Hungarian law, and must sooner or later creep into the Anglo-Saxon.

So, the committee of the British Medical Association on hypnotism at the Birmingham meeting, 1890, reported in 11 *Medical Legal Journal*, 73, stated that they had satisfied themselves of the genuineness of the hypnotic state, but that no phenomena which had come under the observation gave support to the theory of animal magnetism.

And in 2 *Hamilton, Legal Med.* 212, the writer expresses the opinion that all impressionable individuals can be hypnotized, but says that hypnotism for the present is of greater theoretical than practical importance both from a medical and a forensic point of view.

And in the Case of Czyski, reported in 14 *Medico-Legal Journal*, 150, Professor Grashey of Munich, called as an expert, said that "hypnosis has the peculiarity that it can be produced easier and easier as the operation is repeated, and that the subject frequently hypnotized remains more suggestible in the intervening time, and it thus follows that thoughts may be suggested during his waked condition which he would never have accepted before the hypnotic operations had begun, and the control of the subject's will may be undertaken therefore in a waked condition, and can be heightened by suggestions during the period of wakefulness, and thus the hypnotizer may attain finally such power over his subject that a single word or a single look may put him to sleep.

So, in 3 *American Lawyer*, 5, a case in the United States court at Taooma, tried in July, 1894, was reported in which the plaintiff caused an important witness for the defendant to become confused in manner and in testimony, hesitating and uncertain in statement, by hypnotically making passes with his hands in the direction of the witness, which influence was destroyed by placing a person between the operator and the subject.

And in 2 *Hamilton, Legal Med.* 85, it was said that in a hypnotic condition, or one of exaggerated receptivity, an individual is very apt to make illu-

9. Whenever proof of one crime tends to prove a fact material in the trial of another such proof is admissible, and the fact that it may tend to prejudice defendant in the eyes of the jury is immaterial.

10. There will be no reversal for cross-examination as to matters not testified to in chief if the examination in chief is not in the record, so that it does not appear whether the cross-examination was improper or not.

11. Hypnotism of a person accused of crime will not render evidence of statements made by him while under the influence admissible in his favor at his trial.

12. A member of a grand jury impaneled before the trial of a murder case, but

which had adjourned to meet in the future, is not incompetent to act as a juror in the trial which is upon an information and has never been brought to the attention of the grand jury.

13. A separate appeal must be taken from a death warrant signed after judgment, to bring the question of its regularity before the appellate court.

14. Refusal of instructions the meaning of which is involved in doubt, or which are uncalled for in the case, is not reversible error if the instructions given upon that branch of the case are as favorable to the complaining party as the facts and the law would warrant.

(August 23, 1897.)

sional mistakes in identity, which would be out of the question under other circumstances.

IV. Its use in procuring the commission of crime.

There is the same conflict of opinion in the question whether hypnotism can be used as an agent in procuring the commission of crime—in other words, whether one can be compelled to commit a criminal act by hypnotic influence without criminal responsibility on his part.

Thus, in 1 *Kansas City Bar Monthly*, 20, in a paper read before the *Kansas City Bar Association* by J. C. Rosenberger, October 12, 1895, entitled "Has Hypnotism a Place in the Law," it was said that if a condition in which one can be driven by irresistible suggestions of another to the commission of an act which if he were in his normal condition he would not do can be produced by hypnotic suggestion, hypnotism is destined to become a full defense for crime, otherwise it has no place at all in criminal jurisprudence except as a fact of extenuation, or a mere mitigating circumstance according to the degree of dominion exercised over the subject; but that the medical profession is badly divided upon the question whether one can be driven by the irresistible suggestion of another to the commission of acts which if he were in his normal state he would not do.

In the Case of Czynski reported in 14 *Medico-Legal Journal*, 150, Professor Grashey of Munich, called as an expert witness, said: "The potentiality of putting a man so promptly and so rapidly to sleep is not reconcilable with the assumption of free-will power, and rather presupposes a condition of unfreedom of will."

And in *Albany Law Journal* of October 6, 1894, it was said editorially that "from the legal standpoint it is certain that in the minds of jurors, at least, a practical demonstration of the power of hypnotism will raise a reasonable doubt such as would entitle the defendant to an acquittal at the hands of the jury."

So, in 51 *Alb. L. J.* 87, H. M. Bannister, M. D., Chicago, said in an article upon "Hypnotic Influence in Criminal Cases" that it may perhaps be admitted as a possibility that crimes may be provoked in the hypnotic subject in the actual condition of trance, though in many cases and probably in the vast majority this would be impossible, and that immoral or improper acts might also be done under suggestion by those who would refuse to commit actual crime, and that any strong natural propensity might be stimulated so that improper acts growing out of such propensity would be more likely to be committed or submitted to.

And in 2 *Hamilton, Legal Med.* 212, it was said that suggestions made with evil intent during the waking state are still of far greater importance than those issued to a hypnotized individual.

So, in *Cleveland, Medical Jurisprudence of Insanity*, 107, it is said that in 1895 Hayward was hanged in St. Paul, Minnesota, accused of having

induced Blitz by hypnotic suggestions to murder Miss Ging. Blitz was sent to the penitentiary for life.

And in the Case of Czynski, reported and commented upon in 14 *Medico-Legal Journal*, 150, Czynski was tried in the higher courts of Munich, Bavaria, on the charge of having had recourse to hypnotic suggestions in order to win the affections of a woman of high social position, and obtain her consent to live with him in criminal intimacy, and subsequently to marry him, after he had subjected her to his will imposed upon her by his power of hypnotism, and was convicted upon the charge, and sentenced to imprisonment after a protracted trial.

And in the Bompard-Eyraud Case, tried in France and reported in H. Gerald Chapin's article on "The Forensic Aspect of Hypnotism," 3 *American Lawyer*, 585, Eyraud was murdered in apartments hired for the purposes by one M. Gouffe, the woman Gabrielle Bompard, his mistress, acting as the decoy. The woman alleged that she was hypnotized to do the act by M. Gouffe, but was convicted and sentenced to twenty years' imprisonment.

But in 18 *Crim. L. Mag.* 100, it was said editorially that there are few cases in which the hypnotized subject will not refuse to do a wrong act or to submit to a wrong, no matter if it be suggested, and that scoundrelism cannot flourish on hypnotism, and the case of the murder of Miss Ging, and the confession of Hayward, and the statements of Blitz that he was hypnotized by Hayward to kill Miss Ging has been investigated, and found to be mostly false, and that while it is not safe to assert that crime never was or can be committed with the aid of hypnotism, experience has taught that such a case is highly improbable.

And in 13 *Medico-Legal Journal*, 54, it was said by Clark Bell, Esq., of New York, in an article on "Hypnotism and the Law," with reference to the case of the murder of Catharine Ging, that "it would be quite outside of any legal experience to accept, as entitled to any credit, the waking story of murder committed by the accused while under hypnotic influence. Such statements should be entitled to no credit, and I know of no authority which would justify the position that the subject, on awakening from a hypnotic trance, could remember all or relate anything done while under hypnotic influence, and it would be a very unsafe proposition of law in regard to testimony to place a witness in a hypnotic trance, and to accept as truth the statements of events that he in that state described as having occurred at a previous time."

And the same statement was made by the same person in 18 *Crim. L. Mag.* 1.

And in 13 *Medico-Legal Journal*, 241, it was said, in an article on "Hypnotism and Crime," by W. Xavier Sudduth, M. D., of Chicago, who attended the Hayward-Blitz-Ging trial in order to make a psychological study of the principal in the case,

APPEAL by defendant from a judgment of the Superior Court for San Diego County convicting him of murder. *Affirmed.*

The facts are stated in the opinion.

Mr. J. S. Callen for appellant.

Messrs. W. F. Fitzgerald, Attorney General, and **Henry E. Carter** for respondent.

Searls, C., filed the following opinion:

The defendant, Joseph Japhet Ebanks, was charged by information with the murder of Harriet Stiles at the county of San Diego, state of California, on the 10th day of September, 1895, and upon a trial had under said information was convicted of murder in the first de-

gree, and sentenced to death. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

Defendant moved to set aside the information upon the grounds: (1) That before the filing thereof the defendant had not been legally committed by a magistrate. (2) That it was not subscribed by the district attorney of the county of San Diego, state of California.

The record shows that a complaint was filed with the justice, a warrant issued, the defendant arrested, and committed for examination on the 17th day of September, 1895. The order holding the defendant to answer for the crime of murder is dated October 4, 1895. The

that Hayward undoubtedly possessed a strong influence over Blitz, but the latter never claimed it was hypnotic, and that plea never was made in defense. That Hayward hired Blitz to do the deed for \$2,500, and when he found that his courage was failing drugged him with whisky in order to nerve him up to doing the deed.

But in 18 Crim. L. Mag. 1, Clark Bell, Esq., in an article on hypnotism in the criminal courts said with reference to the Bompard Case that the writer was of the opinion that the general impression of scientists agreed that hypnotic suggestion entered largely into the crime itself.

So, in 1 Kansas City Bar Monthly, 20, in a paper read before the Kansas City Bar Association by J. C. Rosenberger, October 12, 1895, entitled "Has Hypnotism a Place in the Law," it was said that the only kind of hypnotism which could at all affect the question of criminal responsibility is that by which the individual is deprived of intelligent consciousness, and can be driven by the irresistible suggestions of another to the commission of the act which if he were in his normal state he would not do.

And in 51 Alb. L. J. 87, H. M. Bannister, M. D., Chicago, said in an article upon "Hypnotic Influence in Criminal Cases" that hypnotism as a plea in criminal cases should be especially distrusted and the benefit of any reasonable doubt ought to be given to the party accused of instigating the crime, and that the greatest danger of the plea of hypnotism in criminal cases, if it is to become a popular or frequent one, is that of false accusation, and the escape of an occasional criminal is an unimportant miscarriage of justice when compared with that of the conviction of an innocent individual.

And in 3 American Lawyer, 45, it was said editorially that "Judges should remember that when they admit testimony of hypnotic control they are entering upon a path the end of which cannot at this day be seen. We do not think the courts will find it difficult with no increase of legislation to place legal responsibility where it belongs. We are glad that hypnotism as a legal defense, or, as the sole moving cause of offense, has as yet received no recognized standing in our jurisprudence."

So in Clevinger, Medical Jurisprudence of Insanity, 106, it was said that it has not yet been proved that an innocent person could be influenced by hypnotic suggestion of another to commit crime, and the presumption remains that anyone who commits a crime through hypnotism or other suggestions is fully capable of so doing, and without such prompting, and that the act is one consistent with his disposition, and that the suggestion would have been resisted had the person been disinclined to the offense naturally, and the question is open as to whether such a hypnotized criminal is not a principal, or at least a *particeps criminis*.

And in 2 Hamilton, Legal Med. 212, it was said 40 L. R. A.

that no serious crime has ever been committed in obedience to hypnotic suggestion, and efforts to prove hypnotic influences in recent French trials have utterly failed, and that there is every probability that the instigator to such a crime could be easily detected of the subject when re-hypnotized by a competent person, as in the hypnotic state information or hints would be given which would lead to discovery, though in the interval between such states the subject would be ignorant of everything that had occurred.

And in 1 Kansas City Bar Monthly, 20, in a paper read before the Kansas City Bar Association by J. C. Rosenberger, October 12, 1895, entitled "Has Hypnotism a Place in the Law" it was said that when we consider the difficulty of proving the defense of hypnotism by direct evidence and the fact that no one can be hypnotized against his will, added to the natural prejudice against innovation, it may safely be said that the time is far off when an ordinary jury can be convinced that an accused malefactor was the unwilling agent of the evil enterprise of another.

So, in 18 Crim. L. Mag. 1, Clark Bell, Esq., in an article on hypnotism in the criminal courts, said: "Whatever may be the facts of the case it is beyond all doubt that the phenomena of the hypnotic trance, and of so-called hypnotic suggestions, are not recognized as an existing fact by the great majority of lawyers at all, and probably not by the majority of the judges."

And Hon. C. D. O'Brien of St. Paul is quoted in "Hypnotism and Crime," 13 Medico-Legal Journal, 239, as saying that the law does not recognize the existence of the hypnotic condition, and that he does not think it ever will recognize it as a defense to a criminal act.

And Judge Seargrave Smith of Minneapolis, who presided at the Hayward trial, is quoted in that article as saying that he does not consider hypnotism as a proper or fitting defense in a criminal action.

And Thomas J. Hudson, Esq., of the Washington bar, author of the "Psychic Phenomena," is quoted therein as saying "that hypnotism has no legitimate place in criminal jurisprudence, and that while a criminal hypnotized in control of a criminal subject could undoubtedly procure the commission of a crime under exceptionally favorable circumstances, it would not be a legal defense on the grounds: (a) Because in the nature of things a hypnotized subject can have no standing in a court of justice as a witness; (b) the cross-examination of a subject as to the nature and extent of the suggestions made to him by the hypnotizer would be quite impossible and absurd."

And in 3 American Lawyer, 535, it was said by H. Gerald Chapin, LL. B., in an article on "The Forensic Aspect of Hypnotism," that as it is almost impossible that anything said or done while in the hypnotic state should be remembered in the post-hypnotic state, the very fact that the defense of

contention is that it does not appear that the defendant was given an examination until said last-mentioned date, and hence that the justice lost jurisdiction of the case. The record shows that at the hearing of the motion to set aside the information, among other things, the depositions of the witnesses taken upon the preliminary examination of the defendant were in evidence, but they are not set out in the record, and when they were taken does not appear; *non constat*, but that the justice may have entered upon the examination immediately after the 17th day of September, and continued to conduct the same until October 4, the date of the commitment. It is further objected that

there is no evidence that any shorthand reporter was appointed to take the evidence at the preliminary examination, except the certificate of the reporter himself.

I find no such certificate in the record, and no evidence that a shorthand reporter was appointed or acted, except that in the judgment roll, under the head of "Proceedings in the Superior Court of November 21, 1895," the following entry: "The following appears by the transcript thereof filed in the superior court, to wit: . . . Fred H. Robinson is appointed to act as shorthand reporter." Counsel refers to folio 210 of the record in support of his contention, but folio 210 in the transcript

hypnotism is interposed constitutes evidence of its falsity; and that subjects of hypnotism usually try to find reasons for the most foolish suggested acts, and that hypnotism would be the last reason which the subject would assign as the defense therefor, because in case it had been suggested to him that the deceased had attempted to murder him he would under all probability insist upon the existence of that fact and not that he had been hypnotized, and had he simply been ordered to do the act some reason other than that of hypnotism would have been given by him, so that the very fact that he set up hypnotism as a defense shows that the crime was committed entirely of his own volition.

So, in 15 *Medico-Legal Journal*, 254, Carl Sextus, in an article on "Different Forms of Hypnotisms," read before the psychological section of the Medico-Legal Society, November 12, 1897, said "that . . . [a hypnotized person] cannot be made to do that which is against his character or ethics, or anything that it was impossible to make him do under general daily conditions, without the aid of suggestion or magnetism. Because if that which he is suggested to do should be something that his whole nature and soul revolt against, the experiment will fail and the influence of the experimentalist will be at an end."

In "The Arena," vol. 18, pp. 548, 549, Marion L. Dawson, B.L., in an article on "Hypnotism in its Scientific and Forensic Aspects" expressed the opinion that hypnotism cannot be induced without the knowledge and against the will of the individual, and asserts that the power of hypnotic suggestion for immoral or criminal purposes, broadly speaking, depends upon the moral tendency of the hypnotized subject.

A hypnotized person will obey when acts commanded do not antagonize the moral standard he has set up for himself; but criminal or immoral suggestions meet the auto-suggestion arising from his own conscience, and confusion results. W. Xavier Sudduth, A. M. M. D., of Chicago, in "Hypnotism and Crime," 13 *Medico-Legal Journal*, 230.

So, in 3 *American Lawyer*, 535, it was said by H. Gerald Chapin, LL. B., in an article on "The Forensic Aspect of Hypnotism," that there is no doubt concerning the power of auto-suggestion to successfully resist the command of a stranger, and that subjects with a strong abhorrence of the ridiculous will refuse to commit an undignified act although it be suggested in the most forcible manner; and that many attempts have been made to obtain from members of an order or society secrets relating thereto, and not in a single instance have they succeeded; and that it is a well-known fact that persons opposed to the use of intoxicating liquors cannot be compelled to drink a glass of brandy while in a state of hypnosis.

And in the case of Czyski reported in 14 *Medico-Legal Journal*, 150, Dr. Fuchs of Donn, called as an 40 L. R. A.

expert therein, said that hypnotism could not succeed with any person who had a feeling of serious responsibility, and that no one would succeed in inducing one who simulated disease to relinquish such simulation.

And in 51 *Alb. L. J.* 187 H. M. Bannister, M. D., Chicago, in an article upon "Hypnotic Influence in Criminal Cases," it was said that in a vast majority of cases, if not in all, the efficiency of post-hypnotic suggestion depends entirely upon the belief of the subject in some mysterious power exercised over him by the operator, and that if moral impulses are strong there is very little probability of its being effective for evil. It is, at best, not equal to the profounder sentiments of our nature.

And in 3 *American Lawyer*, 535, it was said by H. Gerald Chapin, LL. B., in an article on "The Forensic Aspect of Hypnotism," that in numberless cases the hypnotized subject who performs acts at the command of the hypnotizer has admitted that he knew at the time of performing them that the suggestion was false, but obeyed with the imagined object of pleasing the hypnotizer.

So, in 27 *Chicago Legal News*, 65, it was said editorially that the main test of moral responsibility in cases of hypnotism would lie in the inquiry whether the person hypnotized realized, when himself, that in submitting to hypnotism he became the passive tool of another person, and that if such knowledge existed, in voluntarily surrendering his own reason and will he should be held to the same accountability as if he had voluntarily abdicated his normal mentality and made himself a prey of frenzied passion through intemperate indulgence in drink; and that it would be legitimate to charge a jury, where hypnotism was alleged as a defense, that although they found that the defendant was actually unconscious of his act at the time of its commission, yet if they found that he had actual knowledge or reasonable grounds to infer that a hypnotist contemplated the commission of a crime, and nevertheless submitted himself to his dominion, he would be legally responsible as an accomplice.

And in 3 *American Lawyer*, 535, it was said by H. Gerald Chapin, LL. B., in an article on "The Forensic Aspect of Hypnotism," that hypnotism is not something that can be forced upon a person, and therefore, one, who, knowing that while in a state of hypnosis he may be compelled to commit crime, voluntarily suffers himself to be placed in that condition, may be supposed to have anticipated all consequences of his act, and agreed to become responsible for them, and this would apply to a case in which it was suggested by the hypnotist that a false state of facts existed which would, if true, justify the commission of the offense.

So, in "The Arena," vol. 18, p. 554, it was said by Marion L. Dawson, B. L., in an article on "Hypnotism in its Scientific and Forensic Aspects," that if the subject voluntarily permits himself to

is a blank. If, however, it be true that Robinson was not appointed reporter in the justice court, we fail, in the absence of proof that he acted or reported the testimony, or certified thereto, to see how error can be predicated thereon. The further objection that the information was not properly signed by the district attorney is without merit. The information is entitled, "In the superior court of the county of San Diego, state of California." In the body of the information it is charged that the defendant "at the said county of San Diego, in the said state of California," etc., and it is signed by "A. H. Sweet, District Attorney of the said county of San Diego." The objection is that the officer omitted the words "the state of California" after the words "county of San Diego." Section 809 of the Penal Code requires that the information shall be "subscribed

by the district attorney," but does not require him to add to his signature the name of the county or of the state. In *People v. Ashnauer*, 47 Cal. 98, the district attorney signed an indictment "Henry Starr, District Attorney," without adding the name of the county, and it was held sufficient. The courts will take judicial notice that the county of San Diego is in the state of California. *Humboldt County v. Dinsmore*, 75 Cal. 604. The motion to set aside the information and the demurrer thereto, for like and other causes, were both properly overruled.

At the trial the regular panel of jurors drawn having been exhausted without securing a sufficient number of competent jurors, a special venire issued to the sheriff, commanding him to summon additional persons to act as jurors. Counsel for defendant interposed a

be placed in a state of mental irresponsibility the well-settled principle of law that a person cannot take advantage of his own misconduct would govern in case of his violation of the law while in that condition.

But in 27 *Chicago Legal News*, 65, it was said editorially that "evidence of any knowledge the patient may have acquired, when in her normal condition, of general or particular criminal purposes, on the part of her hypnotizer would be material [in a prosecution in which hypnotism is claimed in defense as], it might be too harsh to apply the analogy from drunkenness to the case of a person who was without any ground for suspicion of criminal motives—one, for instance, who submitted to a hypnotist in a jesting spirit, or out of curiosity, or for supposed medical treatment."

So, merely showing that a woman who committed a homicide was told to kill the deceased by her husband, and that she subsequently did it, does not prove hypnotism, or, at least, does not tend to establish a defense to a charge of murder. *People v. Worthington*, 105 Cal. 186.

And testimony as to the effect of hypnotism upon those subject to such influence is not admissible in a criminal prosecution in which the crime was alleged to have been committed under the influence of hypnotic suggestion, where there was no evidence tending to show that the defendant was subject to the disease if it be such. *People v. Worthington*, 105 Cal. 186.

V. Its use in procuring submission to criminal acts or attacks.

In 2 *Hamilton, Legal Med.* 541, 542, it was said that hypnosis might be used as a means to prevent resistance to sexual approach; but all cases in which accusations are made upon this basis should be scrutinized with the greatest caution. In such a case it may not be difficult to prove whether or not the female was amenable to hypnosis or to detect malingering, but it may be impossible to show that she was in an hypnotic state at the time of the alleged sexual assault; and testimony given by the subject should be corroborated by more objective evidence than alleged perceptions of events during such an abnormal state of consciousness.

So, in 2 *Witthaus & Becker, Med. Jur.* 434, 435, a case is cited as given by Bellanger in which the sexual relations of a doctor and his patient were kept up only during the hypnotic state, and knowledge of the conditions of affairs was finally revealed to the patient's mother in one of the seances. And it was said that lethargy and catalepsy are favorable to criminal purposes, since the girl is absolutely without power to resist, and attention was called to the cases reported by Auban and Rowx in 1865, in which rape was repeated in

succeeding states, and to cases collected by Tourette in *Le Vail dans Hypnotisme*, Ann. d'Hyg. 1886, in which several of the victims were virgins whose deforation was followed by the usual pain and bleeding, and in two cases pregnancy resulted.

And in 2 *Hamilton, Legal Med.* 33, it was said that it is possible to induce various hallucinations by hypnotic suggestion, and in women they not unrarely have a sexual relation.

So, in 2 *Witthaus & Becker, Med. Jur.* 454, a case is reported in which a girl, after visiting a therapeutic hypnotizer daily for some time found herself pregnant, and on examination her pregnancy dated from the time of her visits. But no mention was made of the fact that impregnation might have been the result of intercourse between the visits, citing *Devergie in Gaz. Med. de Paris & Edin. Monthly Journal*, 1860, vol. 2, p. 561.

And in "The Arena," vol. 18, p. 549, in an article by Marion L. Dawson, B. L., on "Hypnotism in Its Scientific and Forensic Aspects," the Castilian case reported by Prosper Despine is referred to in which hypnotic influence was supposed to have been exerted over a female subject for an immoral purpose, and in which the defendant was convicted and sentenced to confinement in the penitentiary.

And in the case of the dentist Levy, in the *Rouen Assizes* (1878), the dentist was convicted of rape on a young woman in the dentist's chair upon her testimony as to her subsequent condition, and that of the dentist that the intercourse took place with her consent, and the report of the medical examiners that the state of nervous sleep really existed, and that a girl might be violated while her will is abolished by this means. 2 *Witthaus & Becker, Med. Jur.* 453.

So, in a case reported in 15 *Medico-Legal Journal*, 266, a girl aged twenty years claimed to have been kidnapped, taken to the woods, stripped of part of her clothing, and tied to a tree, where she was found the next morning, and four young men were charged with the crime and arrested and convicted, but a new trial was granted, and they were subsequently convicted of sending improper letters to her which determination was also set aside; subsequently she made a sworn confession that her testimony was false, and that the letters were written by her guardian and others for the purpose of convicting the young men, but when this confession became known she was taken to a newspaper office by the guardian and there denied ever having made it, and also denied the confession when again brought into court, though it was witnessed by four prominent and trustworthy citizens, the guardian being present when the denials were made. Subsequently she escaped from the guardian's residence, and declared that the confessions

challenge to the panel under this special venire, upon the ground of the sheriff being disqualified by reason of bias, etc. The challenge was traversed by the district attorney. All the jurors, including those accepted and those summoned under the special venire, were excluded from the court room, and testimony taken; the sheriff testifying to facts clearly showing him to have been biased, and to having had and expressed an unqualified opinion, etc.; whereupon the people confessed the challenge, and the court directed an affidavit to be made by the sheriff, embodying the substance of his testimony as given, which was verified and filed, the challenge sustained, and a venire issued to the coroner.

Defendant objected to filing the affidavit, moved to strike it out, and predicates error on the action of the court in refusing so to do. It

would seem to the ordinary mind that, defendant having secured the only object of his challenge, it could matter but little to him as to the form in which the facts appeared of record, where, as here, the jurors were not present, and he could by no possibility be injured by the testimony or affidavit. Conceding, therefore, without deciding, that filing the affidavit was an irregularity, it was one which did not injure the defendant, and affords no ground for reversal. Penal Code, § 1258.

During the progress of the trial, the court, upon the several adjournments from day to day, after admonishing the jurors, as provided by § 1122 of the Penal Code, permitted them to separate, and this is assigned as error. This was a matter resting in the discretion of the court, and was not error. Penal Code, § 1121.

The next error assigned is as follows: "The

were absolutely true, and said that he had such an influence over her that she was 'helpless to do otherwise than as he told her to do.

In 13 *Medico-Legal Journal*, 254, W. Xavier Sudduth said, in an article on "Hypnotism and Crime," however, that hypnosis would be no plea in defense of rape, because a truly virtuous woman would resent the least approach toward familiarity in the hypnotic state, even as she would in the waking condition, and if the immoral suggestions were persisted in it would awaken her, but that intercourse might be had with a courtesan in a hypnotic state, and that she might be led to believe that the act was done by a perfectly innocent person, but that anyone who should allege seduction in a hypnotic condition would proclaim herself an immoral person.

And in 13 *Medico-Legal Journal*, 241, Dr. H. A. Parkyn of Chicago, who was present when the Briggs-Pickins case occurred, is quoted, in an article by W. Xavier Sudduth of Chicago on "Hypnotism and Crime," as saying that this case was one of hysteria, or of original sin. That when the Briggs girl and her girl companion first returned after their two days' absence nothing was said about hypnotism; but when people began to talk about and shun them they found it necessary to hunt up an excuse for their absence, and to account for their presence in the place where they were found. That the Briggs girl knew something of hypnotism, and was shrewd, sentimental, and hysterical, and that she may have imagined the commission of a crime during a hysterical moment, or she may have concocted the story to screen her part in the case, and that no one who knows anything about the case now believes that hypnotism had anything to do with it.

In 2 *Hamilton, Legal Med.* 542, it was said that the hypnotic state is one pre-eminently hallucinatory, and therefore prone to originate false ideas, especially in the hypnotic subject, and that for this reason there can be no excuse for the induction of the hypnotic condition in a female by a man without the presence of witnesses.

VI. Its use as an inquisitorial agent.

In *Bouvier's Law Dictionary*, Rawle's Revision, title, *Hypnotism*, it was said that the use of hypnotism as an inquisitorial agent is permitted by the law in Holland, citing 95 *Law Times*, 500.

And in 2 *Witthaus & Becker, Med. Jur.* 454, it was said that in hypnotism there is a complete loss of memory of events which take place during sleep, on waking. The memory recurs in succeeding states, however, so that the crime must be described while the subject is under hypnotic influence at some subsequent date.

And a case is reported in 15 *Medico-Legal* 40 L. R. A.

Journal, 208, taken from the *American Journal of Insanity*, 1848, in which a man was accused by a hysteric lunatic of an attempt to murder her; she was hypnotized and her narration of the story during the hypnotic state varied decidedly from that given in the conscious state, and the mesmerizer was permitted to testify to such facts.

In 3 *American Lawyer*, 535, it was said by H. Gerald Chapin, L.L. B., in an article on "The Forensic Aspect of Hypnotism," however, that the condition of the subject during hypnosis is almost identical with natural sleep, and that therefore the general rule of law that statements during sleep are not receivable in evidence should apply, and that hypnotism should not be made use of for the purpose of eliciting testimony.

This is the view adopted by the principal case.

And in 51 *Alb. L. J.* 87, H. M. Bannister, M. D., in an article upon "Hypnotic Influence in Criminal Cases," said that when an individual is fully in the hypnotic condition he can be made to say anything, and even honest questioning may act as false suggestion, and that therefore any confession or admission made by hypnotized persons ought to be legally excluded; that susceptibility to suggestion, even to the extent of affecting bodily functions, does not necessarily imply the hypnotic condition, though the difference is to some extent one of degree only; this must be remembered in considering or estimating the value of testimony.

VII. Its curative uses—propriety of restraint.

Hypnotism may influence some patients to anaesthesia, so that surgical operations can be performed without pain, but such possibilities are rare, or it would come into more general use.

Clevinger, Medical Jurisprudence of Insanity, p. 107.

And faith healers, Christian Scientists, and others, who sufficiently impress the imagination, occasionally effect cures of minor ailments, but all organic troubles are beyond the reach of such means of cure, as is also the loss of an eye or an amputated leg. *Clevinger, Medical Jurisprudence of Insanity*, p. 107.

And in the report of the committee on hypnotism of the British Medical Association at the Birmingham meeting, 1890, reported in 11 *Medico-Legal Journal*, 73, it was said that the committee was of the opinion that as a therapeutic agent hypnotism is frequently effective in relieving pain, procuring sleep, and alleviating many functional ailments, as to its permanent efficacy in the treatment of drunkenness the evidence before the committee is encouraging, but not conclusive.

So, in 15 *Medico-Legal Journal*, 367, Thomas Bassett Keyes, M. D., of Chicago, in an article entitled "Criminality and Degeneracy; Its Treatment by

jury retire in charge of B. P. Hill, elisor. See folio 277. The minutes of the clerk and the records fail to show any disqualification of the coroner." Had the learned counsel turned to folios 274, 275, he would have seen that an affidavit was filed, showing that by reason of sickness the coroner was physically unable to perform the duty of coroner, that the sheriff and his deputies were disqualified therefrom, and that therefore Benjamin P. Hill was appointed an elisor, to take charge of the jury, etc. Under the circumstances this was entirely proper.

At this point, and to the end that some of the objections taken to the introduction, and refusal by the court to permit the introduction, of evidence may be the better understood, it is necessary to state the more salient facts in the case. On the 6th day of September, 1895, Leroy R. Stiles, aged sixty-five years, his wife, Harriet Stiles, aged sixty years, and J. B.

Borden, the father of Mrs. Stiles, aged eighty-five years, all residents of Riverside, went to the ocean beach about 15 miles above Ocean-side, in the county of San Diego, for a week's recreation. They were camped in a tent on the beach. On the morning of the 10th day of September, 1895, Mr. Stiles, accompanied by Mr. Borden, left Mrs. Stiles at the tent, and went up the beach a distance of say 1½ miles, Mr. Stiles fishing as he went along, and Borden accompanying him. While fishing Mr. Stiles saw two men on the bluff above him, who were going south down the coast toward his tent, and soon after called the attention of Borden to the fact, and advised the latter to return to the tent, as the strangers might frighten or annoy Mrs. Stiles. Mr. Borden started for the tent, which was not in sight from Stiles' position. Some time later, and probably about 10:30 A. M., Mr. Stiles started back for his camp, and on reaching the tent

Surgery and Hypnotism," recommended hypnotism as a cure for dipsomania and sexual perversion, supporting his recommendation with the opinions of numerous medical men, and said that "by the use of proper hypnotic suggestions we may train the mind on a correct basis and lead the thoughts in a proper channel, while unhealthy and criminal thoughts may be softened, deadened, and obliterated, and thus by proper hypnotic suggestions, fearful passions may be ameliorated. The weakness of character of the occasional criminal may be strengthened. The unresisting desire of the criminal insane or kleptomaniac may be reversed to repulsion. Under hypnotism we may teach and even bring the criminal to religious views in truthfulness, honesty, and uprightness."

Hypnotic suggestions, however, accomplish nothing with the insane. Clevinger, Medical Jurisprudence of Insanity, p. 1002.

But there is a difference of opinion as to the harmfulness of hypnotism; it is probable that it harms some and does not so affect others; at any rate there is enough danger to make considerable caution necessary, particularly as to repetitions. Clevinger, Medical Jurisprudence of Insanity, p. 107.

The fully developed hypnotic state implying a marked disturbance of consciousness and personality is an abnormal one, and may have serious physical results on the subject. H. M. Bannister, M. D., of Chicago, in 51 Alb. L. J. 87.

And in Bouvier's Law Dictionary, Rawle's Revision, title, *Hypnotism*, it was said that the consensus of medical opinion would seem to be in favor of regulation of hypnotism.

So, in the report of the committee on hypnotism of the British Medical Association at the Birmingham meeting, 1890, reported in 11 Medico-Legal Journal, 78, it was said that damages in the use of hypnotism may arise from the want of knowledge, carelessness, or intentional abuse, or from too continuous repetition of suggestions in unsuitable cases, and that in their opinion when used for therapeutic purposes its employment should be confined to qualified medical men; and they expressed their strong disapprobation of public exhibitions of hypnotic phenomena, and the hope that some legal restrictions will be placed upon them.

And in the case of Spurgeon Young, reported in 14 Medico-Legal Journal, 529, the coroner of Chautauqua county, who was also the health officer of Jamestown, New York, held an inquest with a jury to inquire into the cause of Young's death and how far it was due to or traceable to his condition as affected by repeatedly placing him in a hypnotic

state by hypnotizers who were not skilled. The jury, after hearing the answers of numerous medical experts to hypothetical questions involving the facts, returned a verdict of death from diabetes and nervous exhaustion caused by hypnotic practices upon him for several months prior to his death, his body having been suspended between two chairs while under hypnotic influence, the back of his head resting on one chair and his feet upon another without other support, and that while so suspended a person weighing at least 180 pounds sat upon him, and that he had also while under such influence been carried through the various stages of intoxication and delirium tremens and other hypnotic feats, and recommended that the state legislature pass a law prohibiting the practice of hypnotism.

In Russia no physician can hypnotize except in the presence of two others; and in Prussia public exhibitions of hypnotism are forbidden; and in France the use of hypnotic suggestion is limited to the medical profession. Marion L. Dawson, B. L., in "Hypnotism in Its Scientific and Forensic Aspects," in *The Arena*, vol. 18, p. 564.

So, in 2 Hamilton, Legal Med. 212, it was said that the possibility of the commission of crime under hypnotic suggestion cannot be denied, and that the practice of hypnotism should therefore be limited by law, and public exhibitions should be entirely prohibited.

Legislation regulating the use of hypnotism and prohibiting its illegitimate exercise has been passed in Russia, France, Italy, and Switzerland, but in the United States the great majority of the profession is inclined to be skeptical, and is waiting for further proof. J. S. Rosenberger, in 1 Kansas City Bar Monthly, 17.

In 3 American Lawyer, 535, however, H. Gerald Chapin, LL. B., in an article on "The Forensic Aspect of Hypnotism," arrived at the conclusion that no laws need be passed to restrain the exercise of hypnotism, and said that it would seem to be better to place it within the same category as intoxicating liquors or explosives. Any person may purchase or own them, he is only to be held accountable for the manner of their use.

And in *The Arena*, vol. 18, p. 564, it was said by Marion L. Dawson, B. L., in an article on "Hypnotism in Its Scientific and Forensic Aspects," that before the medical profession can reasonably claim any right to the sole use of psychic phenomena it should be required to show that physicians are better qualified than other scientists to use the power for the benefit of the afflicted, and less liable to employ it for injurious purposes. F. H. B.

found Mrs. Stiles and her father, Borden, both dead in the tent. The death of Borden was caused by two bullet wounds, one in the head and the other in the left breast; and the body of Harriet Stiles showed that she had received three wounds, which were caused by two bullets. An autopsy showed that one bullet had passed through the body of Borden, through a gunny sack upon which he was lying, and was found in the sand under him. Another bullet had passed through a cot which was in the tent. The wounds and the bullet found indicated that they were fired from a 45-caliber Colt's revolver. The testimony connecting the defendant with the murder was circumstantial, and, as is frequently the case where circumstantial evidence is relied upon to convict, consisted of a long chain of circumstances. Defendant made a statement after his arrest to the officers, and was also a witness in his own behalf. According to his own testimony he had resided in San Diego in the summer of 1895, and had become interested in religious subjects, and in July of that year he went from San Diego, in part on foot, in part by rail, and in part by wagon, in the vicinity of Downey, to attend a camp meeting of Adventists, Salvationists, or some other religious sect. He seems to have spent his time at Downey and in that vicinity until about the 6th of September, with the exception of a trip to San Pedro, where he worked nearly a week, and then returned to Fullerton, a town or village a few miles from Downey, Anaheim, etc. He had made the acquaintance of an aged member of the society holding the camp meeting, by the name of Adams, who resided in Fullerton, and who permitted him to sleep in a room in his house when in town. When he left Fullerton, two pistols, which had been left in the room occupied by him, one a large white-handled Colt's revolver of 45-caliber, and the other a smaller one, a cartridge belt with ammunition in it, a dagger, two shirts, all of which belonged to R. F. Gibson, were missing. The larger revolver and the shirts had the initials of the owner, R. F. G., marked upon them. A coat and a few other things were taken from the same room at the same time. Defendant testified and admitted that for the last few nights he occupied the room in Adams' house, also spoken of as the Adams & Baxter house; he was excessively drunk, and knew little or nothing of what occurred. Admitted that he had a faint recollection of taking and pawning or selling the smaller revolver, and that a day or two later he found himself on his way toward San Diego with the coat, but denied emphatically the taking or possession of the large white-handled revolver, or that he had any revolver, or that he had a flour sack in which he carried clothes or other things, but averred that he did have a bundle in a white handkerchief or handkerchiefs. The question as to the large white-handled pistol and the flour sack became leading factors in the case, as we shall presently see. Several persons in Fullerton and vicinity saw a large white-handled pistol in the hands of defendant at Fullerton, saw him with a white flour sack, and one person saw him place the pistol, belt, etc., in the sack. One of the witnesses who saw the pistol was famil-

iar with it, and asked defendant if it was not "Gibson's" gun," and he answered "No." One or two other witnesses who were familiar with the Gibson pistol saw the one with defendant, and said it resembled it, and they thought it the same, and one of them recognized the scabbard by a patch on it. From the 6th of September until the 9th several witnesses met and saw defendant on his way to San Diego, with a flour sack, and some hard substance in it, which caused the sack to protrude; one thought it probably a boot heel, another the handle of a frying-pan, etc. On the 9th of September defendant met one Garges near El Toro station, and they traveled south together, walking on the railroad track. Garges was a repairer of watches and clocks, and was plying his vocation about the country. He describes defendant as carrying a white flour sack, which he says "appeared to be an empty flour sack, something more than half full." It appeared to have clothing in it and some hard substance, like a cooking utensil. They walked south that day, slept in the open air at night, and on the morning of the 10th defendants stopped at a section house on the railroad at San Onofre, procured some bread from a lady named Florence Steele, who wrapped it in a newspaper called the "Ladies' World," from which she had made a clipping, which paper she identified afterwards, as stated herein. They followed the railroad south, saw a man fishing (presumably Stiles), and later a tent on the beach, and a person apparently bathing in the surf, who defendant said was a woman. Defendant fell behind at this point and was soon lost sight of by Garges, who continued on his journey until say 2 o'clock p. m. of the same day, when, while resting, he was again joined by the defendant, who said that, having lost Garges, he thought the latter had taken the wagon road, and that he, defendant, had done the same, etc. They parted soon after, Garges leaving the main line of the road to go to Fallbrook, and defendant going to San Diego, where he arrived on the night of September 11, when he visited the room of an acquaintance, requested permission to sleep with him and to be put on board an English ship in the stream, and about to sail in the morning. This was declined and defendant requested his friend to say nothing of his presence there. He was arrested a few days later some 30 miles in the interior, where he said he had gone to hunt work. Over two months later, a white flour sack, much soiled, and resembling that carried by defendant, was found in a thicket of brush near the scene of the murder, containing Gibson's revolver, with four chambers of the cylinder containing empty, and two chambers loaded, cartridges, with the belt, cartridges, dagger, one of Gibson's shirts, with his initials on it, a few slices of bread wrapped in the newspaper identified by Florence Steele, etc. The other shirt of Gibson and the coat taken from the same room were on the person of the defendant when arrested.

It should also be stated that Garges testified that, when defendant joined him on the afternoon of the 10th of September, he did not have the flour sack which he had previously carried. Also that Stiles had a small bag of Durham smoking tobacco in his tent, which

was missing after the murder, and that defendant, who had been previously begging tobacco, had, when he joined Garges, a sack of Durham smoking tobacco. There are other inculpatory circumstances, but these are deemed sufficient to show (1) that the evidence was sufficient to warrant a verdict of guilty; (2) to show, by the character of the testimony, that the objections to evidence, which must, in the aggregate, reach into the hundreds, and which cannot be considered in detail, were mainly destitute of merit.

We here notice what the learned counsel for appellant terms a flagrant and gross error on the part of the court in the admission of evidence and refusal to strike out the same, and which he asserts calls for reversal: The testimony of Mrs. Aurelia Price was to the effect that she resided nearly 2 miles south of Santa Ana, and some 10 miles from Fullerton. That on the 7th day of September defendant came to their place, with the white flour sack, so often described. She described his dress, etc., and identified the sack presented in court as one like that carried. On the next day, viz., Sunday, September 8, about 11 o'clock A. M., he came again to the Price ranch or house with the same sack, etc. At 7 P. M. of the same day Mrs. Price entered her bedroom, and smelling the fumes of tobacco, which her husband did not use, she lighted a lamp and looked under the bed, where she found the defendant, who rushed out, and before the witness could get to a shotgun, he was out of the door, and from the manner he carried his hand she thought he was going to shoot, although she did not see a pistol, and witness ran out of doors. Defendant came to a screen, and witness asked him if his sack was in the house, and he said "Yes." Witness went in the house after it, and defendant ran off the place. The husband of the witness was at the barn when this occurred. It will be borne in mind that the incident related is one occurring during the trip of defendant from Fullerton to San Diego, and that it occurred during and at the time when defendant afterwards testified that he was at least partially unconscious from intoxication. The Sunday morning alluded to is that mentioned by him as succeeding the night when he slept in a box car near Santa Ana, and first found he had the coat, but he did not know how he came by it, etc. The declared object of the prosecution was to show his conversation in reference to the sack, and to show that defendant had a pistol. In the latter respect the testimony of the witness only showed that from defendant's actions she thought he had one, but the evidence was admissible as an incident throwing light upon the acts of defendant, his appearance, and his belongings, at a period not remote from the 10th day of September, the day of the alleged murder.

As was said in *People v. Rolfe*, 61 Cal. 541: "It all consisted of circumstances more or less direct, tending to connect the defendant with the perpetration of the robbery, and to establish his guilt. Evidence that he was seen at different places, not far distant from the robbery and on days not remote from the day on which the crime was committed: that he was seen in company with Hampton, the accom-

plish, who was used as a witness on behalf of the state; that they were armed, one with a rifle and pistol, and the other with a shotgun; that they had the same dog with them; that they stopped at certain houses, procured meals there, and walked off in certain directions; that they made various inquiries, and otherwise conducted themselves in a suspicious manner,—were all circumstances in the case which were properly submitted to the jury."

Touching the suggestion of counsel that the evidence tended to prove the attempt of defendant to commit another offense, and thus prejudice him in the eyes of the jury, the case of *People v. Walters*, 98 Cal. 138, is in point. In that case the court, speaking through Beatty, Ch. J., said: "It is true that, in trying a person charged with one offense, it is ordinarily admissible to offer proof of another and distinct offense, but this only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. These remarks are applicable to any case in which two persons are murdered or assaulted at the same time, and as part of the same transaction." See also *People v. Cunningham*, 66 Cal. 668; *People v. Smith*, 106 Cal. 74, 82; *People v. Craig*, 111 Cal. 460, 468; *People v. Bidleman*, 104 Cal. 613; *People v. Lane*, 101 Cal. 517; *People v. Walters*, 98 Cal. 138; *People v. McGilker*, 67 Cal. 53; *People v. Sanders*, 114 Cal. 216; *Moore v. United States*, 150 U. S. 57, 37 L. ed. 996; *People v. Harris*, 136 N. Y. 423; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *Com. v. Coe*, 115 Mass. 481, 501; *Com. v. McCarthy*, 119 Mass. 354, 355; *State v. Patza*, 3 La. Ann. 513; *Kramer v. Com.* 87 Pa. 299, 301; *Goersen v. Com.* 99 Pa. 388, 399; *Susan v. Com.* 104 Pa. 218, 220; *Goersen v. Com.* 106 Pa. 477, 496, 51 Am. Rep. 434; *State v. Myers*, 82 Mo. 562, 52 Am. Rep. 389.

These cases are quoted and cited to meet, not only the foregoing point, but many other objections offered in the trial of the cause, which space will not permit us to discuss at length; among which may be mentioned objections to evidence of the death of Borden, the bullet and cot offered in evidence, the taking of the pistols and clothing at Fullerton, etc.

There is a large group of objections made by defendant to questions put to him on cross-examination, upon the ground, so far as we can determine, that they were not legitimate cross-examination, or in explanation of anything he had testified to in chief. The only reference made to most of them is in the following style: "The matter elicited over the objection of defendant in folio 1603 was clearly error and prejudice." "The objection was well taken to the introduction of the testimony admitted." See folios 1661, 1662, 1664, 1666, 1667, 1670, 1672, 1673, 1674, 1675, 1676, 1678, 1679, 1680. We shall content ourselves with saying that a careful review of the scope of the testimony given by the defendant in his examination in chief leads to the conclusion

that one and all of the questions propounded to him on cross-examination were within the rules enunciated by this court in previous decisions, or were unproductive of injury to defendant. *People v. Russell*, 46 Cal. 123; *People v. Lee Ah Yute*, 60 Cal. 96; *People v. Robles*, 29 Cal. 421; *People v. Murray*, 85 Cal. 350; *Sharp v. Hoffman*, 79 Cal. 405; *Jackson v. Feather River & G. Water Co.* 14 Cal. 24; *Neal v. Neal*, 58 Cal. 288; *Harper v. Lamping*, 33 Cal. 641.

Defendant was asked on cross examination concerning a trip made by him in, say April, 1895, to Los Angeles. This may or may not have been proper. The record does not contain all of defendant's testimony on direct examination. It shows that on January 16, 1896, "Joseph Japhet Ebanks [defendant] resumed the stand, and proceeds with the question: 'You spoke about your parentage yesterday, Mr. Ebanks. What nationality was your father? You said your parents were European.'" etc. None of his testimony of the previous day is in the record, and he may have testified as to his visit to Los Angeles. Error must affirmatively appear, and will not be presumed. *People v. Winters*, 29 Cal. 661; *People v. Barton*, 88 Cal. 176; *People v. Gibson*, 106 Cal. 458; *People v. Reilly*, 106 Cal. 648. But, as stated above, if this is not correct, there was nothing in his answers which could have injured defendant.

Defendant called as a witness one B. A. Stephens, and offered to prove by him that he was an expert hypnotist, that he had hypnotized defendant, and that when hypnotized defendant had made a statement to him in regard to his knowledge of the affair, from which statement witness is ready to testify that the defendant is not guilty, and that defendant denies his guilt while in that condition. The court sustained an objection to the testimony. The court said: "The law of the United States does not recognize hypnotism. It would be an illegal defense, and I cannot admit it." The court then repeated, in substance, what it had said to the jury, and told them to disregard the offer. We shall not stop to argue the point, and only add the court was right.

After the trial had been pending some ten days, but before the prosecution closed its case, counsel for the defendant interposed a challenge to W. A. Begole, one of the jurors impaneled to try said cause, upon the ground that he was a member of the grand jury of the county which had been impaneled before the trial of this case came on, had taken a recess to meet in the future, and had not yet been discharged, and that such facts were unknown to the defendant or his counsel at the time said Begole was accepted as a juror in this case. The challenge was denied. The defendant was prosecuted by information filed long before the grand jury met, and there is no intimation that it ever had anything to do with this case. "Having served on a grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information," afford grounds for challenge. Penal Code, § 1074. But this case does not come within that provision. ▲ Appellant gives

us no reason for holding the juror incompetent, and we know of none. We find no error in the rulings of the court upon impaneling the jury.

It is urged that the death warrant was, on the 9th day of April, 1896, signed by the superior judge, "not in the presence of the defendant, nor in the presence of his counsel, and without the knowledge or consent of the counsel of defendant, or of the defendant himself." The judgment was entered on April 6, 1896, consequently the order referred to was an order made after judgment, from which an appeal will lie under § 1237 of the Penal Code. *People v. Sprague*, 54 Cal. 92; *People v. McNulty*, 95 Cal. 594. Defendant has appealed from the judgment, and from an order denying his motion for a new trial, but not from the order made after final judgment of which he now complains.

The court refused to give two instructions asked by the defendant, which are as follows: "The jury are instructed that, if there is any one single fact proved to the satisfaction of the jury, by a preponderance of evidence, which is inconsistent with the guilt of the defendant, to raise a reasonable doubt, and the jury should acquit the defendant. Refused. *Pierce, J.* You are instructed that it is the settled policy of the law that a person charged with a crime must be acquitted, unless the evidence on the case establishes his guilt beyond all reasonable doubt, and it is better that a hundred guilty persons escape punishment than that one who is innocent be punished. Refused. *Pierce, J.*" The meaning of the first of these instructions is involved in doubt, and the final clause of the second instruction is uncalled for. The whole doctrine of reasonable doubt was fully and properly laid before the jury by the court in the instructions which it gave apparently on its own motion, and also in those given on behalf of defendant, marked 1, 2, 4, 5, 6, 8, 10, 11, and 12. We quote the fifth, sixth, and eighth of those instructions of the defendant given by the court. They are as follows: "It is not sufficient to warrant a conviction in a criminal case that the evidence is merely such that a man of prudence would act upon it in his own affairs of the greatest importance. Men frequently act in their own grave and important concerns without a firm conviction that a conclusion upon which they proceed to act is correct: but, having deliberately weighed all the facts and circumstances known to them, they form a conclusion, upon which they proceed to act, although they may not be fully convinced of its correctness. But this degree of certainty is wholly insufficient to authorize a verdict of guilty in a criminal case. In such a case the jury should be fully convinced of the correctness of their conclusion that the defendant is guilty, and that conviction should be so clear and strong as to exclude from their minds all reasonable doubt that their conclusion is correct. Given. *Pierce, J.*" (6) "You are instructed that mere probabilities are not sufficient to warrant convictions; nor is it sufficient that the greater weight or preponderance of the evidence supports the allegation of the information; nor is it sufficient that, upon the doctrine of chances, it is more probable that the defendant is guilty

than that he is innocent. To warrant a conviction the defendant must be proved to be guilty so clearly and conclusively that there is no reasonable doubt upon which he can be innocent, when all the evidence in the case is considered together. Given. Pierce, J." (8) "The court further instructs the jury that in this case the law does not require of the defendant that he prove himself innocent, but the law imposes upon the prosecution to prove that the defendant is guilty in the manner and form charged in the information, to the satisfaction of the jury beyond all reasonable doubt; and, unless this has been done, it is your duty to find the defendant not guilty. Given. Pierce, J."

The instructions, taken as a whole, are quite as favorable to the defendant as the facts and law will warrant.

The other alleged errors need not be noticed. We have studied the printed record of 896 pages with the care and solicitude which the importance of the case and the grave results to the defendant demand at our hands, and, as a result, we recommend that the judgment and order appealed from be affirmed, and that the court below be directed to bring the defendant

before it, and then and there fix a day for carrying the judgment into execution.

We concur: **Belcher, C.; Chipman, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed, and the court below is directed to bring the defendant before it, and then and there fix a day for carrying the judgment into execution.

McFarland, J.:

I concur in the judgment and in the opinion of Mr. Commissioner Searls; but what is said in the opinion on the subject of hypnotism must be taken as applicable to the testimony offered on that subject in this case, which was clearly inadmissible, and not as covering the whole subject. It will not be necessary to determine whether or not testimony tending to show that a defendant committed the act charged while in a hypnotic condition is admissible until a case involving that precise question shall be presented.

We concur: **Henshaw, J.; Van Fleet, J.**

MISSOURI SUPREME COURT (In Banc).

STATE of Missouri, *ex rel.* W. W. GARTH *et al.*, Exrs., etc., of John C. Conley, Deceased,

v.

Lewis M. SWITZLER, Judge of Boone County Probate Court.

STATE of Missouri, *ex rel.* L. R. WILFLEY, Exr., etc., of Susan E. Spear, Deceased,

v.

Leo RASSIEUR, Probate Judge of St. Louis.

(.....Mo.....)

1. The maintenance of a state university established by the state Constitution is a public purpose.
2. The maintenance of free scholarships in a state university, for the support of those students who are dependent upon their own exertions for their education and financially unable to obtain it otherwise, who shall pass the most meritorious examinations, is the use of funds for a private purpose, and a statute appropriating public moneys therefor is in violation of Const. art. 4, § 46, prohibiting grants in aid of any individual.
3. Taxes for the benefit of private individuals are within the direct prohibition of Const. art. 10, § 3.
4. Provisions for the creation of a "free scholarship fund" in a statute which provides for using three fourths of the annual in-

come for the support of students who get the scholarships cannot be sustained, when the provision for such use of the income is unconstitutional.

5. The estate of a deceased person cannot be subjected to a collateral inheritance tax by statute passed after the death of the owner, where the Constitution prohibits retrospective legislation.

6. A succession tax is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of the state.

7. The tax to be levied upon the appraised value of the whole estate left by a deceased person, except such part as is exempt under the Missouri act of 1897, amending the act of 1895, by adding § "1a," is a tax upon the property of the deceased, and not upon the devisees and legatees, and is therefore unconstitutional because it is not levied in proportion to the value of the property, as required by Const. art. 10, § 4.

8. A succession tax which is levied at different rates on legacies of different amounts, although made to persons of the same class, is, when it constitutes a property tax, in violation of the rule of uniformity prescribed by Const. art. 10, § 3.

(March 15, 1898.)

WRITS OF CERTIORARI to review judgments of probate courts assessing the col-

NOTE.—In respect to the constitutionality of a succession tax which imposes a higher rate on large sums than upon small ones, see the late decision of the United States Supreme Court in the Illinois case of Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. —.

For other cases as to constitutionality of succe-

sion taxes, see *State, Schwartz, v. Ferris* (Ohio) 80 L. R. A. 218; *State v. Alston* (Tenn.) 28 L. R. A. 178; *Minot v. Winthrop* (Mass.) 26 L. R. A. 259; *State v. Hamlin* (Me.) 25 L. R. A. 632; *State, Gelsthorpe, v. Furnell* (Mont.) 39 L. R. A. 170; *State, Davidson, v. Gorman* (Minn.) 2 L. R. A. 701.

lateral inheritance taxes upon the estates of certain deceased persons. *Proceedings quashed.*

The facts are stated in the opinion.

Messrs. Turner & Hinton, C. B. Sebastian, and W. M. Williams, for relator Garth:

John C. Conley died prior to the passage of the amendatory acts of March 16 and 17, 1897. If, therefore, the act of April 1, 1895, is in conflict with the Constitution, there was no law in force at the time of his death, imposing a collateral succession tax.

Const. art. 2, § 15; *Re Seaman*, 147 N. Y. 69; *Re Embury*, 20 Misc. 75; *Re Roosevelt*, 143 N. Y. 120, 25 L. R. A. 695.

The act of April 1, 1895, is in conflict with § 28 of art. 4 of the Constitution of this state.

Witzman v. Southern R. Co. 131 Mo. 612; *State, Steel, v. Baker*, 129 Mo. 482; *State, Kirkwood, v. Heege*, 135 Mo. 112; *Henderson v. London & L. Ins. Co.* 135 Ind. 23, 20 L. R. A. 827; *Moses v. Mobile*, 52 Ala. 198.

The tax provided for by this act is not levied for a public purpose within the meaning of § 3 of art. 10 of the Constitution.

Deal v. Mississippi County, 107 Mo. 464, 14 L. R. A. 622; *Citizens Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896; *Lowell v. Boston*, 111 Mass. 463, 15 Am. Rep. 39; *State, Griffith, v. Osawkee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *Kingman v. Brocton*, 153 Mass. 255, 11 L. R. A. 123; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *Mead v. Acton*, 139 Mass. 341.

The bounty created by the act is to be paid to a favored class, who are in no wise a public charge, and are not treated as such. It is, in effect, the exaction of money from one class of persons for the benefit of another class.

It is class legislation of the most objectionable character.

Cooley, Taxn. 2d ed. p. 221; *Burroughs, Taxn.* pp. 18-21; *Sewickley School Dist. v. Osborne School Dist.* 6 Pa. Dist. R. 211; *Philadelphia Asso. for Relief of Disabled Firemen v. Wood*, 39 Pa. 73; *State, Griffith, v. Osawkee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *Mead v. Acton*, 139 Mass. 341; *Henderson v. London & L. Ins. Co.* 135 Ind. 23, 20 L. R. A. 827; *Hitchcock v. St. Louis*, 49 Mo. 484.

It cannot be presumed that the legislature would have provided for the tax at all, if it was not to be used for the special purpose mentioned. The various provisions of the act are wholly inseparable, so far as the general object is concerned.

Webb v. Lafayette County, 67 Mo. 363; *Chambe v. Durfee*, 100 Mich. 112; *Cooley, Const. Lim.* § 178.

The tax created by the 1st section of the act of April 1, 1895, is not "uniform upon the same class of subjects within the territorial limits of the authority levying the tax." It charges a higher rate when the amount of the property exceeds \$10,000, than when its value is less than that sum, and is in violation of § 3, art. 10, of the Constitution of this state; and also, of the 14th Amendment of the Constitution of the United States, and, if regarded as a tax upon the property of the state, it is not lev-

ied in proportion to value, and cannot be upheld under § 4, art. 10, of the Constitution.

State, Schwartz, v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218; *State, Davidson, v. Gorman*, 40 Minn. 232, 2 L. R. A. 701; *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337; *State, Sanderson, v. Mann*, 76 Wis. 469; *State v. Hamlin*, 86 Me. 504, 25 L. R. A. 632; *St. Louis v. Spiegel*, 75 Mo. 145; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257; *Re Westburn*, 152 N. Y. 93; *San Mateo County v. Southern P. R. Co.* 13 Fed. Rep. 722.

A succession tax would necessarily be imposed upon the respective parties succeeding to the residue of the estate, after payment of debts.

State, Sanderson, v. Mann, 76 Wis. 469; *Mason v. Sargent*, 104 U. S. 689, 26 L. ed. 894.

Under the construction of the probate court, this tax was assessed upon the estate as a whole, and the executors directed to pay it as any other charge upon said estate.

The act overlooks the fundamental principle upon which a succession tax is based.

Re Westburn, 152 N. Y. 93.

If the act is unconstitutional, because it fails to provide for notice and a hearing, it cannot subsequently be validated by the appearance of the parties interested before the probate judge.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; *Dos Passos, Inheritance Tax Law*, 2d ed. § 22; *Evans v. Fall River County* (S. D.) 68 N. W. 195; *Bieswaenger v. Werner*, 5 Mo. App. 582.

Where an act, or portion of an act, is amended so as to read in a prescribed way the section amended, it is entirely repealed and obliterated thereby.

Endlich, *Interpretation of Statutes*, § 196, p. 265; *State, Kemper, v. St. Louis, K. C. & N. R. Co.* 9 Mo. App. 532; *Re Prime*, 136 N. Y. 347, 18 L. R. A. 713; *Knox v. Baldwin*, 80 N. Y. 610.

The order of the probate court, levying a tax in excess of 5 per cent, was beyond its jurisdiction and without authority of law.

Knox v. Baldwin, 80 N. Y. 610.

Messrs. M. F. Watts, Silas B. Jones, Frank M. Estes, and L. F. Parker for relator Wilfey.

Messrs. William J. Stone, G. S. Hoss, and D. C. Reeves, for respondents:

The jurisdiction conferred by the acts of 1897 on the probate courts to fix the valuation of estates, directing the payment of the taxes, etc., applies to estates in process of administration prior to the passage of those acts, and subject to the tax imposed by the act of 1895.

State, Rosenblatt, v. Kerr, 8 Mo. App. 125; *State, Kemper, v. St. Louis, K. C. & N. R. Co.* 9 Mo. App. 532; *St. Joseph & I. R. Co. v. Cudmore*, 103 Mo. 634; *Van Rheaden v. Bush*, 44 Mo. App. 253; *Lorell v. Davis*, 52 Mo. App. 342; *Kirk v. Doerste*, 45 Mo. App. 134; *State, Police Comrs., v. St. Louis County Ct.* 34 Mo. 546; *Wellshear v. Kelley*, 69 Mo. 354; *Porter v. Mariner*, 50 Mo. 367; *State v. Johnson*, 81 Mo. 60; *State, Cramer, v. Hager*, 91 Mo. 456; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. ed. 403; *Wood v. Westborough*, 140 Mass. 403; *Logan v. Logan*, 77 Ind. 558; *Coffman v. Bank*

of Kentucky, 40 Miss. 29, 90 Am. Dec. 813; *Cook v. Gray*, 2 Houst. (Del.) 455, 81 Am. Dec. 188; *Scobey v. Gibson*, 17 Ind. 572, 79 Am. Dec. 490; *Johnson v. Wells County Comrs.* 107 Ind. 25; *Sparks v. Clapper*, 30 Ind. 208; *Ex parte Buckley*, 53 Ala. 43; *Flinn v. Parsons*, 60 Ind. 574; *Bronson v. Kinzie*, 1 How. 811, 315, 11 L. ed. 143, 144; *Guild v. Rogers*, 8 Barb. 502; *Jones v. Crittenden*, 4 N. C. (1 Taylor's Law Repos. 385), 55, 6 Am. Dec. 581; *Wood v. Wood*, 14 Rich. L. 148; *Rathbone v. Bradford*, 1 Ala. 812; *Ex parte Pollard*, 40 Ala. 77; *Starkweather v. Haces*, 10 Wis. 126; *Maynes v. Moore*, 16 Ind. 116; *Hopkins v. Jones*, 22 Ind. 310; *Webb v. Moore*, 25 Ind. 4; *Smith v. Bryan*, 34 Ill. 364; *Templeton v. Horne*, 82 Ill. 491; *Frost v. Isley*, 54 Me. 345; *Coosa River S. B. Co. v. Barclay*, 30 Ala. 120; *Philbrick v. Philbrick*, 39 N. H. 468; *Klaus v. Green Bay*, 34 Wis. 628; *Leathers v. Shipbuilders' Bank*, 40 Me. 386; *Bigelow v. Pritchard*, 21 Pick. 169; *Danley v. State Bank*, 15 Ark. 16; *Buckingham v. Moss*, 40 Conn. 461; *Dobbins v. First Nat. Bank*, 112 Ill. 553; *Winslow v. People*, *Walrath*, 117 Ill. 152; *State v. Shreve*, 81 Iowa, 615; *Cooley*, Const. Lim. p. 287.

If a state legislature shall pass a law within the general scope of its constitutional powers, the courts cannot pronounce it void because in their judgment it may be unwise as a matter of public policy or contrary to the principles of natural justice.

Culder v. Bull, 3 Dall. 386, 1 L. ed. 648; *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. ed. 458; *Norris v. Clymer*, 2 Pa. 285.

The tax levied by § 1 of the act of April 1, 1895, is not a tax on property, but is a tax, excise, or bonus imposed on the privilege of succeeding to property of decedents by gift or inheritance.

Strode v. Com. 52 Pa. 182; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287; *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171; *Re Vanderbilt*, 2 Connolly, 319; *State v. Alston*, 94 Tenn. 680, 28 L. R. A. 178; *Minot v. Winthrop*, 162 Mass. 123, 26 L. R. A. 259; *State v. Hamlin*, 86 Me. 504, 25 L. R. A. 632; *Pullen v. Wake County Comrs.* 66 N. C. 363; *Kochersperger v. Drake*, 167 Ill. 122; *Dos Passos*, Inheritance Tax Law, 2d ed. § 2, p. 5.

A provision in the statute making the tax a lien on property affected by it does not make it a tax on property, or in any wise change the nature of the tax.

State, Schwartz, v. Ferris, 53 Ohio St. 326, 30 L. R. A. 218.

The taxes imposed by §§ 2 and 3 of the act in question are taxes levied on privileges, and not on property.

Strode v. Com. 52 Pa. 182; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287; *Re McPherson*, 104 N. Y. 320, 58 Am. Rep. 502; *Re Vanderbilt*, 2 Connolly, 319; *State v. Alston*, 94 Tenn. 680, 28 L. R. A. 178; *Minot v. Winthrop*, 162 Mass. 123, 26 L. R. A. 259; *State v. Hamlin*, 86 Me. 504, 25 L. R. A. 632; *Pullen v. Wake County Comrs.* 66 N. C. 363; *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171.

The act in question does not conflict with § 3, art. 10, of the Constitution.

1. The section of the Constitution referred 40 L. R. A.

to does not apply to special taxes on privileges.

St. Louis v. Green, 7 Mo. App. 468; *Glasgow v. Rouse*, 43 Mo. 480; *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *Garrett v. St. Louis*, 25 Mo. 510, 69 Am. Dec. 475; *Farrar v. St. Louis*, 80 Mo. 386; *Egyptian Leece Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *St. Joseph v. Anthony*, 30 Mo. 537; *Adams v. Lindell*, 72 Mo. 193; *St. Joseph, Gibson, v. Owen*, 110 Mo. 455; *Newton v. Atchison*, 31 Kan. 151, 47 Am. Rep. 486; *Ex parte Robinson*, 12 Neb. 269, 28 Am. Rep. 794.

2. If that section does apply to the taxes in question, then the statute is not in conflict with that section of the Constitution requiring uniformity. All the taxes imposed by the statute are uniform upon the same class of subjects.

Kochersperger v. Drake, 167 Ill. 122; *New Orleans v. Kaufman*, 29 La. Ann. 283, 29 Am. Rep. 328; *East St. Louis v. Wehrung*, 46 Ill. 394; *Sacramento v. Crocker*, 16 Cal. 120; *State Bd. of Assessors v. Central R. Co.* 48 N. J. L. 146; *Minot v. Winthrop*, 162 Mass. 123, 26 L. R. A. 259; *Com. v. Moore*, 25 Gratt. 956.

Before the courts will declare a tax void there must be an absence of all possible public interest in the purposes for which the tax is levied; and in passing upon the question the courts give great weight to the legislative assertion.

Booth v. Woodbury, 32 Conn. 123; *Brodhead v. Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; *State v. Nelson County*, 1 N. D. 88, 8 L. R. A. 283; *Speer v. Blairsville School Directors*, 50 Pa. 152; *Schenley v. Allegheny*, 25 Pa. 180; *People, Detroit & H. R. Co., v. Salem Twp. Board*, 20 Mich. 475, 4 Am. Rep. 400; *Guilford v. Chenango County Supers.* 13 N. Y. 143.

If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy and not of natural justice, and the determination of the legislature is conclusive.

Sharpless v. Philadelphia, 21 Pa. 174, 59 Am. Dec. 759; *Booth v. Woodbury*, 32 Conn. 123; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *People, Board of Water Comrs., v. East Saginaw*, 33 Mich. 164; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 268, 14 Am. Rep. 99; *People, Stickney v. Marshall*, 6 Ill. 672; *People, Harless, v. Hatch*, 33 Ill. 180; *Ex parte M'Collum*, 1 Cow. 554; *Thomas v. Le'and*, 24 Wend. 65; *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Briggs v. Whipple*, 6 Vt. 95; *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 818; *People, McCullough, v. Packeas*, 27 Cal. 175; *New Orleans v. Clark*, 95 U. S. 654, 24 L. ed. 522; *Mount v. State, Richey*, 90 Ind. 31, 46 Am. Rep. 192; *Long v. Richmond County Comrs.* 76 N. C. 280.

There is no necessity for notice to interested parties when the property is valued and the tax is levied by the probate court, as the parties have their day in court before the tax can be collected.

St. Louis v. Richeson, 76 Mo. 470; *Kansas v. Huling*, 87 Mo. 203; *Saxon Nat. Bank v. Carswell*, 126 Mo. 436; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Rec-*

lamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569; *Kentucky Railroad Tax Case*, 115 U. S. 321, 29 L. ed. 414; *State v. Hamlin*, 86 Me. 504, 25 L. R. A. 632.

Personal property of a resident decedent, whether situated within or without the state, is subject to the collateral inheritance tax law.

Re Swift, 137 N. Y. 77, 18 L. R. A. 709. See also *Re Merriam*, 141 N. Y. 479; *Strode v. Com.* 52 Pa. 181; *Re Knoedler*, 140 N. Y. 371; *Miller v. Com.* 111 Pa. 321; *Williamson's Estate*, 153 Pa. 508.

A law may stand so far as it is constitutional, although it has in it certain provisions which are not valid.

State v. Clarke, 54 Mo. 36; *St. Louis v. St. Louis R. Co.* 89 Mo. 44, 58 Am. Rep. 82; *State, Aull, v. Field*, 119 Mo. 612; *St. Louis & S. F. R. Co. v. Evans & H. Fire Brick Co.* 85 Mo. 307; *State, Maggard, v. Pond*, 93 Mo. 635; *Tarkio v. Cook*, 120 Mo. 1; *Gordon v. Cornes*, 47 N. Y. 608; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318.

By the term "clear market value" is meant the actual market value of the estate at the date of the death of the decedent, after first deducting all just and legal demands for which the estate is liable.

Commonwealth's Appeal, 127 Pa. 440; *Re Milheard*, 6 Misc. 425; *Lines's Estate*, 155 Pa. 378.

Mr. F. N. Judson also for respondents.

Gantt, Ch. J., delivered the opinion of the court:

This is an original proceeding in this court for a writ of certiorari to the judge of the probate court of Boone county, commanding him to send up the record of his proceedings in the matter of the assessment and levy of a collateral succession tax upon the estate of John C. Conley, late of said county, deceased. The writ was issued, and made returnable to division No. 2 of this court; but owing to the importance of the question involved, and the fact that a similar writ had also been issued upon the application of L. R. Wilfley, executor of Susan E. Spear, against Judge Rassieur, judge of the probate court of the city of St. Louis, returnable to the court in banc, this cause was transferred to the court in banc; and, the records of the probate court in each case having been removed into this court, the two cases were heard together, upon a motion to quash the proceedings for want of jurisdiction in said courts to assess and levy said collateral succession tax. John C. Conley died in Boone county, Missouri, on the 6th day of December, 1896, leaving an estate, consisting of realty in this and other states, and of bonds, notes, certificates of stock, and other securities. His will, dated February 18, 1896, was duly established and admitted to probate by the probate court of Boone county, on the 7th of December, 1896. The said testator was never married. He made a bequest of \$20,000 for charitable purposes, and gave the remainder of his estate, in different amounts, to his collateral relatives. He gave some special legacies of a certain amount, and, after the payment of various special bequests, the residue of the estate is given by his will to certain nephews and nieces named in the residuary clause. Letters

testamentary were duly issued to the relators, who qualified as executors of the will on the 15th of December, 1896, and filed their inventory on the 11th of January, 1897. The probate court, on the 30th of August, 1897, entered an order of record reciting the death of said John C. Conley, the probating of his will, and setting out the terms thereof, the date of letters testamentary, and of the filing of the inventory, and, over the protest of the relators (who waived formal notice of the proceedings, but objected to the right of the court to make such assessment), proceeded to fix the value of said estate, for the purposes of the collateral succession tax, under the act of April 1, 1895, and the amendatory acts of 1897. The court found that the sum of \$20,000 was given by the will, to trustees, for charitable purposes; \$18,391.31 of the estate will be required to pay the debts of the testator (so far as appeared up to the date of that order) and other legal demands; that the real estate in the state of Missouri was of the value of \$45,660; and that the personal property of the estate was of the value of \$132,919.34,—making a total valuation of \$228,579.34. The court deducted from this amount the sum of \$20,000, given for charitable purposes, and \$18,391.34, required to pay debts and expenses of the administration, and held and determined that the clear market value of all of said property subject to such tax was \$190,188, and that said amount was subject to the payment of a collateral succession tax of \$5 for each and every \$100 of such sum, up to \$10,000; and \$12.50 for every \$100 in value in excess of said sum of \$10,000. Eighty five shares of stock in the Bank of Hico, Texas, of the par value of \$3,925, was included in the above valuation. The court then levied and charged said estate with a total tax of \$23,023.50, and ordered the executors to pay the same. All these facts appear upon the face of the record of the probate court. A similar state of facts exists as to the tax on Susan E. Spear's estate, in all material respects.

The constitutionality of the act of the general assembly of Missouri entitled "An Act Providing for the Endowment of the State University, and for the Establishment and Endowment of Free Scholarships of Merit Therein in Each County," approved April 1, 1895, and of an act of the general assembly entitled "An Act to Amend an Act Passed by the 88th General Assembly of the State of Missouri, Entitled 'An Act Providing for the Endowment of the State University, and for the Endowment of Free Scholarships of Merit Therein in Each County,' by Adding a New Section after § 1 of Said Act, to be Numbered § 1a, which New Section Shall Read as Follows, 'approved March 16, 1897,'" is directly assailed in and by these proceedings. The proposition of relators is that both the act of April 1, 1895, and the amendatory act of March 16, 1897, are void, because in conflict with various provisions of the Constitution of Missouri and the 14th Amendment to the Constitution of the United States. No question is raised as to the power of this court by certiorari to supervise the proceedings in the probate courts, and, if their action in levying said taxes is found in excess of their powers, to quash their proceed-

ings, and we have no doubt of our power to do so. At the risk of being deemed prolix, we will insert so much of the acts as bear directly upon the questions raised.

The act was passed in 1895, and amended by two acts passed in 1897. As amended, it provides, among other things, as follows:

"Sec. 1. That all property conveyed by will, or by the death of an intestate, . . . to any persons other than the father, mother, husband, wife or direct lineal descendant of the testator, intestate, . . . except property conveyed for some educational, charitable, or religious purpose exclusively, shall be subject to the payment of a collateral succession tax of \$5 for each and every \$100 of the clear market value of such property.

"Sec. 2. That in addition to the fees now provided by law, no corporation shall be organized under the laws of this state, and no foreign corporation shall do business in this state unless the incorporators shall, upon filing the articles of association, pay to the state treasurer, in trust for the state of Missouri, to be disposed of as hereinafter provided in this act, the sum of twenty-five hundredths of a dollar for every \$1,000 of the capital stock of such corporation as a franchise fee; and a like franchise fee shall be paid in the same manner on every \$1,000 of the increase of the capital stock of any corporation.

"Sec. 3. That every manufacturer of patent medicines shall annually pay a license tax of \$25.

"Sec. 4. That all moneys, which may hereafter escheat to the state, shall be distributed in the manner provided by this act.

"Sec. 5. That all taxes, fees, or moneys received under this act by any county official, shall be paid during the first week of the following month to the county treasurer, who shall credit three fourths to a fund hereby created, to be known as 'the state university scholarship fund,' and remit the remaining one fourth to the state treasurer; and from all money received directly by the state treasurer under this act, he shall monthly reserve one fourth, and remit the remaining three fourths to all the county treasurers of the state, to be credited to 'the state university scholarship fund' of such counties.

"Sec. 6. That all moneys received by the state treasurer to be retained by him under this act shall be deposited in the state treasury to the credit of the 'seminary fund' as provided by law.

"Sec. 7. That all moneys received by the county treasurer of each county to be credited to 'the state university scholarship fund' shall be forever kept and preserved as a sacred permanent fund; and shall be invested and loaned in the manner provided in this act."

Sections 8, 9, and 10 of the act are in the following words:

"Sec. 8. The income of the moneys in 'the state university scholarship fund' shall be collected annually, and one fourth of the same added to the principal, and the remaining three fourths shall be faithfully appropriated for establishing and maintaining free scholarships in the state university, the amounts and terms of which shall be fixed and changed from time to time, as may be necessary, on 40 L. R. A.

the written order and resolution of the board of curators of the state university.

"Sec. 9. On the first week of August of each year, beginning with the first Monday after due notice thereof, as prescribed by the county court, in two newspapers in each county, representing different political parties where such newspapers exist, there shall be held at the court-house, in the county seat, an examination of all applicants qualified under the law to be students of the university. Such applicants shall be actual residents of the county, and such examinations shall be conducted by three examiners, one of whom shall first be appointed by written notice to the county clerk by the president of the board of curators of the university during the month of July, and one selected thereafter by the county court, of another political faith, and the third selected by the agreement of the two so chosen, with power in the county court, or the presiding judge thereof in vacation, to fill all vacancies in the position of examiner; and such examination shall be written, and shall meet the requirements for entrance in the academic department of the university; provided, that the duties imposed on county courts or the judges thereof, by this section, shall be discharged in the city of St. Louis by the mayor.

"Sec. 10. Those applicants passing the best and most meritorious examinations, to the number of scholarships established in each respective county, shall be awarded such scholarships, and be entitled thereon to enter free of matriculation fees any department, school, or college of the university, and have paid to them in equal monthly instalments while attending the university, the sum provided by the scholarship so awarded, for defraying the expenses of such attendance; provided, that no applicant shall be qualified to receive such scholarship unless such examiners shall be satisfied that the applicant is dependent upon his own exertions for his education, and financially unable to otherwise obtain the same."

By comparison of the act thus revised and amended in 1897 with the original act of 1895, it will be seen that the progressive feature of the original act, to wit, the increase of 7½ per cent on amounts of over \$10,000, is repealed, and specific provision is added for valuation of inheritances and enforcing the collection of the tax. Amendments are also made to §§ 2 and 8 in matters not material in the present proceeding; while in § 5, the basis of the distribution of the funds collected by the state treasurer in trust under the provisions of the act, is arranged so that it is made in the different counties on the basis of representation in the general assembly.

Lying at the threshold of this discussion is the objection which goes to the very substance of this enactment. It is insisted that the tax provided in the act is not levied for a public purpose, within the meaning of § 3 of art. 10 of the Constitution of Missouri, which ordains that "taxes may be levied and collected for public purposes only." This provision of our Constitution accords with the definition of a "tax," as expounded by the courts and law writers of this country. Judge Cooley, in his work on Constitutional Limitations, says:

"Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Judge Coulter, in *Northern Liberties v. St John's Church*, 13 Pa. 104, said: "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government, for the purpose of carrying on the government in all its machinery and operations; that they are imposed for a public purpose." The Supreme Court of the United States, in *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455, in a luminous opinion by Judge Miller, after a review of the authorities and a discussion of the power to tax, laid it down as an established principle that "beyond cavil there can be no lawful tax which is not laid for a public purpose." In *Re New York*, 11 Johns. 80, the court said: "The word 'taxes' means burdens, charges of impositions, put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word 'tallage' (2 Co. Inst. 532); and Lord Holt, in *Carth. 488 [Brewster v. Kidgell]*, gives the same definition, in substance, of the word 'tax.'" Chief Justice Appleton, in *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185, says: "A tax is a sum of money assessed under the authority of the state on the person or property of an individual, for the use of the state. 'Taxation,' by the very meaning of the term, implies the raising of money for public uses, and excludes the raising if for private objects and purposes." Judge Jere Black, in *Sharpless v. Philadelphia*, 21 Pa. 167, 59 Am. Rep. 759, says: "I have conceded that a law authorizing taxation for any other than public purposes is void."

We construe § 3 of art. 10 of our Constitution as a direct inhibition upon the general assembly to levy a tax for a private purpose, or for the benefit of any private individual. The language used is not susceptible of any other construction. We shall assume without further comment that, if the act under review authorizes the levy of a tax, that tax must be for a public purpose; otherwise, it is a direct violation of the Constitution of this state. Does it authorize a tax? The learned counsel for the probate judges argues that it is not strictly a tax. He says: "Although called a 'tax,' it is not properly so, but a bonus or price exacted from the collateral kindred and strangers to the blood, as the condition upon which they take the estate whose owner is dead." But, even if such a distinction can be maintained, the contention does not reach the vital point upon which the relators insist, namely, that, by whatever name this burden or excise, tax, bonus, or exaction from the citizen may be called, still it falls within the purview of the word "taxes," as used in the 8d section of article 10 of our Constitution. The word in that section is used in its generic sense, as expounded by lexicographers, judges, and lawyers long before its use in our organic law. In the sense that taxes can only be levied for a public purpose, that word includes every character and kind of tax, general or special. The power of the state to demand such a bonus is referable, and referable only, to the taxing power; so that, whether this "collateral

succession tax," as it is denominated by the legislature, be termed a tax or a bonus, an excise, a price imposed for the privilege of taking an estate by will or inheritance, it must be levied or exacted for a public purpose only under our Constitution, and under those limitations on the taxing power which exist in the very nature of our free institutions. Miller, *Const. U. S. p. 242*. Outside of express constitutional inhibitions, there are limitations upon the powers of every branch of our governments, state and Federal. Every branch has its limitations short of absolute power. The Supreme Court of the United States expressed it in these words: "No court . . . would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D, or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B." And in the same case the court further said: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law, and is called 'taxation.' This is not legislation. It is a decree under legislative forms." [20 Wall. 663, 664, 22 L. ed. 461].

That the state of Missouri, for public purposes, may assess and levy taxes upon the succession or devolution of property under our inheritance laws or statute of wills, subject only to the prohibitions of the Constitution of the state and the Constitution of the United States, we have no doubt whatever. The constitutionality of such a tax has been too long affirmed by the courts of last resort to admit of doubt; but we have not found nor have counsel pointed to any statute which has received the sanction of the courts which levied such a tax for other than a plainly public purpose. Is the purpose for which the act in question authorizes this collateral succession tax a public one? Perhaps few branches of the law have been more carefully considered than that which this inquiry suggests. The duty and power of imposing taxes is a legislative one, and the presumption is, and must be, that the legislature will only levy a tax for a public purpose; and the courts are only justified in interposing when it clearly appears that the Constitution, which is the supreme law governing both the legislature and the courts, has been or will be violated by the enforcement of the legislative purpose. What is and what is not a public purpose is not always easily determined. The Supreme Court of the United States in *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455, states the rule to be that "in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they [the courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of

the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." The supreme court of Michigan, in *People, Detroit & H. R. Co., v. Salem Twp. Board*, 20 Mich. 452, 4 Am. Rep. 400, with signal ability and thoroughness, discussed this question, and came to the conclusion that "the term 'public purpose,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish objects for which according to settled usage the government is to provide, from those which, by the like usage, are left to private inclination, interest, or liberality." How these general principles have been applied, reference to the judgments of the courts will best determine.

In *Citizens' Sav. & Loan Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455, a statute of the state of Kansas which authorized a town to issue its bonds in aid of the manufacturing enterprise of private individuals came before the Supreme Court of the United States; and it was held void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profits of others, and not for a public use, in the proper sense of these words.

In *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185, a town, at a meeting legally called, voted to loan its credit to a firm to the amount of \$10,000, and issue its bonds for that sum, provided the firm would invest \$12,000 to \$13,000 in a steam sawmill, with a run of stone to grind meal, and maintain it for ten years; and the legislature afterwards passed an enabling act authorizing said loan, but the supreme judicial court held the act unconstitutional and void, because not for a public use.

All the buildings on a very large portion of the city of Charleston, South Carolina, having been destroyed by fire, the city council passed an ordinance providing for the issue of bonds by the city to be loaned the owners, to build and rebuild the waste places and burnt districts. The legislature afterwards, by an act reciting the ordinance, fully confirmed and authorized the issue of said bonds, known as "Fire Loan Bonds," and certain persons bought them. Afterwards suit was brought against the city to collect them, but the supreme court of the state held said bonds were issued for a private purpose, and void. That the taxing power could only be exercised for some public purpose. *Feldman v. Charleston*, 28 S. C. 57, 55 Am. Rep. 6.

In November, 1872, a great conflagration swept over a large portion of the city of Boston. The legislature of Massachusetts passed an act authorizing the city of Boston to issue bonds, and loan the proceeds on mortgage to the owners of the land, to enable them to rebuild their houses. The supreme court held the act void; that it was not for a public object, in a legal sense. *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

In *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187, the legislature empowered the town of Jefferson to raise a sum by taxation to be paid to the treasurer of the Jefferson Liberal Institute, a private educational institution, but the supreme court held the act void, the tax being for a private purpose; and a like conclusion was reached in *Jenkins v. Andover*, 103 Mass. 94.

This court in *Deal v. Mississippi County*, 197 Mo. 464, 14 L. R. A. 622, held § 5697, Rev. Stat. 1879, void, because it gave a bounty to private individuals for growing forest trees upon their own lands.

In each and all of these cases it was held that the fact that the public might be incidentally benefited by rebuilding a burnt city, the establishment of manufactories and schools, would not sustain the tax. Every factory, every private school or academy, every industrial enterprise which furnishes opportunity for labor and the earning of wages, benefits a community in one sense; but the indirect good which inures in this way furnishes no basis for taxation of other business to build up such occupations. Learned counsel for the respondents do not seriously controvert this general proposition, but meet it with the assertion that the state university is a state institution, established and maintained for a public purpose. This is at once conceded by the relators, because the people of Missouri, in their sovereign capacity, have recognized and declared in their organic law that a general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people, and imposed upon the legislature the duty of establishing and maintaining free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years. Mo. Const. 1875, art. 11, § 1. Moreover, by § 5 of art. 11 of the Constitution, the general assembly is enjoined, whenever the public school fund will permit and the actual necessity of the same may require, to aid and maintain the state university, now established, with its present departments. By § 6 of the same article of the Constitution, a fund is provided, the annual income of which, together with so much of the ordinary revenue of the state as may by law be set apart for that purpose, shall be appropriated for the maintenance of the free public schools and the state university. If, then, this collateral succession tax is levied to support the state university, unquestionably it is for a public purpose.

At this point, however, the real contention in this case arises. Relators insist that the fund sought to be accumulated by this tax is not a provision for the support of the university, but is a tax to raise a fund, the proceeds of which must be paid to certain favored individuals, to enable them to buy food and clothing for their own use while pursuing their studies at the university. The controversy must be determined by the act itself. By reference to the summary of its various sections as hereinbefore set out, it will be observed that three fourths of all the moneys raised by this tax was intended to create the "State University Scholarship Fund" of the several counties of this state, to be kept as a

permanent fund, to be invested so as to bear interest. This interest is to be collected annually, and one fourth of it added to the fund, and the remaining three fourths to be appropriated for establishing and maintaining free scholarships in the university, the amounts and terms of which are to be fixed by the curators of the university. By § 9 provision is made for competitive written examinations on the first week of August in each year of actual residents of each county, which shall meet the requirements for entrance in the academic department of the university, provided, however, that no applicant shall be eligible to receive such free scholarship, unless the examiners "shall be satisfied that the [said] applicant is dependent upon his own exertions for his education, and financially unable to otherwise obtain the same." Having thus determined who may be the beneficiaries of this tax, and segregated them from the great mass of citizenship, and awarded them these free scholarships, § 10 of the act provides that they shall "be entitled thereon to enter free of matriculation fees any department, school, or college of the university, and have paid to them in equal monthly instalments while attending the university, the sum provided by the scholarship so awarded, for defraying the expenses of such attendance."

Deferring for the present any discussion of the proposition that one fourth of the tax may be sustained because it is directed to be paid into the state treasury for the benefit of the "Seminary Fund,"—an admitted public use,—we direct our attention to the arguments for and against the "Free Scholarship Fund." It is perfectly evident, we think, that no distinction can be maintained between the fund and its annual increment. It cannot be true that this fund is a state or public fund, under this act, while the whole beneficial use and interest arising therefrom is private. Such a distinction is illogical and unsound. The fund is created for the sole purpose of producing the interest to be derived from it, and it is incredible to believe that the legislature would have provided the tax at all if it was not to obtain the interest to be used for the maintenance of the scholars. The fund and the interest are inseparable.

Counsel for the curators urge that this statute can only be properly construed by keeping in view "the historical setting" of the university, and "its historical genesis." They assert that university education is a proper, indeed, one of the primary, objects for which public taxation may be levied, and that the extent of such taxation in aid of higher education is for the legislature alone to determine; that, the Constitution having established free public schools and the university, the legislature can go further, and furnish free support of the children while attending these schools and the university. It is true that the learned counsel for the curators are not altogether in harmony on this proposition. Some of the learned counsel for the curators boldly argue that, if the legislature can furnish free schools and free teachers, why can it not go further, and furnish a free support to the children who attend these schools, if that is deemed necessary to make

the system a success; whereas their colleague draws the line at the free support of the students of the university, and denies the right to furnish free living to the children attending the common schools, "because the law recognizes and enforces the parental obligation of support during the period of elementary education." Some of the learned counsel for the curators admit that such a support of the students is paternalism in its most pronounced form, but say it is "not a hurtful or dangerous kind; that it is only paternalism of the state, not of the Federal government." Paternalism, whether state or Federal, as the derivation of the term applies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs, and is pernicious in its tendencies. In a word, it minimizes the citizen, and maximizes the government. Our Federal and state governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government,—a system in which the people are the sovereigns, and the government their creature, to carry out their commands. Such a government is founded on the willingness and the right of the people to take care of their own affairs, and an indisposition on their part to look to the government for everything. The citizen is the unit. It is his province to support the government, and not the government to support him. Under self-government, we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. Paternalism is a plant that should receive no nourishment upon the soil of Missouri. While the exigencies of this case may require the operation of such a principle, we are sure its germ is not to be found in the Constitution of this state, nor in the spirit of its people. Whatever other fault the Constitution of 1875 may have, it is certain that its framers sought most sedulously to curb the power of those clothed with authority to legislate in behalf of favored classes, and to leave the people the largest possible control over their own affairs. Especially has the power of taxation been jealously hedged about and limited. The same authority is found in the Constitution to levy taxes to clothe and feed the children who may desire to attend the free public schools, as there is to raise money by taxation to hand over to young men and young women to support them while they acquire what is termed "the higher or university education;" but we find no warrant for either in the organic law of this state or in the character of our government. It is one thing to provide for the establishment and maintenance of a state university and a system of free public schools,—the state, through its own officers, agencies, and municipalities, constructing and owning the buildings and apparatus, and employing the teachers as public functionaries, responsible under her own laws

for the discharge of their duties,—and a wholly different thing to support private individuals who attend the university and public schools, by public taxation. But it is said that nothing is more common than the endowment of free scholarships as a part of the endowment of a university. This may be true of the universities of Europe, and individual instances are to be found in this country where some great benefactor of the race has, out of his own bounty, provided such scholarships; but these examples furnish no guide to the free states of this Union, clearly not to the legislature of Missouri under its organic law.

The act under consideration endows the scholar, not the university. It provides in unmistakable terms that a fund shall be raised by taxation and paid over to students attending the university, for their support while so engaged. It is a pure and simple gift of public money by the state to private individuals, for their own private use, in plain violation of § 46 of art. 4 of the Constitution, which prohibits the legislature from granting public money to any individual, association of individuals, or other corporation whatsoever. We hold that, when the Constitution provided for the establishment and maintenance of the university, it conferred authority to support an institution belonging to the state; and this grant is not to be extended to the unlimited support of the pupils who may attend or desire to attend that school. In obedience to the mandate of the Constitution, the legislature has made generous provision for the university and public schools, and the opportunities for education are commensurate with the greatness of the commonwealth and the needs of the people. Neither the Constitution nor a sound public policy demands that the state should indirectly stifle all motive for individual effort and laudable mention. Free common schools adorn every school district in the state. Splendid normal schools are distributed to its different sections, and the doors of the university are practically opened to every thrifty, energetic young man and woman in the state. The state has not been niggardly with its children. Every proper stimulus is set before them. But here she stops, and says to the citizen, "The right to lay further burdens for your private benefit is exhausted. Under equal and just laws, by your own self-reliance and energy, you must win the rewards of labor and the honors of the state."

It is only necessary to add that counsel for the curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers, in the meaning of the law. Even without this admission, it is perfectly apparent that the act, by its terms, does not confine this pension to the children of poor persons who may, in a legal sense, be denominated "paupers." The class of ambitious young men and women who could avail themselves of the benefits of this act would resent such a designation, and scorn this proffered aid if, to obtain it, they must first be classed as paupers. It is perfectly clear that the tax is not levied upon any such principle. If it were, it would collide with an-

other fundamental principle. It would be class legislation. Says Judge Cooley, in his work on Taxation, 2d ed. (p. 121): "To justify taxation for the purpose of education, the rules under which the people shall be admitted to the privileges given must not be invidious and partial, but must place all parties upon a plane of practical equality. The rule is substantially the same here that applies in the apportionment of taxation. Equality must be the aim of the law, and it must be assumed that the state has no special favors to bestow upon privileged classes. . . . It will not be competent to single out some one class of the community, and exclude them from the benefits of the public schools on arbitrary grounds." Our conclusion is that this tax is levied for a purely private purpose, and for that reason it is in contravention of the Constitution of Missouri.

This tax is assailed in another vital point. Relators assert it is void for want of uniformity. John C. Conley one of the testators, died on the 6th day of December, 1896. His will was probated February 18, 1896. Susan E. Spears, the other testator, died June 10, 1896. It is essential that we determine whether the act of 1895 or that of 1897 governs. Is the tax to be levied under the act of 1895 if valid, or the act of 1897, which was enacted long after the death of both of these testators? There is nothing in the act of 1897 which gives it a retrospective operation, and, if there was, it would be in direct conflict with the Constitution of Missouri, which prohibits retrospective legislation. We think it must be plain that the act of 1895, adopted prior to the death of these testators, if valid, must control, and not the act of 1897, enacted after their deaths. This, we take it, is the usual construction. By the terms of each, the devolution of the property and the right of the state to tax accrues immediately upon the death of the testators. *Re Seaman*, 147 N. Y. 69; *Re Embury*, 20 Misc. 75; *Re Roosevelt*, 143 N. Y. 120, 25 L. R. A. 695; Mo. Const. art. 2, § 15; *Leete v. State Bank* (Mo.) 42 S. W. 1074.

Looking to the act of April 1, 1895 (Laws Mo. 1895, p. 278) for authority for this tax, we are met with the objection that this tax is also void, because the said act is in violation of § 3 of art. 10 of the Constitution of Missouri, and of the 14th Amendment of the United States, and § 4 of art. 10 of the Constitution of Missouri. Of these in their inverse order. As already remarked, no doubt longer exists that it is competent for the legislature to levy a tax upon the succession of estates. It is quite universally held that such a tax is not a tax upon property, in the ordinary sense, but is in the nature of an excise or bonus, exacted by the state upon the privilege or right to inherit or succeed to an estate. It is not necessary at this time to enter upon an examination of the extent of this right on the part of the state, nor to approve or disapprove the extreme views expressed by some of the courts. While conceding the right to tax, our duty now is to ascertain, if we can, what was the purpose of the legislature in enacting this law. A primary and safe rule of interpretation of a statute is to endeavor to gather the legislative intent from the words they used. *Gardner v.*

Collins, 2 Pet. 93, 7 L. ed. 359; *Brewer v. Blougher*, 14 Pet. 178, 10 L. ed. 408. The general assembly has declared that it intended to levy "a collateral succession tax," and we all agree that, by whatever name this exaction may be called, it is referable to the taxing power of the state. The controlling question is, Upon what did it authorize that tax to be levied,—upon the property or estate of the deceased person, or upon the right or privilege of his beneficiaries to receive his estate by inheritance or devise? If upon the latter, it is settled by the great weight of authority that it does not fall within the regular ordinary taxation upon property which our Constitution requires shall be in proportion to its value. Recurring, then, to the language of the act, we find that the ordinary machinery, so to speak, was not prepared for enforcing the act of 1895, as for enforcing other delinquent taxes. It ordained that a tax of \$5 for each and every \$100 of the clear market value of such property where the money or property exceeds \$10,000 or less in value, and, where the money or property affected exceeds \$10,000 in value, the same shall be subject to a tax of \$5 for each and every \$100 of the clear market value thereof up to and including \$10,000 in value, and a tax of \$7.50 in addition for every such \$100 in value in excess of \$10,000, and gave a first lien upon the property affected, but provided no method of valuation. The mode of procedure was amended in 1897, by providing a means of ascertaining the value of such estates, which had been overlooked in the act of 1895, and a new section, to be known as "§ 1a," which provides that it shall be the duty of the judge of the probate court in this state, whenever the inventory and appraisement of any estate is filed, which is subject to the payment of a collateral succession tax, to immediately levy upon and charge such estate with the amount of such collateral succession tax, and require the executor, administrator, or beneficiary to pay the same, etc. A "succession tax," as the words indicate and the history of such taxes clearly establishes, is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of the state. Wherever properly laid, this is its distinguishing feature, in contradistinction from a property tax. The language of these two acts of 1895 and 1897 is very much involved, and more or less doubt must be felt in interpreting the meaning of the legislature, and this is true of other acts in other states. When it is clear that the tax is upon the succession, it is computed, not on the aggregate valuation of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate interest into which it is divided by the will or by the statute laws of the state, and is a charge against each share or interest, according to its value, and against the person entitled thereto; that is to say, it is a burden on each person claiming succession, measured by the value of his interest, and collectible out of his interest only. Accordingly, in New York, after whose statute the act in question seems to have been in several respects patterned, great difficulty was experienced in construing the law; but having

sustained the act as levying a succession tax, it was ruled in *Re Hoffman*, 143 N. Y. 827, that, when the will created contingent estates, the executors could not pay the tax until the expectancies became fixed and actual; in other words, being a tax upon the person receiving the share of the estate, it did not accrue until that person was finally ascertained, and that the state could only get its taxes when the legatees or devisees obtained their property. And in *Re Roosevelt*, 143 N. Y. 120, 25 L. R. A. 695, in answer to the contention of counsel for the state that, while it might be considered a hardship to compel annuitants to pay a tax upon an interest that they might never receive, it was the fault of the statute, and the tax could only be postponed by giving bond, the court of appeals answered: "This contention admits away the entire case of the state. It is not to be assumed that the legislature intended to compel the citizens to pay a tax upon an interest he may never receive." Until the vesting of the estate, "the power to tax does not exist." It is obvious that the tax is upon the transfer, by will or devolution, by inheritance; and, in the absence of a transfer and a transferee, there is no basis for a succession tax in its true sense, as it comes to us in the history of jurisprudence and of nations.

With these essential characteristics in view, can the acts of 1895 and 1897 be said to have levied a succession tax? Section 1a requires the tax to be levied upon the appraised value of the whole estate left by the deceased. The tax is at once levied upon that estate, and the personal representatives of the deceased, not the devisees and legatees, are required to pay the tax. How such a tax differs from general taxes upon the property of the deceased, under our system, we are not able to state. The mere calling of such a tax a "succession tax" does not make it different from an ordinary tax upon property, when the effect and operation are identical with an ordinary property tax. This tax is collectible out of all property devised by will or descending to any person other than the father, mother, husband, wife, or direct lineal descendant, whether the estate of the ancestor, devisor, or grantor is solvent or insolvent. If insolvent, there is nothing to which the heir or devisee or legatee can succeed; and yet upon the theory of a succession, an onerous tax is added to the charges against an estate, and payable in advance of other claims. The language of the supreme court of Wisconsin, in *State, Sanderson, v. Mann*, 76 Wis. 469, seems exceedingly appropriate upon this point: "A succession tax would necessarily be imposed upon the respective parties thus succeeding to such residue. . . . But the tax in question is not upon such succession, but upon the whole estate at its appraised valuation, regardless of whether it is solvent or insolvent. In case of an insolvent estate nothing would be left after the payment of debts for transmission; and in most estates there are likely to be sufficient debts to reduce the amount of such transmission far below the amount of such valuation. Besides, the amount of such tax is graduated by the amount of such appraisal, and is to be paid by the executors or administrators before or at the time of filing such appraisal, notwithstanding they may only

be interested as such officials, and never succeed to any of such estate. Manifestly the burden imposed is not a succession tax, but a tax upon the whole estate regardless of whether it is solvent or insolvent."

The New York act (Laws 1896, chap. 908, § 225) provides for a refunding of a proportionate part of the tax in case debts are allowed after its payment; and it was owing largely to this provision that that act was sustained, but no such provision is found in our acts of 1895 and 1897. *Re Westurn*, 152 N. Y. 98. We think the language of this act, whatever conjecture we may indulge as to the intention of its author, imposes a tax directly upon the property of the decedent, and not upon those who may succeed to his estate; and it must be conceded that, if it is a property tax, it is unconstitutional, because it subjects this estate to an additional property tax to that levied upon all other like property in the state for the same year, and is not levied in proportion to its value. But in no event can the act of 1895, which governs these two cases, be upheld, because the tax authorized by it is not uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Mo. Const. art. 10, § 3. The class of subjects to be taxed under this act is the succession or inheritance of property by collateral kindred or devisees other than those named in the statute as exempt from its imposition. It is not necessary to determine what would or would not be proper classification under this act in all cases; but it is perfectly clear that, when the tax is levied upon the property as under this act, uniformity is only attainable by levying the same per cent upon all property belonging to persons bearing the same relation to the decedent. A law which levies 5 per cent upon one cousin or uncle whose legacy is \$10,000 and 5 per cent upon the first \$10,000 of a legacy of \$20,000, bequeathed to another cousin of the same degree, and 12½ per cent upon the remaining \$10,000 thereof, violates the constitutional principle of uniformity. It is an arbitrary classification, without rhyme or reason. Such was the decision of the supreme court of Ohio in *State, Schwartz, v. Ferris*, 53 Ohio St. 814, 30 L. R. A. 218, upon a provision of the Constitution of that state substantially like § 3 of art. 10 of the Constitution of Missouri. It is a significant fact that in New York, Maine, Maryland, Virginia, Pennsylvania, and Massachusetts, in which inheritance taxes are sustained, the statutes only authorize a uniform rate of taxation. The constitutional guaranty of uniformity upon the same class of subjects would avail but little if the legislature can arbitrarily vary the classes as often as the amount of property devised or transmitted by inheritance shall differ. If such a rule obtain, the classes will be innumerable, and the constitution a dead letter. Where the amount of prop-

erty received is made the basis of the tax, uniformity can only be attained by levying the same per cent upon the property of each beneficiary under the will or by inheritance. While the legislature might perhaps distribute the collaterals according to the different degrees of kinship to the decedent or testator or grantor, and levy a different rate upon the different degrees, yet when it ignores all such natural classification, and makes the amount of money received by each the test of classification, it runs counter to another principle that is well-nigh universally accepted,—that a uniform rate of taxation upon every man's property secures equality of burden. To levy a different rate simply because the amount of each man's holdings is different would produce favoritism and destroy that principle of equality before the law which is the boast of free government. If it be so urged that the one receiving the larger bounty enjoys a greater privilege, still the principle of uniformity answers that the value of his right to receive is in direct proportion to the value of the property to which he succeeds, and must, if taxation is to be uniform, be taxed in that proportion or according to one common rate. In *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 632, the supreme court of Maine, in upholding a tax consisting of a uniform per cent, said: The constitutional requirement of uniformity is satisfied by a tax on the transmission of property by will or descent to strangers and collaterals when it is uniform as to the entire class affected, although other classes of persons are exempted from the tax. See also *Railroad Tax Cases*, 13 Fed. Rep. 722.

Other grave objections are made to the act,—one challenging its title as containing two distinct subjects; another, that the various subject-matters found in the body of the act are not indicated at all in the title. These objections have been presented with the greatest ability, and have been duly considered; but, inasmuch as the propositions already decided go to the very substance of the act, we deem it unnecessary to pass upon the point as to the title of the act. To respond to the very thorough discussion of the point by counsel would extend this opinion unnecessarily to too great length. The act of 1895 must be held void, and it follows that the probate courts of Boone county and of the city of St. Louis were wholly without jurisdiction to levy the taxes upon the estates of John C. Conley and Susan E. Spear, and their *proceedings* in that behalf *must be quashed*; and it is so ordered.

Sherwood, Burgess, Robinson, and Brace, JJ., concur.

Williams and Marshall, JJ., having been of counsel, take no part in the decision of the case.

NEW YORK COURT OF APPEALS.

Mary G. ATHERTON, *Resp't.*,
r.

Peter Lee ATHERTON, *Appt.*

(155 N. Y. 129.)

1. The matrimonial domicil of a wife who is justified in leaving her husband for cruelty may be changed by removal to another state so as to prevent jurisdiction over her on constructive service in a divorce suit in the state where the husband resides.

2. An agreement to provide for the best interests of a child, made by parents who had separated and were to live in different jurisdictions, by which the husband agrees to pay certain sums for the maintenance of the child and a certain allowance of alimony to the wife, with a provision that a divorce or second marriage of either party shall terminate the agreement, is terminated and mutually abandoned when the husband obtains judgment for absolute divorce in one state, and the wife obtains a limited divorce in another state.

(March 1, 1898.)

A PPEAL by defendant from a judgment of the General term of the Supreme Court, Fourth Department, affirming a judgment of a special term for Oneida County granting plaintiff a separation from her husband, the custody of their child, and money for its support. *Affirmed.*

The facts are stated in the opinion.

Messrs. Alexander P. Humphrey and Simon W. Rosendale, for appellant:

The Kentucky judgment is a bar to this action pursuant to the provisions of the Constitution of the United States, that full faith and credit shall be given in each state to the judicial proceedings of every other state.

U. S. Const. art. 4, § 4.

Also, under the provisions of the Federal statutes that authenticated judicial proceedings shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

U. S. Rev. Stat. § 905.

The plaintiff in the Kentucky action, Peter Lee Atherton, was all his life a resident of that state—and the courts of that state had jurisdiction in that action to fix the status of plaintiff; this would be so even if there was no jurisdiction over the defendant.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, approved in *Lynch v. Murphy*, 161 U. S. 247, 40 L. ed. 688; *Nelson, Divorce*, § 28.

The marital domicil of the parties was in the state of Kentucky.

A citizen of one state and a citizen of another state contracting with each other, may agree between themselves which laws will control the agreement, and may agree upon either state in good faith.

2 Kent, Com. 480; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 758; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104.

The divorce in the Kentucky suit was valid, so far as it affects the marital status of the parties there, assuming even that the dwelling place of Mrs. Atherton was in the state of New York.

Rigney v. Rigney, 127 N. Y. 408; *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525.

The union of husband and wife legally involves unity of domicil, and the residence and intention of the husband necessarily fixes the domicil of the wife as well as her own.

Ditson v. Ditson, 4 R. I. 87, 10 Abb. N. C. 833, note; *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654.

The provisions of the Federal Constitution would be a nullity if the court of the state of New York should, after conceding jurisdiction to a sister state, assume to decide that some of its findings (incidentally only involving jurisdiction), were erroneous, and assume therefore to ignore its decree.

Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132, cited in 160 U. S. 543, 40 L. ed. 529.

The divorce proceedings in Kentucky were in the nature of proceedings *in rem*, i. e., in its application to the status of the parties.

Rigney v. Rigney, 127 N. Y. 408; *Williams v. Williams*, 130 N. Y. 193, 14 L. R. A. 220; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Davis v. Davis*, 2 Misc. 549.

One's residence may be in one place and domicil in another.

Campbell v. Campbell, 90 Hun. 235, citing *Re Thompson*, 1 Wend. 45; *Re Roberts*, 8 Paige, 524; *Re Denick*, 92 Hun. 161.

Although not personally served, still if her domicil, either actual or constructive, were in Kentucky, the judgment would be binding on her.

2 Black, Judgm. § 926; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *De Meli v. De Meli*, 120 N. Y. 485; *Rigney v. Rigney*, 127 N. Y. 408; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Nelson, Divorce*, § 28; *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654.

Assuming jurisdiction as to the marital status, by the courts of Kentucky, and that the state of New York and the state of Kentucky had equal jurisdiction, the decree in the state which first assumes jurisdiction should be permitted to control.

Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829.

The judgment appealed from is contrary to the law as laid down by text-writers of repute and courts of authority, and is not supported by the decision of this court.

1 Freeman, Judg. § 314; *Rhymys v. Rhymys*, 7 Bush, 316; *Hackins v. Ragsdale*, 80 Ky. 353, 44 Am. Rep. 483; 2 Black, Judgm. § 926;

NOTE.—As to domicil of wife for purpose of divorce suit, see *Loker v. Gerald* (Mass.) 16 L. R. A. 497, and note; also *Ellis's Appeal* (Minn.) 23 L. R. A. 287; *Miller v. Miller* (Fla.) 24 L. R. A. 137; *Wood* 40 L. R. A.

v. Wood (Ark.) 28 L. R. A. 157; *McCreery v. Davis* (S. C.) 28 L. R. A. 656; *Clutton v. Clutton* (Mich.) 31 L. R. A. 160.

2 Bishop, Mar. & Div. § 152; *Pennoyer v. Neff*, 96 U. S. 714, 24 L. ed. 565; *Creely v. Clayton*, 110 U. S. 701, 28 L. ed. 298; *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95; *Ross v. Ross*, 129 Mass. 248, 37 Am. Rep. 321.

When an inhabitant of this state goes into another state or country to obtain a divorce for any cause occurring here and while the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state. In all other cases a divorce decreed in any other state or country, according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this state.

In the *Williams Case*, the separation occurred while the parties were domiciled in New York, the husband going to Minnesota, refusing to allow his wife to follow him, and there obtaining his divorce.

In the *Rigney Case*, the only doubt was as to the validity of the judgment so far as it was for alimony and costs, *in personam*.

In the *De Meli Case*, while both parties were domiciled in New York, the husband sued in Germany.

In the *Jones Case*, the parties separated in New York, and the wife went to Texas and there sued.

In the *Cross Case*, the parties separated in New York, and the husband went to Illinois to sue.

In the *O'Dea Case*, the parties separated in New York, and the husband went to Ohio to sue.

In the *Baker Case*, the parties separated in New York, and the wife went to Ohio to sue.

In the *Hunt Case*, the parties separated in Louisiana; the husband stayed at home; the wife came to New York; and yet a judgment in favor of the husband, on constructive process in Louisiana, was held valid.

In the *Hoffman Case*, the parties separated in New York, and the husband went to Indiana to sue.

In the *Kerr Case*, the parties separated in New York, and again the husband went to Indiana to sue. Indeed, in both of these cases (the *Hoffman* and the *Kerr Cases*), it was found that at the time the husband obtained his divorce in Indiana he was a citizen of New York.

We are not making a distinction which is novel to the administration of the law in these cases.

Re Morrison, 52 Hun, 102; *Re Morrison*, 117 N. Y. 638; *Re Degaramo*, 86 Hun, 390; *Campbell v. Campbell*, 90 Hun, 233; *Re Denick*, 92 Hun, 161; *Bell v. Bell*, 4 App. Div. 528; *McGown v. McGown*, 19 App. Div. 368.

When a wife separates herself from her husband there is no law by which he can restrain her movements.

Queen v. Jackson [1891] 1 Q. B. 671.

The plaintiff was only temporarily in the state of New York. The place of residence or dwelling place is the permanent abode, and the word is synonymous with inhabitancy or domicile, as distinguished from temporary residence.

DeMeli v. DeMeli, 120 N. Y. 485; *Nelson, Divorce*, § 40.

40 L. R. A.

Length of residence will not alone effect the change; intention alone will not do it; but the two taken together do constitute the change of domicile.

DePuy v. Wurtz, 53 N. Y. 556, Approved in *Hart v. Kip*, 148 N. Y. 806; *DeMeli v. DeMeli*, 120 N. Y. 485.

Courts should, and do, discountenance efforts at attempted residential change for purposes of divorce.

Story, Conf. L. § 744; Wharton, Conf. L. § 490; *Warrender v. Warrender*, 2 Clark & F. 488; *Dolphin v. Robins*, 7 H. L. Cas. 390.

Messrs. William Kernan and A. M. Mills, for respondent:

It is sufficient to authorize the interposition of the court to grant a separation, that there be illtreatment and personal injury, or a reasonable apprehension of personal injury.

Whispell v. Whispell, 4 Barb. 217; *Davies v. Davies*, 55 Barb. 180; *Bihin v. Bihin*, 17 Abb. Pr. 20; *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236; *Lutz v. Lutz*, 31 N. Y. S. R. 718; *Straus v. Straus*, 67 Hun, 491; *Wattermire v. Wattermire*, 110 N. Y. 183; *DeMeli v. DeMeli*, 5 N. Y. Civ. Proc. Rep. 306; *Evans v. Evans*, 1 Hagg. Consist. Rep. 35; *Mason v. Mason*, 1 Edw. Ch. 278.

The decree of divorce in Kentucky in favor of the defendant is no bar to this action.

The court of another state cannot divorce a citizen of this state, domiciled and actually residing here at the commencement of and during the pendency of the judicial proceedings in that state, without personal service of process upon the defendant in such proceedings in that state, or a voluntary appearance by the defendant in such proceedings.

Beckwith v. Beckwith, 24 N. Y. Week. Dig. 5; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23; *Jones v. Jones*, 108 N. Y. 415; *Cross v. Cross*, 22 N. Y. Week. Dig. 309, Affirmed 108 N. Y. 628; *DeMeli v. DeMeli*, 120 N. Y. 485; *Rigney v. Rigney*, 127 N. Y. 408; *Williams v. Williams*, 130 N. Y. 193, 14 L. R. A. 220; *Re Degaramo*, 86 Hun, 390; *People v. Karlsioe*, 1 App. Div. 571; *Bell v. Bell*, 4 App. Div. 527; *Kilburn v. Woodcorth*, 5 Johns. 37, 4 Am. Dec. 321; *Ward v. Boyce*, 152 N. Y. 191, 36 L. R. A. 549.

A wife may acquire a residence and domicile separate from that of her husband, whenever it is necessary and proper for her to do so. Certainly it was eminently necessary and proper for the plaintiff in this case to do so.

2 Bishop, Mar. & Div. § 125; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Rundie v. VanIncegan*, 9 N. Y. Civ. Proc. Rep. 328; *Mellen v. Mellen*, 10 Abb. N. C. 329, and note.

The evidence and the attending circumstances clearly show that the plaintiff intended to and did abandon her residence and domicile in Kentucky, and came to her mother's at Clinton, New York, with the intention of making that her home, and has since resided there and made it her home; and that she became and was from the time of coming to Clinton a citizen and resident of this state, actually residing in this state.

The question was one of fact, to be decided

upon all the evidence and circumstances, and was correctly decided, and is conclusive upon this court.

DuPuy v. Wurtz, 53 N. Y. 556; *Prentiss v. Butler*, 87 N. Y. S. R. 605; *Bassett v. Wheeler*, 84 N. Y. 486; *DeMeli v. DeMeli*, 120 N. Y. 486; *Phelps v. New York, N. H. & H. R. Co.* 17 App. Div. 392.

The agreement between the father and mother is not binding upon the child, or upon the court as to the custody of the child. The court has the power, and it is its duty, to provide for the best interests and welfare of the child, aside from any agreement between the parents.

People, Barry, v. Mercein, 3 Hill, 400, 38 Am. Dec. 644; *People, Barry, v. Mercein*, 8 Paige, 47; *Mercein v. People, Barry*, 25 Wend. 64, 35 Am. Dec. 653; *Re Hartman*, 23 N. Y. Week. Dig. 128; *People, Brush, v. Brown*, 35 Hun, 324; *Allen v. Affleck*, 64 How. Pr. 580.

The court had the power, and it properly exercised it in giving the care and custody of the child to the mother.

N. Y. Code Civ. Proc. § 1766; *Re Waldron*, 13 Johns. 418; *Re Maurer*, 18 N. Y. Week. Dig. 568; *Re Hartman*, 23 N. Y. Week. Dig. 128; *People, Olmstead, v. Olmstead*, 27 Barb. 9; *Mercein v. People, Barry*, 25 Wend. 64, 35 Am. Dec. 653; *Re Welch*, 74 N. Y. 299; *People, Allen, v. Allen*, 105 N. Y. 628; *People, Pruyn, v. Walts*, 122 N. Y. 288.

Bartlett, J., delivered the opinion of the court:

The defendant seeks on this appeal the reversal of a judgment for limited divorce recovered against him by his wife. The judgment rests upon the finding of the trial court that the defendant had treated the plaintiff in such a cruel and inhuman manner that it rendered it unsafe and improper for her to cohabit with him, and justified her in seeking a separate residence. It gives her alimony, and the custody of the only child of the marriage. The plaintiff, a young lady of refinement and excellent social position, was married, when twenty-two years old, to the defendant, at her father's house in Clinton, New York, on the 17th day of October, 1888. The defendant is a young man of good family, a native of Kentucky, and at the time of his marriage resided with his parents at the city of Louisville. After the wedding trip, the plaintiff and defendant took up their residence at the house of defendant's parents. On the 8th of January, 1890, a daughter was born, and is the only issue of the marriage. On the 3d of October, 1891, the plaintiff left her husband's home permanently, taking the child with her. On the 10th day of October, 1891, and before her departure for the state of New York, the plaintiff, her trustee, and the defendant, with the advice of counsel, entered into a certain agreement that will be referred to later. Immediately thereafter the plaintiff departed from the commonwealth of Kentucky, and came to the state of New York, with the intention, as the trial court finds, of changing her residence and domicil from Kentucky to New York. In the month of December, 1892, the defendant commenced an action against plaintiff in Kentucky for an absolute divorce, alleging that she had

abandoned him in the month of October, 1891, without fault on his part, and such abandonment had continued uninterruptedly for the period of more than one year. Under the statutes of Kentucky the proof of this state of facts entitles a plaintiff to a decree dissolving the bonds of matrimony. The defendant was not served with process in Kentucky, nor did she appear in the action. The decree of divorce was obtained upon the assumption that the defendant was a resident of Kentucky, who had been absent therefrom for four months, and could, therefore, receive notice of commencement and pendency of the action by a designated constructive process. The plaintiff made his formal proofs, and, in the absence of the defendant, the Kentucky decree was entered about March 14, 1893. The wife began the present action for a limited divorce on the ground of cruel and inhuman treatment in January, 1893, and the trial court rendered judgment in her favor in June, 1893. The husband appeared in this case, was represented by able Kentucky and New York counsel, and the issues were thoroughly tried.

The principal question presented by this appeal is whether the Kentucky decree is a bar to this action, the defendant having set it up in his answer. The plaintiff attacked this decree on the ground that it was entered by a court having no jurisdiction of her person, she being at the time the Kentucky action was begun and the decree therein entered, a resident of the state of New York. On the other hand, the defendant insisted that his wife was, at the time referred to, a resident of Kentucky, and, consequently, bound by the decree. This was one of the issues tried and decided in favor of the wife. The learned counsel for the defendant from Kentucky argued with great earnestness and ability that the matrimonial domicil of the wife is that of her husband, and consequently we are compelled by the Constitution of the United States to give full faith and credit to the decree in her husband's favor. Article 4, § 1. In view of the fact that we have a finding fixing the wife's domicil in this state, we are of opinion the Kentucky decree is void as to her under the law as well settled in this jurisdiction. It is undoubtedly true that the matrimonial domicil of the wife is that of her husband, but this general rule has its exceptions. In this case we have the finding that the plaintiff was justified in leaving her husband, and that her sole reason for so doing was his cruel and inhuman treatment. This court said in *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129, in speaking of the general rule as to the wife's domicil (at page 242): "There are, however, exceptions to the rule, one of which is invoked by the plaintiff in this suit, so that in certain cases a married woman may have a domicil in another jurisdiction than that of her husband. This is so, when they are living apart under a judicial decree of separation, or when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce. She may acquire a separate domicil whenever it is necessary for her to do so. But the right to do so springs from the necessity for its exercise." In the case at bar we have the undoubted right of the plaintiff to change her domicil under this rule, fol-

lowed up by the finding that she did so change it to the state of New York. It has been held in many cases that the jurisdiction of the court of another state in which judgment has been rendered is always open to inquiry in the courts of this state, and, if that court has exceeded its jurisdiction or has not obtained jurisdiction of the parties, the proceedings are void. *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23; *Jones v. Jones*, 108 N. Y. 415; *DeMeli v. DeMeli*, 120 N. Y. 488; *Rigney v. Rigney*, 127 N. Y. 408; *Williams v. Williams*, 130 N. Y. 193, 14 L. R. A. 220.

We have carefully examined the evidence, and have reached the conclusion that the findings of the trial court as to the issues of domicile of the plaintiff and the cruel and inhuman treatment by defendant of his wife are not without evidence to support them, and because of their affirmance by the general term they are binding upon this court. It therefore follows, upon the facts and the law, that the Kentucky judgment is not a bar to this action.

It remains for us to consider the appellant's points based on the alleged effect of the agreement entered into by the plaintiff, her trustee, and the defendant just prior to plaintiff's final departure from Kentucky. This agreement bears date October 10, 1891. We do not regard this instrument as technically articles of separation between husband and wife, but rather an agreement to provide for the best interests of the child, made in contemplation of the fact that the parents had separated, and were to live in different jurisdictions. The opening recitation of the agreement refers to the parties as "having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequences which may follow, or right which may arise to either party, if such status shall continue." This language makes it clear that, while the separation was recognized as a fact, the agreement was not to prej-

udice or affect existing rights of either party growing out of that situation. The recitation clause further states that the parties desire to provide for the best interest of the child, and with this view they have entered into an agreement. It provides for the alternating custody of the child by her mother and the mother of the defendant. The defendant obligates himself to pay \$500 for maintenance of the child during that portion of the year in which she is with her mother. The wife is to receive alimony at the rate of \$125 a month, the divorce or second marriage of either party to terminate the agreement. The agreement was to continue as to the child until she was fourteen years of age, and as to her mother until January 8, 1904. If divorce was granted, the provisions as to plaintiff were to be carried into the decree. There are other details not necessary to mention. We are of opinion that the suit for absolute divorce brought by the husband in Kentucky in December, 1893, and the action for limited divorce instituted by the wife in this state in January, 1893, both having proceeded to judgment, may be regarded as a mutual abandonment and termination of the agreement under its terms, and left the court below free to act as it deemed proper respecting the alimony of the wife and the custody and maintenance of the child. The provision of the agreement for the wife's alimony was not carried into the Kentucky decree, but the judgment in this action provides for the same amount of alimony per month of \$125. It is unnecessary for us to consider any of the questions which are argued in the briefs, resting on the assumption that the agreement was in full force and effect at the time the judgment was entered herein at trial term. The husband and wife had sought relief in the courts, and the interests of the child were safe, with the supreme court of this state guarding her rights.

The judgment of the General Term should be affirmed, with costs.

All concur, except **Gray, J.**, absent, and **Martin, J.**, not sitting.

OHIO SUPREME COURT.

Adam WILHELM, *Plff. in Err.*,
v.

City of DEFIANCE.

(.....Ohio.....)

***A municipal corporation, having, in the proper mode, provided for the construction of a sidewalk** and notified the owner of abutting land, may require of him the construction of a sufficient walk in front of his premises, and, upon his default, may itself construct such walk and assess the cost thereof upon his land; but it cannot recover from him indemnity on account of a judgment recovered

*Headnote by the COURT.

NOTE.—See also the similar case of *Rochester v. Campbell* (N. Y.) 10 L. R. A. 393.
40 L. R. A.

against it for injuries occasioned by such owner's negligent construction of the walk.

(March 1, 1898.)

ERROR to the Circuit Court for Defiance County to review a judgment reversing a judgment of the Court of Common Pleas which sustained a demurrer to the petition in an action brought to hold defendant liable for the amount of a judgment which the city had been compelled to pay because of a defect in a walk in front of defendant's property. *Reversed.*

Statement by **Shauck, J.**:

The city of Defiance filed its petition against Wilhelm in the court of common pleas alleging in substance that he was the owner of lot

1 abutting on Clinton street in said city; that an ordinance of the city required him to construct and maintain in front thereof good and sufficient sidewalks; when constructed of wood to be 6 feet in width and laid with good sound pine-board planks not less than 6 nor more than 12 inches wide and 1½ inches thick, and free from sap and unsound knots, on white or burr oak stringers, etc.; that on November 7, 1889, the council of said city adopted a resolution declaring it to be necessary to improve the walk in front of Wilhelm's lot in accordance with the provisions of the general ordinance relating to wooden sidewalks, and that notice thereof was personally served upon Wilhelm; that Wilhelm thereupon took upon himself the work of constructing and repairing said walk, but constructed it in a negligent manner and of unfit and defective materials, and left it in an unsafe and dangerous condition, in consequence whereof one Martha L. Sammis, while lawfully passing along said walk, without fault on her part sustained severe injuries for which in the court of common pleas a judgment had been awarded her against the city for \$1,500, and \$108.53, the costs of suit; that before the trial of her said action against the city, Wilhelm was notified of the pendency of said action, and that the city would require him to indemnify it for all damages which it might be adjudged to pay her; and that it paid the amount of the judgment so recovered by her, and demanded of Wilhelm that he reimburse it, which he failed to do. The prayer of the petitioner was for judgment for the amount which the city so paid to Mrs. Sammis.

In the court of common pleas a final judgment was rendered in favor of Wilhelm on his demurrer to the petition.

On a petition in error by the city, the circuit court reversed the judgment of the common pleas.

Messrs. Henry Newbegin and Edward H. Newbegin, for plaintiff in error:

No liability was cast upon Wilhelm for the injury on account of the defective sidewalk. The sidewalk was a part of the public street, under the entire control of the city, and, in regard to it, Wilhelm owed no duty to the public, whatever.

2 Dill. Mun. Corp. §§ 1008, 1012; *Re Burmeister*, 76 N. Y. 174; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *Taber v. Grafmiller*, 109 Ind. 206.

For mere negligence in permitting a sidewalk to be out of repair, when he has actually done nothing to obstruct it, or the defect is not in some particular part of it which he has constructed for his own private use and not for the common and general use of the public, the abutting lotowner is not responsible.

Dill. Mun. Corp. 1012; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532; *Noonan v. Stillwater*, 38 Minn. 198, 53 Am. Rep. 23; *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Kirby v. Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682; *Betz v. Limingi*, 46 La. Ann. 1113; *Keokuk v. Independent Dist.* 53 Iowa, 352, 36 Am. Rep. 40 L. R. A.

226; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Rochester v. Campbell*, 123 N. Y. 405, 10 L. R. A. 393; *Tiedeman, Mun. Corp.* § 348; 9 Am. & Eng. Enc. Law, p. 395, ¶ 10, note 3.

To have this right of action over against Wilhelm, the city must have been without fault itself. The city was negligent of its duty to keep the sidewalk in repair under § 2640, Ohio Rev. Stat.

Cardington v. Fredericks, 46 Ohio St. 442; *Cleveland v. King*, 132 U. S. 295, 33 L. ed. 334.

There can be no recovery over by the city against Wilhelm for the reason that one of two joint wrongdoers cannot have contribution from the other.

Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; 2 Addison, Torts, Wood's ed. last par. § 1394, note 1.

Wilhelm was not liable to Mrs. Sammis.

Sammis v. Wilhelm, 6 Ohio C. C. 565.

If not liable directly to the injured person he could not be held liable indirectly to the city for damages suffered by the injured person through its fault.

Tobin v. Portland S. & P. R. Co. 59 Me. 188, 8 Am. Rep. 415; *Urquhart v. Ogdensburg*, 97 N. Y. 238; *St. Louis v. Connecticut Mut. L. Ins. Co.* 107 Mo. 92; *Keokuk v. Independent Dist.* 53 Iowa, 352, 36 Am. Rep. 226; *Lowell v. Gliddon*, 159 Mass. 317; 2 Dill. Mun. Corp. § 1012; *Tiedeman, Mun. Corp.* §§ 346, 348.

Mr. Edwin A. Latty, for defendant in error:

One who negligently creates or maintains an obstruction or nuisance in a public street is, irrespective of authority or license, liable to persons injured thereby.

Clark v. Fry, 8 Ohio St. 359, 72 Am. Dec. 590; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701; *Haever v. Whalen*, 49 Ohio St. 69, 14 L. R. A. 828; *Sexton v. Zett*, 44 N. Y. 430; *Bliss v. Schaub*, 48 Barb. 339; *Steinermann v. White*, 16 Jones & S. 523; *Dixon v. Brooklyn City & N. R. Co.* 100 N. Y. 170; *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 498; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Mulcairns v. Janesville*, 67 Wis. 24; *Indianapolis v. Emmelman*, 108 Ind. 580, 58 Am. Rep. 65.

In case the defect was caused by a licensee, the right of recovery depends on his contract, express or implied, to perform the act permitted in such a manner as to protect the public from danger and the municipality from liability.

Port Jervis v. First Nat. Bank, 96 N. Y. 550; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Troy v. Troy & L. R. Co.* 49 N. Y. 657.

Where a municipal corporation has been compelled to pay a judgment rendered against it, for damages sustained by reason of the wrongful acts of a third person, rendering a street unsafe, it has a remedy over against such person.

Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; *Lowell v. Short*, 4 Cush. 275; *Boston v. Worthington*, 10 Gray, 496; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33;

Woods v. Groton, 111 Mass. 357; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469; *Rochester v. Montgomery*, 72 N. Y. 67; *New York v. Dimick*, 20 Abb. N. C. 15; *Seneca Falls v. Zalinski*, 8 Hun, 571; *Troy v. Troy & L. R. Co.* 49 N. Y. 657; *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Rochester v. Campbell*, 123 N. Y. 412, 10 L. R. A. 898; *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627; *Morgan v. Muldoon*, 82 Ind. 347; *Bever v. North*, 107 Ind. 544; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Western & A. R. Co. v. Atlanta*, 74 Ga. 774; *Aberdeen v. Blackmar*, 6 Hill, 324; *Elliott, Roads & Streets*, p. 657; *Elkhart v. Wickwire*, 87 Ind. 77; *McNaughton v. Elkhart*, 85 Ind. 384; *Brookville v. Arthurs*, 152 Pa. 334; *Portland v. Atlantic & St. L. R. Co.* 66 Me. 485; *Brooklyn v. Brooklyn City R. Co.* 8 Abb. Pr. N. S. 356; *New York v. Brady*, 81 Hun, 440; *Reading City v. Reiner*, 167 Pa. 41; *Wabasha v. Southworth*, 54 Minn. 79; *Canandaigua v. Foster*, 81 Hun, 147.

When a remedy exists the corporation may notify such wrongdoer of the pendency of the action against it, and request him to come in and defend; he will then be concluded by any judgment as to the existence of the defect, the liability of the city, and amount of damages.

Boston v. Worthington, 10 Gray, 496; *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720; *Seneca Falls v. Zalinski*, 8 Hun, 571; *Troy v. Troy & L. R. Co.* 49 N. Y. 657; *Rochester v. Montgomery*, 72 N. Y. 65; *Morgan v. Muldoon*, 82 Ind. 347; *Bever v. North*, 107 Ind. 544; *Western & A. R. Co. v. Atlanta*, 74 Ga. 774; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Binsse v. Wood*, 37 N. Y. 530; *Aberdeen v. Blackmar*, 6 Hill, 324; *Elliott, Roads and Streets*, p. 657.

If, after notice and request to defend, the wrongdoer fails to make any defense in the action against the city, and the city defends it for him, it may, if guilty of no misfeasance itself, recover from such wrongdoer, not only the amount of the judgment recovered against it, but also all reasonable and necessary expenses incurred in defending the action, including reasonable attorney's fees.

Westfield v. Mayo, 122 Mass. 100, 23 Am. Rep. 292; *Veazie v. Penobscot R. Co.* 49 Me. 119; *Chesapeake & O. Canal Co. v. Allegany County Comrs.* 57 Md. 201, 40 Am. Rep. 430; *Bazendale v. London, C. & D. R. Co.* L. R. 10 Exch. 35; *Elliott, Roads & Streets*, p. 657; *Aslin v. Parkin*, 2 Burr. 665; *Marlatt v. Clary*, 20 Ark. 251; *French v. Parish*, 14 N. H. 496; *Levitaky v. Canning*, 33 Cal. 299.

The rule that no contribution exists between wrongdoers is always confined to cases where the party seeking redress knew, or must be presumed to have known, the act was unlawful; and does not apply to cases where the party seeking contribution was a tortfeasor only by an inference of law.

Adamson v. Jarvis, 4 Bing. 72; *Wooley v. Batte*, 3 Car. & P. 417; *Pearson v. Skelton*, 1 Mees. & W. 504; *Jacobs v. Pollard*, 10 Cush. 287, 57 Am. Dec. 105; *Bailey v. Bussing*, 28 40 L. R. A.

Conn. 455; *Moore v. Appleton*, 26 Ala. 638; *Goldsbrough v. Darst*, 9 Ill. App. 205; *Sherner v. Spear*, 92 N. C. 148; *Horbach v. Elder*, 18 Pa. 33; *Armstrong County v. Clarion County*, 66 Pa. 218, 5 Am. Rep. 368; *Acheson v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663; *Grund v. Van Vleet*, 69 Ill. 479; *Ives v. Jones*, 25 N. C. (3 Ired. L.) 538, 40 Am. Dec. 421.

In the following similar cases, where recovery over was sought, the rule of no contribution between tortfeasors was expressly held not to apply.

Lowell v. Boston & L. R. Corp. 23 Pick. 24, 34 Am. Dec. 33; *Campbell v. Somerville*, 114 Mass. 834; *Griday v. Bloomington*, 68 Ill. 47; *Minneapolis Mill Co. v. Wheeler*, 81 Minn. 121; *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355; *Horbach v. Elder*, 18 Pa. 33; *Bailey v. Bussing*, 28 Conn. 455; *Wooley v. Batte*, 2 Car. & P. 417; *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324; *West Boylston v. Mason*, 102 Mass. 341.

Shauck, J., delivered the opinion of the court:

In *Morris v. Woodburn*, 57 Ohio St. 380, we held that if the owner of a lot abutting upon a street of a municipality, for the use of his property, constructs a vault under the sidewalk over which he negligently places and maintains a defective covering, he is liable directly to a footman injured thereby, notwithstanding the omission by the municipality of the duty imposed upon it by statute to keep the street in repair. And since the decisions in *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298, and 4 Wall. 657, 18 L. ed. 427, it seems to be the settled law that if a municipal corporation is held in damages for its failure to keep a sidewalk in repair by removing the source of danger so created by an abutting owner for his own personal ends, it may, having given him notice of the pendency of the suit against it, recover from him the amount which it is adjudged to pay because of his torts.

But it is not assumed that the grounds upon which recoveries were sustained in those cases are available here. The opinion of the circuit court in the present case (12 Ohio C. C. 346), shows that it was mindful of the fact that the statute imposes upon the municipality, and not upon the abutting owner, the duty of keeping the streets and sidewalks in repair and free from nuisance. It is conceded that the law imposes upon such owner no duty with respect to the walk whose mere omission could be asserted as the foundation of an action against him. According to the view there taken, Wilhelm, having assumed the duty of constructing and maintaining the walk, thereby became bound to exercise due care in the selection of materials and reasonable skill in constructing and repairing the walk, and by his failure in respect thereto, he actually created the dangerous place and negligently left it unguarded, whereby he became directly liable to the person injured, or to the city in the present action, it having been compelled to respond first because of its failure to perform the duty imposed upon it by the statute. No authority is cited by the circuit court in support of its view, and most of the cases cited by the city

solicitor in support of the judgment relate to the points decided in *Morris v. Woodburn*, and *Chicago v. Robbins*.

The right of the municipality to recover from the wrongdoer was upheld in *Chicago v. Robbins*, and in the cases following it upon the ground that the recourse of the person injured is primarily against him; and the municipality, having relieved him of that liability, is subrogated to the right of the person injured. In *Rochester v. Campbell*, 123 N. Y. 405, 10 L. R. A. 393, it was correctly said of those cases: "These were all cases where the dangerous conditions of the street were created by the defendants, and they were held liable for the consequences of their unlawful acts, under their common-law obligations as the creators of nuisances, and not by reason of any duty enjoined upon them by statute or otherwise." Section 2640, Revised Statutes, provides: "The council shall have the care, supervision, and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges, within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

This, it has been repeatedly held, is not merely a grant of power to the municipality, but the imposition of a duty upon it. Cognate provisions of the statute authorize the municipality to require, in the mode specified, the abutting owner to construct or repair the walk in front of his premises. The effect of his failure to comply with the requirement is also defined by the statute; that upon his failure the municipality may construct or repair the walk and assess the cost thereof upon his property. But the right of the city to be indemnified in this manner is expressly limited to one fourth the amount at which the property is valued for the purposes of taxation. The consequence thus indicated by the statute is exclusive. In considering the effect of similar statutory provisions in *Keokuk v. Independent Dist.* 53 Iowa, 352, 36 Am. Rep. 226, it was

said: "The city has sole authority over its streets, is charged with their improvement and repair, and vested with the power to tax for that purpose. Where the lotowner is required by the city to construct or repair sidewalks it is simply a method of exercising such power of taxation by which he is made the agent of the city to expend the amount of the tax, and the responsibility for the performance of the work remains where the authority to control it is found.

In well-considered cases it has been held that the liability which the statute imposes upon the abutting owner is exclusive, and not reconcilable with an unlimited liability for injuries occasioned by the defective condition of the streets and sidewalks which are constructed and maintained under the authority of the municipality, where the condition results from negligence merely. *Flynn v. Canton Co.* 40 Md. 812, 17 Am. Rep. 603; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *St. Louis v. Connecticut Mut. L. Ins. Co.* 107 Mo. 92. That conclusion is in harmony with the view of the subject taken in *Rochester v. Campbell*, where it is said that to hold the abutting property liable in an action for indemnity "would tend to relax the vigilance of municipal corporations in the performance of their duties with respect to the repair of streets and highways, and impose that duty upon those who might be utterly unable to discharge it."

The policy of the statute, as indicated by its provisions, according to the doctrine of the cases cited and the numerous cases which they review, seems to require the conclusion that when a municipality accepts a sidewalk constructed by the owner of abutting property pursuant to its notice, as a compliance therewith, all liability for mere negligence in construction and maintenance must rest and remain upon it.

Judgment of the Circuit Court reversed, and that of Common Pleas affirmed.

WASHINGTON SUPREME COURT.

George F. VIETOR *et al.*, *Appts.*,

v.

James M. GLOVER *et al.*, *Respts.*

(17 Wash. 37.)

1. The only ground on which preferred creditors of a partnership can complain of a deed of trust made by it for benefit of creditors is that the claims of preferred creditors is not bona fide and real.

2. Partnership property may be conveyed to pay notes signed by the individual partners, and not in the firm name.

3. Subsequent creditors of an insolvent firm cannot complain that a note was given by the continuing partners to a withdrawing member for his alleged share in the assets of the firm.

NOTE.—As to the assumption by a partnership of the individual debts of the partners, see note to *Re Edwards* (Mo.) 29 L. R. A. 881.

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4. A conveyance for the security of several claims some of which are fraudulent will be sustained in favor of those which are valid.

5. Creditors who act in good faith in taking a conveyance of their debtor's property, in satisfaction of their claims, and who surrender notes to a larger amount than are covered by the assets assigned, may retain what they receive although the grantors may act in bad faith.

(April 23, 1897.)

APPEAL by plaintiffs from a judgment of the Superior Court for Spokane County in favor of defendants in an action brought to set aside a conveyance for the benefit of creditors as in fraud of plaintiffs' rights. *Affirmed.*

The facts are stated in the opinion.

Messrs. Samuel R. Stern, Cyrus Happy, and W. W. Tolman, for appellants:

Where successive firms are formed, or where

changes in partnerships occur, as by a partner selling an interest to another, the property of the old firm is converted into that of the new, and the partners in the new firm have an equitable lien to have it applied in payment of the creditors of the latter firm, which lien the court will use in favor of such creditors until they are paid in full, to the exclusion of the creditors of the former firm.

1 Bates, Partn. § 555.

A partner who retires, suffering the continuing partners to go on with the old assets as a new firm, has lost his equity to compel their application to the debts of the original firm.

1 Bates, Partn. § 556.

Then Julius Loewenberg had no lien upon these assets (even conceding that they were the assets of the old firm) for the \$31,000 note given him as representing his share.

A firm must be solvent in order to dispose of the partnership property or preferentially prefer an individual or old debt.

14 Am. & Eng. Enc. Law, p. 116; 1 Bates, Partn. § 556; *Burhans v. Kelly*, 17 N. Y. S. R. 552; *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683; *Charleson v. McGraw*, 3 Wash. Terr. 344.

Where one member of the partnership retires, and no one is taken in his place, the property of the old firm will be first devoted to the debts of the firm succeeding it. If such firm property thus disposed of has not gone into the hands of a bona fide holder, such a transfer is a gift, and is void as to all existing firm creditors who are prejudiced thereby.

17 Am. & Eng. Enc. Law, pp. 979, 984.

If a firm is insolvent, the withdrawal of a large amount of funds, or of his original capital, by one partner, or otherwise drawing from the joint fund an amount in excess of what he is entitled to, knowing that the joint creditors will not have sufficient, whether this is by gratuitous permission of his copartners or under a right to do so given by the articles of partnership, is, as a matter of course, a conveyance in fraud of the rights of partnership creditors, and doubtless also of the separate creditors of the other partners, for it is in effect a gift; and if the court can get possession of the fund before the retiring partner has collected it, they will treat it as partnership assets.

1 Bates, Partn. § 564.

A partnership has no greater right to make voluntary conveyances of its property, or, what is the same thing, use its property to pay or secure debts not its own, when it is insolvent, or when such payment will leave it insolvent, or hinder or delay existing creditors, than an individual of his separate property.

1 Bates, Partn. §§ 565, 566, 568; *Phelps v. McNeely*, 66 Mo. 554, 27 Am. Rep. 378; *Re Cook*, 3 Biss. 122; *Goodbar v. Cary*, 16 Fed. Rep. 316, 4 Woods, 663; *Heineman v. Hart*, 55 Mich. 64; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46, 49 Am. Rep. 160; *Keith v. Armstrong*, 65 Wis. 225; *Deteau v. Fowler*, 2 Paige, 401; *Patterson v. Seaton*, 70 Iowa, 689; *Still v. Focke*, 66 Tex. 715.

Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except it be the interest of such separate partner in the effects after settlement of all the accounts.

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3 Kent, Com. ed. 1889, 98; *Goodbar v. Cary*, 16 Fed. Rep. 319; *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683; *Patterson v. Seaton*, 70 Iowa, 689; *Ferson v. Monroe*, 21 N. H. 462; *Wilson v. Robertson*, 21 N. Y. 587; *Ransom v. Van Deventer*, 41 Barb. 307; *Heineman v. Hart*, 55 Mich. 64; *Taylor v. Missouri Glass Co.* 6 Tex. Civ. App. 337; *Schuster v. Rader*, 13 Colo. 329; *Johnston v. Standard Shoe Co.* 5 Tex. Civ. App. 398; *Baily v. Hornthal*, 89 Hun, 514; *Ames v. Ames*, 87 Fed. Rep. 36.

A parallel case with the one at bar will be found in *Bannister v. Miller*, 54 N. J. Eq. 121.

See *Van Doren v. Stickle*, 24 N. J. Eq. 331, Affirmed 27 N. J. Eq. 498.

The creditors were privy to the fraud, and are not therefore bona fide purchasers without notice.

McDonald v. Gaunt, 30 Kan. 693; *Gollobor v. Martin*, 33 Kan. 252; *Bump, Fraud. Conv.* 3d ed. 22-28. See also *Williams v. Etans*, 6 Neb. 216; *Hunter v. Ferguson*, 3 Colo. App. 287; *Lloyd v. Fulton*, 91 U. S. 485, 23 L. ed. 365; *Humes v. Scruggs*, 94 U. S. 22, 24 L. ed. 51; *Burt v. Agassiz*, 6 Wash. 242.

The transfer in this case was, in effect, a general assignment.

Sabichi v. Chase, 108 Cal. 81; *Strong v. Kalk*, 91 Wis. 29; *Stout v. Watson*, 19 Or. 251; *Truitt Bros. v. Caldwell*, 3 Minn. 364; *Page v. Smith*, 24 Wis. 368; *Murphy v. Caldwell*, 50 Ala. 461; *Burrill, Assignm.* 6th ed. § 4; *Jones, Chat. Mort.* § 352; *Smith v. Sipperley*, 9 Utah, 267.

This transfer being a preferential transfer, and not for the benefit of all the creditors, was contrary to law.

1 Hill's Code, § 274, and as amended by chap. 100, Laws 1893.

The conveyance in this case was made in trust for the use of the persons making the same, and was therefore fraudulent.

1 Hill's Code, § 1452; *Burrill, Assignm.* § 167; *Lawson v. Funk*, 108 Ill. 502.

If the consideration failed in part because of fraud the entire transaction was fraudulent.

Bispham, Equity, p. 260; *Mead v. Combs*, 19 N. J. Eq. 112; 1 Beach, Mod. Eq. Jur. § 73; *Swinford v. Rogers*, 28 Cal. 234; cases cited in *Collins v. Blantern*, 1 Smith, Lead. Cas. Am. Law Series ed. p. 659; *Wait v. Jones*, 1 Bing. N. C. 665.

Although founded on sufficient consideration, if the intent was fraudulent the sale was a fraud.

Bussard v. Bullitt, 95 Iowa, 736; *Billings v. Russell*, 101 N. Y. 226; *Knapp v. Day*, 4 Colo. App. 21; *Cole v. Thornburg*, 4 Colo. App. 95; *Mead v. Combs*, 19 N. J. Eq. 112; *Kellogg v. Root*, 23 Fed. Rep. 525; *Chevalier v. Commins*, 106 Cal. 580; *Lawson v. Funk*, 108 Ill. 502.

Messrs. L. B. Nash, Lucius G. Nash, Dolph, Malloy, & Simon, and John M. Gearin, for respondents:

A debtor in failing circumstances may not only dispose of his property for the benefit of his creditors, generally, but by such conveyance prefer one creditor to another, or one class of creditors to another class.

Clarke v. White, 12 Pet. 178, 9 L. ed. 1046; *Tompkins v. Wheeler*, 16 Pet. 106, 10 L. ed. 903.

If the debtor's property is not encumbered

by liens, he may prefer creditors by paying a debt in full or in part.

The secret motives of the debtor or his intent to defeat execution are immaterial, if the transfer is solely to prefer one creditor over another.

Bump, Fraud. Conv. 3d ed. p. 190; 5 Am. & Eng. Enc. Law, p. 184.

This right of the debtor to alienate his property is restricted only by the principle that he shall not alienate it for the purpose of hindering, delaying, or defrauding his creditors.

Furth v. Snell, 6 Wash. 546; *Turner v. Iowa Nat. Bank*, 2 Wash. 192; *Ephraim v. Kelleher*, 4 Wash. 243, 18 L. R. A. 604; *Benham v. Ham*, 5 Wash. 128; *Samuel v. Kittenger*, 6 Wash. 261.

Each partner has an ultimate interest in the results of the partnership, i. e., if it has made profits, to his interest therein, and on dissolution, to his capital invested, therefore, he has an equity in having the partnership property applied to the discharge of the partnership obligations, and to prevent their being diverted from this central purpose and converted by the other members into their individual property, or applied to the discharge of their individual obligations.

This interest the partner may dispose of, and the equity referred to the partner may waive, and this equity of the creditor subsists so long as that of the partner, through whom it is derived, remains.

Fitzpatrick v. Flannagan, 106 U. S. 654, 27 L. ed. 213.

The partnership has the same *jus disponendi* of partnership property as an individual of individual property, so that, when the partners have united to sell the partnership property, or to divide it, or appropriate it to pay a single firm or a single individual creditor, upon what equitable or legal principle can an interference with their *jus disponendi* be based.

3 Kent, Com. p. 65; *Barkley v. Tapp*, 87 Ind. 25; *Story, Partn.* § 858; *Levis v. Harrison*, 81 Ind. 278; *Lindley, Partn.* pp. 674, 681; *Story, Partn.* § 97; *Purple v. Farrington*, 119 Ind. 164, 4 L. R. A. 535; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. p. 13; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46, 49 Am. Dec. 160; *Kennedy v. National Union Bank*, 23 Hun, 494; *Jones, Chat. Mortg.* § 44; *Re Kahley*, 2 Biss. 883; *Winslow v. Wallace*, 116 Ind. 317, 1 L. R. A. 179; *Fisher v. Syfers*, 109 Ind. 514; *Dunham v. Hanna*, 18 Ind. 270; *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370; *Goudy v. Werbe*, 117 Ind. 154, 3 L. R. A. 114; *Louden v. Ball*, 93 Ind. 232; *McFadden v. Fritz*, 90 Ind. 590; *McFadden v. Hopkins*, 81 Ind. 459; *Morris v. Stern*, 80 Ind. 227; *Schaeffer v. Pithian*, 17 Ind. 463; *Kistner v. Sindlinger*, 83 Ind. 114; *McCormick's Appeal*, 57 Pa. 54, 98 Am. Dec. 191; *Wilson v. Soper*, 13 B. Mon. 411, 56 Am. Dec. 573; 2 Lawson, Rights, Rem. & Pr. pp. 1237-1267; *Fitzpatrick v. Flannagan*, 106 U. S. 648-654, 27 L. ed. 211-213; *Hutiskamp v. Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971; *Rogers v. Batchelor*, 12 Pet. 221, 9 L. ed. 1063; *Nall v. McIntyre*, 31 Ala. 532; *Jackson v. Holloway*, 14 B. Mon. 133; *Sauntry v. Dunlap*, 12 Wis. 364; *Buck v. Mosley*, 24 Miss. 170, and cases cited; *Wait, Act. & Def.* p. 131; *Williams v. Barnett*, 10 Kan. 455.

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A partner may pay a firm debt out of individual property at the expense of individual creditors.

Gallagher's Appeal, 114 Pa. 353, 60 Am. Rep. 350; 2 Lawson, Rights, Rem. & Pr. p. 1268; *Hanover Nat. Bank v. Klein*, 64 Miss. 141, 60 Am. Rep. 47; *Saunders v. Reilly*, 105 N. Y. 12, 59 Am. Rep. 472; *Schmidlapp v. Currie* (Miss.) 30 Am. Rep. 580, with very learned and valuable note by the reporter; *Carver Gun & Mach. Co. v. Bannon*, 85 Tenn. 712; *Haggood v. Cornwell*, 48 Ill. 64, 95 Am. Dec. 516; *Arnold v. Hagerman*, 45 N. J. Eq. 186.

Where all the debtor's property was transferred to satisfy preferred creditors, there is no assignment, but the reverse.

Puget Sound Nat. Bank v. Levy, 10 Wash. 499; *Furth v. Snell*, 6 Wash. 542.

A creditor who accepts goods in the payment of a pre-existing debt is a purchaser for a valuable consideration within the meaning of the rule that a bona fide purchaser of personal property for value without notice, from a vendee who obtained it by means of fraudulent representation, takes a good title, as against the original vendor.

Butlers v. Haughwout, 42 Ill. 18, 89 Am. Dec. 401; *Hanold v. Kays*, 64 Mich. 439; *Gassen v. Hendrick*, 74 Cal. 444; *Robinson v. Levi*, 81 Ala. 134; *Le Grand v. Eufraila Nat. Bank*, 81 Ala. 123, 60 Am. Rep. 140; *Lawrence v. Owens*, 89 Mo. App. 318; *Babcock v. Jordan*, 24 Ind. 14; *Sovle v. Shotwell*, 52 Miss. 236, cited in note 2 Pom. Eq. Jur. § 749; *Horton v. Williams*, 21 Minn. 193; *Oberdorfer v. Meyer*, 88 Va. 384; *Woolridge v. Thiele*, 55 Ark. 45.

A new consideration, besides the discharge of the pre-existing indebtedness, which some authorities require, was exchanged between the parties at the time of the sale of these goods to respondents, and it was a present passing consideration.

Pratt v. Coman, 37 N. Y. 441; *Phonix Ins. Co. v. Church*, 81 N. Y. 222, 37 Am. Rep. 494; *Youngs v. Lee*, 12 N. Y. 555; *Foster v. Ambler*, 24 Fla. 519; *Henderson v. Gibbs*, 39 Kan. 679; *Philbrick v. Dallett*, 48 How. Pr. 425, 12 Abb. Pr. N. S. 425; *Purchase v. Matison*, 3 Bosw. 312.

If a contract is good in part and bad in part, the good part will be enforced if separable.

Jackson v. Shawl, 29 Cal. 267; *Beard v. Beard*, 65 Cal. 354; *Granger v. Original Empire Mill & Min. Co.* 59 Cal. 679.

There is nothing in our statute to prevent, nor was it ever intended to prevent, an insolvent debtor from transferring his property directly to his creditors, either absolutely in payment of his debts or as security by way of mortgage.

Turner v. Iowa Nat. Bank, 2 Wash. 192; *Ephraim v. Kelleher*, 4 Wash. 259, 18 L. R. A. 604; *Samuels v. Kittenger*, 6 Wash. 269; *Furth v. Snell*, 6 Wash. 542; *Benham v. Ham*, 5 Wash. 128; *Dana v. Stanford*, 10 Cal. 275.

A sale of a stock of goods at a fair price by a failing debtor cannot be impeached as fraudulent by creditors of the vendor.

Bedell v. Chase, 34 N. Y. 386; *Ruhl v. Phillips*, 48 N. Y. 125, 8 Am. Rep. 522; *Haste v.*

Connor, 53 Kan. 718; *Giddings v. Sears*, 115 Mass. 505; *Priest v. Brown*, 100 Cal. 626.

Anders, J., delivered the opinion of the court:

On January 2, 1895, a firm composed of Bernhard and Herman Loewenberg, engaged in mercantile business at Spokane, Washington, transferred to one James N. Glover, as trustee, all their firm and individual property, both real and personal. Contemporaneously with this conveyance, Mr. Glover executed and delivered what was termed a "declaration of trust," in which he recited that he held the property for certain banks and persons who were creditors of Loewenberg Bros. in amounts specified, and that he was to sell the property conveyed to him, and out of the proceeds thereof pay the claims, in a certain order therein indicated. Thereafter, and while the property was in the possession of the said Glover, plaintiffs herein, who were, respectively, creditors of Loewenberg Bros., commenced actions against the said firm to recover the respective amounts alleged to be due them. In each of these actions an attachment was sued out, and levied upon the property in the possession of said Glover; and subsequently this action was brought, in aid of the attachments, to set aside the transfer to the trustee, Glover, on the ground that the same was a fraud upon the plaintiffs and other creditors of the firm, for the reason, among others, that it was made to hinder, delay, and defraud the creditors of the said firm, and especially the plaintiffs. The defendants answered, alleging that the transfer of the property was not made or the property received by them to hinder or delay the plaintiffs, or any other creditor or creditors, but for the sole purpose of paying honest debts due them by Loewenberg Bros. and by B. & H. Loewenberg, and that the promissory notes evidencing their respective debts had been delivered to said Loewenberg Bros. and canceled; and praying that the proceeds of the property be distributed in accordance with the terms of the agreement and conveyance. Upon these issues the cause proceeded to trial, and judgment was rendered for the defendants, dismissing the complaint with costs. From this judgment this appeal is taken.

It appears from the evidence that the debts for which the property was transferred were of long standing, and that the notes representing some of them had been renewed from time to time with the consent of the payees. Some of the debts were in existence even while Julius Loewenberg was a member of the firm of Loewenberg Bros., which was prior to October 1, 1893. But the later firm of Loewenberg Bros. recognized these debts as its own, although at least two of the notes were not signed by the firm, but were, upon their face, the notes of the individual partners. Many interesting points are made and discussed in the learned and elaborate brief of counsel for appellants, but they are all practically included in, or illustrative of, the general proposition, urged, that appellants, being creditors of the firm of Loewenberg Bros. as it existed at the time

of the transfer complained of, are entitled to priority of payment out of the firm assets over the joint creditors of the individual partners, as well as the creditors of the preceding firm, and that the conveyance to respondent Glover is therefore, as to them, fraudulent and void. The equitable rule contended for on behalf of appellants only applies where the court is called upon to administer and distribute partnership assets, or where its jurisdiction to set aside a conveyance for fraud in fact has been successfully invoked by firm creditors. A partnership creditor, merely as such, has no right in or lien upon partnership property. He merely has the right to sue and reduce his claim to judgment, and to sell the partnership property on execution. *Lindley*, Partn. 2d Am. ed. pp. 334, 354; 2 *Bates*, Partn. §§ 820, 824; *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. ed. 211; *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971; *Schmidknepp v. Currie*, 55 Miss. 597, 30 Am. Rep. 530. But each partner has the right in equity—often denominated a "lien" by courts and text-writers—to have the firm property applied to the satisfaction of the firm debts, and so long as this equity subsists the courts allow the creditors of the firm to avail themselves of it, on the principle of subrogation, whenever the property is "within the control of the court, and in course of administration." *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370. But this equity or lien, or whatever else it may be called, is primarily for the benefit and protection of the individual partner, and not the creditors. The partner may therefore waive it, and, if he does so, the resulting equity of the creditor is absolutely destroyed. Moreover, this right attaches only to partnership effects, and hence "if, before the interposition of the court is asked, the property has ceased to belong to the partnership,—if by a bona fide transfer it has become the several property either of one partner or of a third person,—the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is therefore always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced." *Case v. Beauregard*, 99 U. S. 125, 25 L. ed. 371. The doctrine thus announced is affirmed in the other cases cited from the same court, and is undoubtedly correct on principle. The controlling question, therefore, in any particular case, is whether or not the transfer of the property is bona fide. The evidence shows, and it is not denied, that at the time of the transfer both the firm and the individual members thereof were insolvent, but that alone did not destroy the right to dispose of its property in good faith and for an honest purpose. If a firm that is in debt could not sell or otherwise dispose of its property, it might never be able to pay its debts at all, and it would be difficult, if not impossible, for it to conduct its business; for it could not give a good and clear title to any specific chattel it might sell, and the purchaser of any partnership commodity would be obliged to take it subject to the lien of creditors possibly unknown to him. It is use-

less to observe that no such doctrine has ever been announced by the courts. But the general right of disposition is limited by the principle that the firm shall not alienate its property for the purpose of delaying or defrauding its creditors. It is the established law of this state that an individual, although insolvent or in failing circumstances, may pay or secure one or more creditors to the exclusion of others equally meritorious, even if, by so doing, he exhausts the whole of his property. *Turner v. Iowa Nat. Bank*, 2 Wash. 192; *Ephraim v. Kelleher*, 4 Wash. 248, 18 L. R. A. 604; *Benham v. Ham*, 5 Wash. 128; *Furth v. Snell*, 6 Wash. 542; *Samuel v. Kittenger*, 6 Wash. 261. The manner of giving the preference is immaterial. It may be given by deed, or in any mode which effects a legal transfer of the property. *Bump, Fraud. Conv.* 3d ed. p. 186. And partners, in this respect, have the same rights that individuals have. "Partners, the same as others, may, by a sale or mortgage of the partnership property, give a preference to their creditors. If a sale or mortgage is made in good faith to secure a bona fide debt or debts, the transaction cannot successfully be assailed on the ground that the creditors preferred were the individual creditors of the several partners." *George, Partn.* p. 278. The right to prefer manifestly involves the right to designate the creditors or class of creditors to be preferred, and it therefore follows that the only ground on which the unpreferred creditors can justly complain is that the claims of the preferred creditors are not bona fide and real. The mere preference of a particular creditor or class of creditors over others by a debtor is therefore not fraudulent, because it is legal, and what the law sanctions cannot rightfully be questioned.

But it is urged on behalf of appellants that in no event could Loewenberg Bros. convey the firm property in payment of the notes which were signed by the individual partners, and which were not in the firm name. It does not appear whether the money evidenced by these notes was used for firm purposes or not, but there is very high authority to the effect that, where the partners are jointly liable, they may transfer property to pay such liability, even though it was incurred outside of the partnership business. *Bump, Fraud. Conv.* 3d ed. p. 390; *Smith v. Howard*, 20 How. Pr. 121; *Saunders v. Reilly*, 105 N. Y. 12, 59 Am. Rep. 472. In the case last cited the court, at page 18, 105 N. Y., says: "All the members of a firm may sell the partnership property, even if wholly insolvent, to a purchaser in good faith, and thus convey, free from the claim of firm creditors, a good title to the firm property. Instead of selling for cash they may transfer firm property to pay a firm debt. And they may transfer the firm property to pay a joint debt for which they are jointly liable outside of the business of the firm, and the joint creditor will obtain a good title to the firm property." See also *Hoare v. Oriental Bank Corp.* L. R. 2 App. Cas. 589. And the same conclusion would seem logically to follow from decisions of the Supreme Court of the United States in the cases to which we have above referred.

It is insisted that the note for \$31,000 held

by the London & San Francisco Bank, one of the preferred creditors, was fraudulent as to appellants, for the alleged reason that it was given without consideration, and was void, and that the conveyance to the trustee was therefore fraudulent as to the unpreferred creditors. Julius Loewenberg, a former member of the firm of Loewenberg Bros., sold his interest to the remaining partners on October 1, 1893; but it was agreed between him and his partners, who continued in business under the firm name of Loewenberg Bros., and retained all of the assets of the preceding firm, that he should not draw out anything for one year thereafter. After the year had expired, this note was given him for his one-third interest, and he indorsed and delivered it to the bank as collateral security for a debt which he owed to the bank. It is claimed that, inasmuch as the firm was insolvent at the time Julius Loewenberg sold his interest and retired, the note was without consideration and void, even in the hands of the bank. It must be borne in mind, however, that, at the time the debt represented by this note was contracted, appellants were not creditors of the firm of Loewenberg Bros., and it is therefore difficult to perceive how they were defrauded by the transaction. The existing creditors might have had reason to complain, but they did not do so, and are not doing so now. But, even conceding the note to be void and fraudulent, yet it does not necessarily follow that the transfer should be set aside as to the creditors whose claims are confessedly just and valid. If this particular note were invalid,—which we do not think is the fact,—the conveyance should nevertheless be sustained as to the other claimants, because the parts are clearly severable. The true rule, we think, is announced in 1 Smith, Lead. Cas. 9th ed. at p. 78, where it is stated that "it is a general rule that any conveyance which is fraudulent as to a part of the property transferred, or which is made upon a consideration partly fraudulent, is wholly void as to the grantor's creditors. But the validity of a conveyance as against creditors, where the parts are severable, cannot depend upon this test. If it is made for the payment or security of several debts, some valid and the others fraudulent, it will be avoided as to the latter, but sustained as to the former, in the absence of any fraud on the part of those beneficiaries." Nor does the conveyance in question amount to a general assignment with preferences, under the insolvent law of this state, as suggested by counsel for appellants. See *Furth v. Snell*, 6 Wash. 542; *Puget Sound Nat. Bank v. Levy*, 10 Wash. 499. A careful examination of all the evidence in the case convinces us that the respondents (that is, the preferred creditors) acted in perfect good faith, and solely from a desire to secure the payment of their debts; and therefore the transfer was not *mala fide* on their part, whatever may have been the secret motives or intention of Loewenberg Bros. The property the creditors received falls far short of paying the full amount of their claims, but they have surrendered their notes for cancellation, and therefore, in our opinion, entitled to retain what they have lawfully received. But, of course, they have no right to

keep property transferred to them by the Loewenbergs, which the latter did not themselves own, if any such was received by them; and therefore nothing we have said in this opinion will in any way affect whatever rights the plaintiff in the case of *Woonsocket Rubber Co. v. Loewenberg* (just decided) 17 Wash. 29, may have to the specific merchandise therein claimed by it.

The judgment is affirmed.

Scott, Ch. J., and Gordon, J., concur.

J. H. DENNIS, *Appt.*,

v.

I. E. MOSES, *Respnt.*

(.....Wash.....)

1. Sales on mortgage foreclosures are within the provisions of Laws 1897, p. 88, respecting appraisement before sale.
2. A mortgagee or lienor may have a sale for the amount of his debt, under Laws 1897, p. 70, § 10, even if that is less than 80 per cent of the property or portion of the property sold.
3. Not more than the amount of the debt of a mortgagee or lienor need be bid upon all the parcels of property when several are included in the security, under Laws 1897, p. 70, and he may segregate his debt and bid a part on each parcel sold.
4. The appraisement required before sale on foreclosure by Laws 1897, p. 70, cannot be waived in the mortgage itself, although it may be waived after default.
5. A statute limiting the right to enforce a debt secured by mortgage to the property mortgaged, whether realty or chattels, is an undue restraint upon the liberty of a citizen to contract with respect to his property rights.
6. A statute limiting the rights of a citizen to contract with reference to his property must tend to promote the public good in some way, or it is an unwarranted interference therewith.
7. Waiver of the right of a mortgagor to remain in possession of property during the period of redemption given by Laws 1897, p. 227, cannot be made in the instrument itself, although it may be made after default.
8. The right to contract for payment in gold coin of the United States cannot be taken away by a state statute which attempts to make any debt payable in any kind of lawful money.
9. The regulation of attorney's fees by Laws 1895, p. 81, limiting stipulations of the parties in that respect, is a valid measure of public policy.

(Dunbar and Reavis, JJ., dissent.)

(February 15, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in

favor of defendant in an action brought to foreclose a mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. John P. Hoyt and Hastings & Stedman, for appellant:

All the statute in question does is to give the mortgagor or judgment debtor the right to have his property appraised before it is sold, and to remain in possession thereof until the time for redemption has expired. There is nothing therein, either in express language or general scope, which in any respect prohibits the interested party from contracting away or waiving such right. On the contrary, it clearly appears from the act, taken as a whole, that the rights are conferred for the benefit of the individual, and may be waived by him.

The public is no more interested in the retention by the individual of his rights under this statute than they are in the retention of any other right or property which he may possess. Hence no consideration of public policy can influence the decision of the question under consideration.

Stockmeyer v. Tobin, 139 U. S. 176, 35 L. ed. 123; *New Orleans Mut. Ins. Co. v. Bagley*, 19 La. Ann. 89; *Desplate v. St. Martin*, 17 La. Ann. 91; *Stockwell v. Byrne*, 22 Ind. 6; *Wray v. Miller*, 20 Pa. 115; *Mitchell v. Freedley*, 10 Pa. 209; *Dean v. Morrison*, 10 Ind. 367; *Baker v. Roberts*, 14 Ind. 552; *Broadwell v. Rodrigues*, 18 La. Ann. 68; *Herman, Executions*, §§ 197, 257; 2 *Freeman, Executions*, 2d ed. § 284, and notes; *First Nat. Bank v. Bell Silver & Copper Min. Co.* 8 Mont. 32, 156 U. S. 470, 39 L. ed. 497.

When parties to a contract include in it a legal remedy by which it is to be enforced such remedy cannot be changed, and parties may by express contract stipulate that neither existing nor anticipated legislation shall in any wise affect or control their agreement.

Taylor v. Stearns, 18 Gratt. 284; *White v. Crawford*, 84 Pa. 436.

Under the legislation in Iowa it was held that the mortgagor was entitled to the possession during the redemption period, yet notwithstanding this holding the courts of that state did not hesitate to enforce provisions in mortgages which deprived mortgagors of this possession.

See *Barrett v. Blackmar*, 47 Iowa, 565; *Myton v. Davenport*, 51 Iowa, 588; *Hill v. Hewett*, 35 Iowa, 562; *White v. Griggs*, 54 Iowa, 650.

But even if the statute must be construed to prohibit the waiver of these rights it is without force to affect them, for the reason that thus construed it is unconstitutional and void.

The right to contract as to property rights is as much property as the right itself. It is also a part of the liberty of the individual. Both are protected by the Constitution of the United States and this state.

Shaver v. Pennsylvania Co. 71 Fed. Rep. 931; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325; *State v. Goodwill*, 83 W. Va. 179, 6 L. R. A. 621; *Millett v. People*, 117 Ill.

NOTE.—For a general view of the constitutionality of statutes restricting the right of contract, see note to *State v. Loomis* (Mo.) 21 L. R. A. 789.

As to contracts for payment in gold or silver, see 40 L. R. A.

note to *Skinner v. Santa Rosa* (Cal.) 29 L. R. A. 512; also *Packwood v. Kittitas* (Wash.) 33 L. R. A. 673; *Burnett v. Maloney* (Tenn.) 34 L. R. A. 541; and *Murphy v. San Luis Obispo* (Cal.) 39 L. R. A. 444.

294, 57 Am. Rep. 869; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Re Jacobs*, 98 N. Y. 106, 50 Am. Rep. 636; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482; *Palmer v. Tingle*, 55 Ohio St. 423; *John Spry Lumber Co. v. Sault Ste. Bank Loan & T. Co.* 77 Mich. 199, 6 L. R. A. 261; *Taylor v. Murphy*, 148 Pa. 387; *Re Eight Hours Bill*, 21 Colo. 29; *Re House Bill No. 203*, 21 Colo. 27; *Schroeder v. Galland*, 134 Pa. 277, 7 L. R. A. 711.

Rents and profits of real estate may be mortgaged and the mortgage foreclosed and the property sold.

Chase v. Ball, 79 Ind. 311.

If rents and profits may be mortgaged surely the possession of the property from which the rents and profits are derived may be waived in a mortgage covering the property.

Storm v. Ermantrout, 89 Ind. 214; *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510; *Hurah v. Hurah*, 99 Ind. 500; *Treat v. Dorman*, 100 Cal. 623; *Montgomery v. Merrill*, 65 Cal. 432; *O'Hara v. Mobile & O. R. Co.* 75 Fed. Rep. 180.

The act of March 11, 1897, Laws 1897, p. 98, is clearly unconstitutional. It interferes with the right to contract. It also deprives the court of the power to enforce a contract fairly made. It prohibits the taking of security for a debt without waiving the right to collect the debt in full though the debtor is abundantly able to pay.

Ramsey v. People, 142 Ill. 380, 17 L. R. A. 853; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340; *People v. Gillson*, 109 N. Y. 389; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 84; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492.

Upon like grounds it must be held that the act of March 11, 1897, Laws 1897, p. 91, is unconstitutional. It is also in contravention of § 10 of art. 1 of the Constitution of the United States, and for that reason void and without effect.

Woodruff v. Mississippi, 162 U. S. 291, 40 L. ed. 973, 48 Cent. L. J. 155, 237, 238; *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460; *Bronson v. Rodes*, 7 Wall. 229, 19 L. ed. 141; *Gregory v. Morris*, 96 U. S. 624, 24 L. ed. 741; *Frank v. Colhoun*, 59 Pa. 386; *Dutton v. Pailaret*, 52 Pa. 109, 91 Am. Dec. 135; *Independent Ins. Co. v. Thomas*, 104 Mass. 192; *Chrysler v. Renois*, 48 N. Y. 209; *Hittson v. Davenport*, 4 Colo. 169; *Myers v. Kaufman*, 37 Ga. 600, 95 Am. Dec. 367; *Chesapeake Bank v. Swain*, 29 Md. 506.

Messrs. John E. Humphries, W. E. Humphrey, and E. P. Edsen, for respondent:

This act is for the benefit of the debtor, and cannot be waived. The contract in mortgage to waive appraisement is void.

Levicks v. Walker, 15 La. Ann. 245, 77 Am. Dec. 187; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415; 20 Am. & Eng. Enc. Law, p. 109; 28 Am. & Eng. Enc. Law, p. 575; *Hardin v. Wolf*, 29 La. Ann. 333; 15 Am. & Eng. Enc. Law, p. 827, note 2; *Cullen v. Minnesota Loan & T. Co.* 60 Minn. 6; 1 Freem. Executions, 40 L. R. A.

2d ed. § 216; *Kneettle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186, 190, note.

Even a trust deed giving right to possession on default without foreclosure will not authorize grantee to take rents and profits without foreclosure.

Teal v. Walker, 111 U. S. 242, 28 L. ed. 415.

The rents and profits of real estate in this state cannot be mortgaged so as to give the mortgagee right to possession of same until after foreclosure of mortgage, and the expiration of year of sale or redemption.

Cullen v. Minnesota Loan & T. Co. 60 Minn.

6. The contract of waiver is void as against public policy.

State v. Considine, 16 Wash. 853; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93; *Swinburne v. Mills*, 17 Wash. 611.

Scott, Ch. J., delivered the opinion of the court:

This action was brought to foreclose a real-estate mortgage given to secure a note for \$1,500, bearing interest at the rate of 6 per cent per annum. The mortgage contained stipulations on the part of the mortgagor waiving all benefits under the provisions of §§ 3 to 10 inclusive, of the act relating to sales of property under execution (Laws 1897, p. 70), and provided that in case of foreclosure the land might be sold forthwith, as lands are sold on execution, to the highest bidder, without appraisement, and without waiting one year, as provided by statute; also waiving the provisions of the deficiency judgment act (Laws 1897, p. 98), and providing that in case of non-payment of the note there might be a decree of foreclosure against the mortgaged land, and a personal judgment upon the note, and, in case the land was not sufficient to satisfy it, that an execution might issue and be levied on other property of the mortgagor. It was further stipulated in the note and mortgage that the debt should be payable only in gold coin of the United States of the present standard value, and that the decree and judgment thereon should so provide, in contravention of the act relating to payment of obligations (Laws 1897, p. 91); also, that the purchaser at the foreclosure sale, or his successor in interest, should have possession of the mortgaged land during the time allowed for redemption, but should apply the rents and profits upon the debt in case it was redeemed, the mortgagor waiving all right to the possession as provided by the act granting judgment debtors right of possession during the period of redemption (Laws 1897, p. 227). The mortgage also provided, in case of suit, that an attorney's fee of 20 per cent upon the amount due should be included in the judgment, and in case of a settlement of the suit before judgment an attorney's fee of \$300 should be payable, which calls in question the provisions of the act regulating attorney's fees (Laws 1895, p. 81). The mortgage recited that the loan was obtained at a lower rate of interest than would have been fixed were it not for the stipulations and the waivers above stated. The lower court found that they were all agreed to, but held that they were all invalid, and that there must be an appraisement, that

the land could not be sold for less than 80 per cent of the appraised value, that the remedy must be confined to the property mortgaged, that it could not be sold before the expiration of one year provided by statute, that the mortgagor should have possession meanwhile, that the debt could be satisfied in any kind of lawful money, and allowed an attorney's fee of 10 per cent, instead of the one stipulated; whereupon the plaintiff appealed.

That some of the questions raised are of paramount importance is apparent. The general situation heretofore and now prevailing is well known, and it is permissible to consider it for the purpose of arriving at the intention of the legislature in enacting some of the laws in question. Incident to the development of a new state, it had been necessary for people to hire money, and this was done largely upon real-estate security, such debts being in the main unsatisfied when said laws were passed, and the mortgages given to secure the same could not be affected thereby. If these laws are valid, and must receive the construction contended for in some of the briefs, it is apparent that a large number of citizens will be prevented from negotiating loans, and from obtaining a generally prevailing lower rate of interest than that previously existing, with which to satisfy present debts, or, perhaps, to obtain binding stipulated extensions of time upon such debts, or for the purpose of contracting new loans for building houses or constructing improvements. Homes might be lost thereby, and the development of the state seriously retarded. They were helpless, so far as existing mortgages are concerned, for such laws could not affect them injuriously, under both the state and national Constitutions. There is no way of compelling new loans or extensions of either foreign or local capital. Realizing the great public interest centered in the decision of these questions, and desiring to be as fully enlightened as might be, the court followed a practice, sometimes adopted, of inviting other competent attorneys to express their views to the court on said matters; they not being interested in the case. These gentlemen have courteously and ably responded, and while in important particulars they have disagreed, and while it will not be necessary to consider the argument presented upon some lines, it has been much to the court's assistance. The most important questions are those arising under the act relating to sales of property under execution, especially the matter of the appraisement, and the deficiency judgment act, as these are the most serious obstacles in the way of obtaining loans and renewals.

Arguments have been presented in several of the briefs to the end that the provisions of the act relating to sales of property under execution, as to the appraisement of land, do not apply in the case of mortgage foreclosures. In the case of *Swinburne v. Mills*, 17 Wash. 611, without entering upon an extended discussion of that point, the court expressed the opinion that, owing to the use of the word "decree," etc., in the title of the act, and the direct reference to mortgages in § 10, mortgages were included in the act, and that there must be an appraisement as to subsequent mortgages.

40 L. R. A.

There are other expressions of like import, such as sales "upon execution or by order of the court," in § 2, and "upon the return of any sale of real estate or execution," in § 14. Also, the evident intent of the act as a whole to deal with all sales of real estate at the suit of the private or individual creditors strengthens that conclusion, and we follow it here. In the discussion of the *Swinburne Case*, the court, after holding that the provisions of the act relating to an appraisement applied to mortgage decrees as well as to ordinary judgments, held that it was an impairment of the obligations of existing contracts, and could not affect prior mortgages, following a long, unbroken line of state and Federal decisions, it being a prior mortgage there in controversy. No attempt was made to interpret or construe the act further in that case, as it was not necessary to do so. But the substance of the entire act is largely involved in this case, for a construction of the particular parts questioned renders necessary a consideration of nearly all of it to some extent, in order to harmonize and give effect to the whole. It is a wholesome, well-established rule that an act should be interpreted or construed to give effect to each of its express provisions, if practicable. In case of conflict, those susceptible of but one meaning will control those susceptible of two, if the act can thereby be rendered harmonious. The general purpose or spirit of the act must always be held in view, and absurd or oppressive consequences avoided, as far as possible. *State, Chamberlin, v. Daniel*, 17 Wash. 111; *People v. Jaehne*, 103 N. Y. 182. Observing these rules we enter upon the further consideration of this act.

First, going back to the necessity of an appraisement, we desire to call attention to § 16 of the act, which seems to have been unnoticed from the briefs. This section clearly recognizes that there are cases where no appraisement is required. To what sales does it apply? Section 8 speaks of an estimated value to be furnished by the judgment creditor; § 4 provides that if the debtor is not satisfied therewith, he may except, and give his estimate, etc.; and § 5, provides that the creditor may demand an appraisement, if he is not satisfied with the debtor's estimate. But, evidently, § 16 did not intend to except those cases where no other appraisement than the first estimate, or estimates, was demanded, because if the debtor should except to the creditor's estimate, and thus bring about the further appraisement provided for at the instance of the creditor, and § 16 means the appraisement provided for in § 5, the debtor will be punished for excepting to the creditor's estimate by cutting off one year of his period of redemption; for, if this is the appraisement that is meant, and none is had, the deed would not issue until one year after confirmation, and, if an appraisement is had, the deed issues immediately after the confirmation. There would be no reason for providing two different periods of redemption to fit these cases, and a cogent one against it. If § 630, vol. 2, of the Code was not repealed, so an immediate sale of mortgaged lands could be had, and it should be held that no appraisement was necessary, the same difficulty and inconsistency would re-

main as to ordinary judgments not constituting a lien until a levy is had, and if mortgaged lands must be appraised, and an immediate sale can be had, under § 630, the confirmation following right along, the period of redemption would be less than one year. The legislature evidently meant to provide a uniform period of redemption in these cases, whether the land was sold under an ordinary judgment or a mortgage or lien decree of foreclosure. There is no reason why an ordinary judgment creditor should have such a preference over a mortgagee or mechanic seeking to enforce his lien. While the words "estimated value" are used in § 3, and "estimate," "valuation," and "appraisement" in § 4, and "appraisement" and "valuation" in § 5, they must mean the same thing, because no such absurd result with reference to the period of redemption could have been intended if the appraisement, as mentioned in § 16, only applies to the further appraisement provided for in § 5, and no appraisement in § 16 has a reference to the estimates in §§ 3 and 4. These estimates are appraisements,—the appraisements of the parties; and it may stop after either the first or the second estimate, if the other party is satisfied. The appraisement mentioned in § 5 is the final appraisement, unless further proceedings are had under § 8, where the matter seems to be finally and substantially left with the court, under the power to compel a fair appraisement, etc. Section 16, in this respect, evidently has reference to the next section (17), where it provides for certain sales without valuation. Valuation must mean appraisement, or it means nothing; and if §§ 16 and 17 would control in this respect, in case of a sale by a city of land to enforce a street assessment proceeding, the same uniform period of redemption of one year would be provided. Whether these would, or how far they would, control or repeal prior laws fixing different periods of redemption, as, for instance, § 41, p. 204, Laws 1893, is another question, not to be decided here. The intention is one thing; the result another. The intention may or may not be accomplished.

The first provision of § 10 of the act is, no property shall be sold for a sum less than 80 per cent of the appraised value thereof, except that, when property is not capable of partition or division, then the same may be sold for the amount of the judgment debt or demand. The second is, when the property is capable of partition, then so much thereof as may be sufficient only shall be sold to satisfy the judgment. The third is, in case of foreclosure of mortgages or other liens, nothing shall prevent the sale of the entire premises included within the mortgage or lien. The first clause provides for a sale for less than 80 per cent of the appraised value; that is, if the debt should not amount to that much, and the property is not capable of partition or division. The second provides that it must be partitioned if it is capable of being divided, and only enough sold to satisfy the judgment. The third makes an additional provision as to mortgages and other liens. It provides that nothing shall prevent the sale of the entire premises included within the mortgage or lien. The other liens referred to are evidently other special liens,

such as mechanics,' materialmen s, and laborers,' the proceedings to enforce which are largely assimilated to mortgage foreclosures. The provisions of § 10, considered separately, are explicit, and are susceptible of but one meaning, according to the expressed intent. It would seem that the first clause might stand without much qualification, considered with relation to the second clause. The last clause, if it means anything, according to its specific provisions extends a greater benefit to mortgagees and other special lienors. If there are several parcels, or even one piece, susceptible of division, included in the mortgage or covered by a mechanic's, laborer's, or other such special lien, the whole may be sold for the amount of the debt, but not, necessarily, for a lump sum. The last part of § 2 provides, in case of the sale of real property consisting of several known lots or parcels, they shall be sold separately when demanded by the judgment debtor or subsequent encumbrancer. A subsequent purchaser of a part would doubtless have the same right. This is a well-established rule everywhere, under both the common law and general statutes, and it cannot be supposed for a moment that there was any intention to provide otherwise in this act. The first provision of § 10, allowing sales for the amount of the debt, must be accorded the right or power expressed, or it is meaningless. To set this aside, if not necessarily in direct conflict with some other express provision, would be judicial legislation, and not construction. If hardships result thereunder, it is a matter for the legislature to remedy; but we fail to see where its practical effects are likely to be injurious. Under the first clause, an appraisement is necessary. Construed with reference to the second, in case of an ordinary judgment, if a levy has been made upon several distinct parcels, or if it is capable of partition or division, it must be divided, and each part appraised; but when that is done, then, under the first provision, in the case of an ordinary judgment levy, doubtless, the tract having the smaller value, not being capable of further partition or division, may be sold for the amount of the debt, although the debt may not equal 80 per cent of the appraised value. This construction gives effect to each clause of the act, and a direct and salutary effect to the matter of the appraisement. Under that, the sale must be the full amount of the debt if the debt is less than 80 per cent of the amount of the appraisement. Thus the spirit of the act is beneficial, and tends to prevent the sacrifice of property. It compels the judgment creditor to bid up to the full amount of his debt, if it is less than 80 per cent of the appraised value, but it says to an ordinary judgment creditor, perhaps a common laborer, who could not avail himself of the laws giving liens in some cases, but who has obtained a judgment on his demand, where the debtor has but one piece of property, not capable of being divided and largely in excess of his demand, that he may sell it for the amount of his debt. Of course, he is not required to bid more than 80 per cent of the final appraised value, if that is less than his debt. If there is no final appraisement, he must bid the full amount of the preliminary appraisement under the act, if his debt

amounts to that much. There is no hardship in this to the debtor class, surely, for a man having a tract of large value, under such circumstances, could raise an amount sufficient to discharge a small obligation, or an amount sufficient to redeem his property within the time provided in case it is sold. In sales under decrees of foreclosure of mortgages, or mechanics' and such special liens, where the lien is given upon all the land included therein, by the contract or by the law, it may all remain as security for the debt until it is satisfied. Where several parcels are included in the mortgage, or, in case of a mechanic's lien covering two buildings built under one contract, while a separate sale of each may be had, the mortgagee or lienor is not required to bid more than the amount of his debt upon all; that is, he may segregate his debt, and bid a part on each parcel. He is not compelled to bid more than 80 per cent of the final appraised value in any event upon any or all of it. He may buy for less, if his debt is less than 80 per cent. The same rule would apply as to the preliminary estimates as in the case of an ordinary judgment; making the amount the limit if the debt amounts to that much. But it would apply as to all of the property here. Otherwise, no meaning could be given to the last clause of § 10, as there may be a separate sale of parts, as we have seen. But under this provision they are all subject to the lien, and for the amount bid.

In the case of *State, Purves, v. Moyer*, 17 Wash. 643, decided a few days after the *Swinburne Case*, it was held that the provisions of the act requiring the levy of an execution did not apply in case of mortgage liens, on the principle that the law does not require the performance of an idle thing, and, the decree being a lien upon specific property, there was no necessity for a levy. In view of this holding, it has been argued in some of the briefs that the provisions of the acts relating to the postponement of sale do not apply, and that a sale of mortgaged lands may be had forthwith, under § 630, vol. 2, of the Code. It was said in that case that the sale must be postponed, and we think correctly. While § 19 of the act expressly repeals §§ 511 to 521, vol. 2, of the Code, relating to redemption, and does not by express declaration repeal other laws in conflict with the act, and although repeals by implication are not favored, it nevertheless follows that conflicting prior laws must yield to later ones, and there would be a conflict here as to the time for redemption if an immediate sale could be had, an appraisal being necessary. Furthermore, it is objectionable to have a sale a year or so before title can be passed. This has been demonstrated under prior laws, and these are to be considered in construing remedial statutes. Consequently, in case of mortgages and other specific liens, no levy being required, the special execution or order of sale should not issue until the expiration of one year from the time of the rendition of the decree, or, if issued, the sale should not be had until a year has expired, the same as in case of an execution upon an ordinary judgment to carry out the spirit and provisions of the act. The stipulations in this mortgage relating to immediate possession and right to rents and

profits will be considered later. We have examined all the authorities cited, and do not think the appraisal can be waived in the instrument itself. After default, when the situation becomes fixed, the act permits the debtor to waive a further appraisal upon notice given of the estimation of value by the judgment creditor. This would militate against construing the act to permit a waiver otherwise, or until default. The form would not be material. The discussion of the rents and profits provision will have a bearing upon this question also, as a measure of public policy to prevent the sacrifice of property.

The act, when considered with reference to itself, let alone other laws, is incongruous and difficult to understand. This is strikingly apparent from the briefs of those who have attempted to construe it. In making this criticism we do not desire to be understood as doing so in any captious spirit; for we appreciate the difficulties surrounding the legislature when enacting laws, the more or less hurried consideration thereof rendered necessary, the want of individual training or education on such lines by a large number of the members, preconceived notions and tendencies of some, and the practical impossibility of carefully considering particular acts with reference to perhaps numerous other existing laws bearing on the same matters. A friendly sympathy should exist between the different branches of the government, working for the common good. The general intention to do right should be accorded to all. Each fills a separate and useful field, but it is not saying too much to say that the greater safety of the people usually rests with the courts. All courts worthy of the name act deliberately, upon well-established lines, not swayed by popular impulse, and usually upon better information than legislatures have, and with better assistance, for courts are called upon to interpret and construe laws after they have been tested in the light of practical experience. They do not hesitate to correct their own mistakes, and they have a continuing, and not a stated, periodical opportunity to do so. It happens occasionally with reference to legislative acts, and it is particularly true of this act, that the provisions are complicated and hard to reconcile. If it were not for the clause authorizing a sale for the amount of the debt, it might be a question, at least, whether the act could stand, where it might prevent a recovery at all by requiring the outlay or payment of a larger sum by the creditor in addition to his debt, in order to have a sale or enforce collection. In the cases examined it is sufficient to say that we have found none where such a burden has been imposed. Somewhat similar statutes have been enacted in several states, but they vary from this one in essential particulars, and the decisions thereon have not been of much aid to us in construing it. If any of such other acts have provisions authorizing a sale for the amount of the debt, such provisions have not been called to our attention. We have not seen any, but we have not examined particularly, as it is immaterial, for the act before us provides for it in unmistakable terms, and this is the act we have to construe. In considering it, we have called attention to some matters we have not at-

tempted to decide, but for the purpose of showing that there may be some effect given to each provision, and that they have not been overlooked. The discussion of many points, and our construction thereof, regarding the act, and § 10 particularly, are rendered necessary under the mortgage here in controversy. The conclusion we have reached, while it differs materially from that contended for or suggested in the briefs attempting to deal with it somewhat in detail, seems to be the only one that will give a legitimate effect to each provision.

We will next consider the act entitled "An Act Relating to Deficiency Judgments" (Laws 1897, p. 98). Section 1 is as follows: "That in all proceedings for the foreclosure of mortgages hereafter executed, or on judgments rendered upon the debt thereby secured, the mortgagee or assignee shall be limited to the property included in the mortgage." Section 2 repeals all acts or parts of acts in conflict with it. The discussions in some of the briefs view the act as prescribing a method of procedure. Looking only to the title of the act, and the older and later practice relating to the foreclosure of mortgages, this would in a measure be justified. If it could be held to apply to a matter of practice only, and to prohibit deficiency judgments in actions to foreclose mortgages, and the right remains intact to enforce collection of the deficiency in a subsequent suit, or to waive the security in the first instance, and bring an ordinary action, where there is a covenant to pay in the mortgage, or a separate instrument contracting to pay, then this question comes up, What measure of public policy can it serve to prohibit a waiver? All agree that, if it is a matter of public policy, it cannot be waived by the parties; if a matter of private concern, it may be. It would be hard to conceive of any public interest that would be promoted in requiring a debtor to be subjected to the costs of two actions. The cases mentioned in 2 Jones, Mortg. § 1711, as to some states, would not apply here, as such distinctions between the practice in equity and at law have been abolished for a long period, and it can hardly be supposed it was intended to take such a decisive step backward, and deprive the court of such power, and compel a resort to the old common-law procedure in this particular. It would be entirely foreign to the whole history and spirit of our jurisprudence. Consequently, if the power to enforce collection of a deficiency exists, the act, as a method of procedure, must be intended to confer a private benefit only, and its provisions can be waived. As limiting the method of procedure, it is clearly worse than useless.

But the act goes further than this, and is manifestly intended for something else, and is so regarded in some of the briefs. Its language is plain, and not susceptible of the construction that it was intended to prescribe as a matter of practice only. The body of the act distinctly limits the right to enforce judgments on a debt for which mortgage security has been given to the property mortgaged, and covers chattel as well as real-estate mortgages. While it might be void in this respect, on the ground that the substance is not embraced

within the title, graver constitutional questions arise. It affects more particularly local capital and business, in relation to which chattel-mortgage security is often taken, as also small urban loans upon real estate; for it is a well-known fact that the greater amount of capital invested in loans in the state belonging to parties residing without the state is invested in loans upon agricultural lands, although loans have been made to some extent upon town property, particularly large loans. It deprives a man to a great extent of the benefit of his general credit, especially if he has but a small amount of property. For instance, if he wanted to hire \$500 to build a house, or buy tools to pursue a trade, he might find a man who was willing to loan it to him by taking mortgage security upon such property as he had with a further reliance upon his individual credit and ability to pay. He might be capable of earning good wages, or have considerable property in expectancy or prospectively. The party having the money might not be willing to loan to him otherwise, but this law says to him that, if he takes mortgage security at all, his remedy is confined to that and that only, regardless of the amount of property the debtor may thereafter acquire; and the result will generally be that the loan cannot be obtained. As applied to farm lands, there would not be so great an objection to such a law, for sufficient security can be taken in the first instance. The value is stable, and not generally liable to destruction or serious impairment. But in the case of improved town property it would be different. It is no answer to say that its value could be protected by insurance policies, for it might be damaged in ways a policy would not cover. Even agricultural lands might be damaged by floods seriously in some localities, and damage in various ways might happen without fault of either of the parties. Furthermore, the title might prove defective, and the debtor have no interest in the property, or, in case of a chattel mortgage upon livestock, the stock might die, and thus the remedy be lost entirely; or, if it should be held in such cases that, the security having been lost, the debt should be regarded as one upon which no security had been taken, then, suppose, in case of the real-estate loan, a small, but inadequate, interest remained in the debtor after the real estate of the title was determined, or, in the case of a mortgage upon several horses, all but one should die, here there would be some security left, but mayhap insufficient to satisfy more than a small part of the demand. Under this law, the remedy would cease when such property was exhausted. Here, also, a class seems to be singled out arbitrarily with no apparent reason other than a matter of opinion, as the law only applies to mortgage loans, and not to other special liens, such as mechanics' liens, or upon debts secured by a deposit of collaterals. A deposit of warehouse receipts would create a lien upon the grain, but the creditor would not be limited thereto in case it proved to be inadequate security; while in case of a chattel mortgage, taken on like property for a similar purpose, another creditor would be. In the case of a lien of a materialman furnishing lumber for the erection of a build-

ing, there would be no such limit; but the groceryman who furnished the necessities of life and took mortgage security would be so limited. Under this law, a man who holds a promissory note for which mortgage security had been originally taken, but where such security has become lost or impaired, is not given the same rights that another citizen is who simply took a promissory note without any security. A law with some general terms may be so hedged in with conditions and specifications as to limit its application to a few citizens, and make it class legislation. Furthermore, that the right to contract with reference to one's property is a property right is well settled, and any abridgment of the enjoyment of the benefits flowing from a contract not against public policy is void.

In considering the sweeping consequences of this act, it would seem to be a propitious time for a recurrence to fundamental principles. Const. art. 1, § 32. Civil liberty is defined by Blackstone to be "no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public." Book 1, p. 125. Judge Cooley, in speaking of constitutional declarations, mentions "those declaratory of the fundamental rights of the citizen, as that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness; that the right to property is before and higher than any constitutional sanction" (Cooley, Const. Lim. 5th ed. p. 45); and that, "in considering state Constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. . . . There never was a written republican Constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition" (Id. p. 47). As if to emphasize this principle, our Constitution (§ 30, art. 1) declares that "the enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people." At page 198 of his work, Judge Cooley says: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." And at page 200, quoting approvingly from a Connecticut case (*Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121), says: "With those judges who assert the omnipotence of the legislature in all cases where the Constitution has not interposed an explicit restraint, I cannot agree." But at page 205 says: "Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation, under the notion of

having discovered something in the spirit of the Constitution which is not even mentioned in the instrument." And at page 206, speaking of the national and state Constitutions, says: "A legislative act cannot, therefore, be declared void, unless its conflict with one of these two instruments can be pointed out." But, while this is to be observed, it is apparent that all declarations, guaranties of right, and limitations cannot be specific, and, unless general ones can be applied to such cases by necessary implication, they would be valueless; or, as said at page 482, quoting approvingly from the *Dartmouth College Case* [4 Wheat. 518, 4 L. ed. 629], there cited: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." At page 483, it is said: "But a statute would not be constitutional which should prescribe a class or a party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt." At pages 486, 487, it is said: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived. Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and, if special privileges are granted, or special burdens or restrictions imposed, in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government. The state, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of

rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so." As to class legislation, see also *Tucoma v. Krech*, 15 Wash. 296, 34 L. R. A. 68, where the principle was held to apply.

To undertake anything like a review of the numerous decisions on these constitutional questions would extend this opinion beyond all due bounds. Many of them are cited in the briefs, and these can be resorted to by those desiring to do so. The rules above quoted are sufficient to indicate the general grounds, and to establish that an act limiting the rights of a citizen to contract with reference to his property must tend to promote the public good in some way or it is an unwarrantable interference therewith. Such laws must be founded on a legitimate reason. Where the reason fails the right ceases. Can such a basis be found here? The act cannot operate as an exemption law. Such laws are sustained on the principle that the state is interested in the retention by each citizen of enough property to enable him to be self-supporting, that he may be enabled to pursue his trade or calling, and in order that he may not become a public charge. These matters are left to the legislature, and to say how little or how much may be exempted. Such laws are liberally construed. It clearly cannot serve any such purpose, for a mortgagor may have a large amount of other property above his exemptions aside from that mortgaged. Why should a mortgagee who has exhausted the mortgaged property not be paid therefrom? It has been heretofore a well-settled policy of the law that a man's property in excess of his exemptions should be subjected to the payment of his debts. It could not be supported as an additional exemption, for it would operate unequally. One man might have a small amount of such property; another, a very large amount. It is no answer to say that the parties have contracted for certain security, for that may be lost or impaired without the mortgagee's fault. The mortgagor has also contracted to pay the debt in addition to giving the security. It does not serve the purpose of an insolvency law in any way, whereby a man is enabled to turn over all of his property above his exemptions to all of his creditors, and start again, freed from former liabilities: for here he is not absolved from the payment of his unsecured debts. If the property he then owns is not sufficient to pay them, payment may be enforced against his future acquired property. On the other hand, he may have property largely in excess of enough to pay all of his debts, whether originally secured or not. It is not a marshaling of assets, or like settlement of estates, as in the case of partnership and individual debts; for the originally secured creditor would have no recourse to the property left after unsecured debts are paid. It cannot be sustained on the ground that an undue advantage may be taken of an unwary or needy debtor, where the law sometimes relieves him on the ground of public policy from his own stipulations, often carelessly entered into, and where he might be overreached otherwise, as in the case of a stipulation in an insurance policy that the agent shall be deemed to be the agent of the

insured, for an instance. He has received the amount of the loan, if it is a case of hiring, and he has agreed to return it. If the mortgage is given to secure payment for the necessities of life or tools of trade which he has purchased, he has agreed to pay for them, and it is a direct primary part of his contract. It does not tend to prevent the sacrifice of real estate, for the sale must be for the amount of the debt, or for 80 per cent of the appraised value if it is less. No one would contend that it in any way involves the police power of the state. It rests on none of these grounds. We know of no similar law anywhere, and may safely say that none like it has ever been sustained in any state of the Union. The results of a turbulent, restless, temporary impulse on the part of the people or majorities in any state or community may sometimes be reflected in contemporaneous legislation, which disregards the rights of individual citizens or classes. In such cases, the people need protection from their own hasty acts. State Constitutions are designed to serve as a check thereon. If they do not do this, they are but a delusion and a snare. When constitutional rights are in issue, a great responsibility rests upon the courts. If they are unconstitutional, it is a duty to hold them so,—one not to be avoided. It is not a matter of choice to act or not, but a duty is imposed which must be discharged. It would seem that, if any law could be an unwarranted interference with a citizen's right to contract, this is one. If this law could be sustained, a law absolutely prohibiting all mortgages, debts, or even the sale of property could as well be. We believe the opinion that such laws would be constitutional is not generally prevalent. In support of the proposition, favored by a few, that legislatures are practically omnipotent, and can interfere with the rights of the citizen under the Constitution, imaginary cases are sometimes presented, such as if the legislature should pass bills repealing all laws providing remedies and substitute no others. Although the courts could not supply them as to future contracts, if they could hold former ones in force as to prior contracts, and, while the Constitution would afford but little protection in such cases, it is true, there is yet something inherent in the social organization itself which prevents them, resting in the settled good sense of the people. That any such thing, so destructive of society, would be done, is not to be thought of. Supposed cases, practically impossible because of their palpable outrageousness, can always be pursued to absurd ends in any direction. Our conclusion is that this law is void as being an undue restraint upon the liberty of the citizen, affecting his property rights.

We will next consider the act granting judgment debtors the right to the possession of property during the period of redemption (*Laws 1897, p. 227*), together with the following clauses contained near the end of the mortgage here in controversy: "That the purchaser at the mortgage foreclosure sale, or his successors in interest, shall have full and complete possession of the mortgaged property during the time allowed for redemption, and that the party of the first part and his successors in interest shall and do hereby waive all

right or claim, allowed by statute, to possession during the period of redemption, whether such period elapse before or after sale, but that whenever the property is redeemed the rents and profits shall be accounted for to the judgment debtor, and credited as payment in part or in whole of the judgment; that from the time of the levy upon the real estate mentioned in the mortgage, and the decree rendered in the foreclosure proceedings thereon, the judgment creditor, being the party of the second part or his successors in interest, shall have full and complete possession of the mortgaged premises, and be entitled to all rents and profits of the same, but that in case of redemption such rents and profits shall be credited upon the judgment." It is contended that these provisions constitute a mortgage on the rents and profits which is binding. A mortgage may undoubtedly be given on rents and profits (1 Jones, Mortg. 5th ed. § 140; *Chase v. Ball*, 79 Ind. 811), and, if a substantial part of the agreement, necessary for the security of the mortgagor, should be enforced. A mortgage in the form of a deed, with a separate defeasance, the deed giving immediate possession and the right to the rents and profits, can doubtless be given; and it could be made to take effect upon a default and foreclosure. But it does not follow that such latter stipulations must be enforced in all cases. Courts of equity have always exercised a control over sales of property, even to the extent of disregarding the stipulations of the parties. Rents and profits might be applied towards the satisfaction of a mortgage debt in the absence of such a stipulation, as is sometimes done where a receiver is appointed before or after default. Nor do we say that it would be necessary that a receiver should be appointed therefor in all cases. These are matters over which the court has control, and may or may not enforce, as the justice of the particular case seems to demand. The stipulations therefor may be in the nature of forfeitures, which are not favored. On a similar principle, stipulations regarding the time of payment, where it is not of the essence of the contract, and as to damages, will not always be enforced. 1 Pom. Eq. Jur. 2d ed. §§ 455, 456; 1 Sutherland, Damages, 2d ed. §§ 283, 284. This is a familiar doctrine. The stipulations in this mortgage as to rents and profits add little, if anything, to the stipulation giving immediate possession after the rendering of the decree. The right to possession would take the rents, and the law now would compel the application of the profits to the debt in case of redemption. It may have been but an attempt in this instance to evade the law relating to possession during the redemption period, not at all necessary for the protection of the mortgagee, nor a substantial part of the contract. If so, the mortgagor could not waive the right in the instrument creating the debt, or before default generally, when the situation becomes fixed, and he is directly confronted with its effects. There was no showing in this case that the land was inadequate security for the debt. After default, the law would permit a waiver. A debtor might waive his exemptions by failing to claim the same after levy. This law declares a public policy and 40 L. R. A.

establishes a salutary rule. While it operates for the benefit of debtors, it also benefits the public by benefiting a large number of citizens. It is of the same class as those laws preventing waivers in insurance policies relating to agents and otherwise, which are well known, and also declaring after what performance life insurance policies shall be non-forfeitable, regardless of stipulations. The law permits a mortgage of a homestead, and it might be a matter of public policy that the owner should not be turned out of possession immediately upon foreclosure. He might surrender possession after default and sale, but not be allowed to stipulate therefor in the instrument creating the debt. *Greenhood*, Pub. Pol. pp. 496 *et seq.*; *Kneetle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186; *Peugh v. Daris*, 96 U. S. 337, 24 L. ed. 776; *Lericks v. Walker*, 15 La. Ann. 245, 77 Am. Dec. 187; *Mills v. Bennett*, 94 Tenn. 651; *Waters v. Randall*, 6 Met. 479; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45; *Cleghorn v. Greeson*, 77 Ga. 343. These matters must be left with the court, and there is nothing presented in this case to warrant our disturbing the finding of the court in that particular. This also disposes of the stipulation for an immediate sale after decree, as the law fixes the time, as heretofore stated.

Regarding the act relating to the payment of obligations (Laws 1897, p. 91), I desire merely to announce the conclusion reached by the other members of the court, as I understand it, *viz.*, that it is a subject upon which a state cannot legislate, but belongs exclusively to the general government. In its practical effects it is of no consequence, although the principle is an important one. The precise point as to whether a state can provide that no contract shall be enforced as payable in any particular money, but may be discharged in any kind of lawful money, regardless of the stipulations of the parties, in the absence of national legislation permitting such contracts, does not seem to have been decided elsewhere. Personally, from the limited examination I have given it, in view of its present at least inconsequential effect and the opinion of the majority, I can see no objection to sustaining such a law. But it follows, from the holding of the other members of the court, that this contract must be enforced according to its terms, and that the act is inoperative.

We are all of the opinion that the act in relation to attorney's fees (Laws 1895, p. 81) must stand. This prescribes a measure of public policy. In the absence of any statute upon the subject, it would be a matter over which the courts would have control, at least to the extent of refusing to allow unconscionable fees. It is also well settled that where no attorney has been employed there can be no recovery of an attorney's fee in the case, and it would follow therefrom that only a reasonable compensation should be allowed where one is employed. It is intended as a matter of costs, to cover the expenses of suit. The practice of allowing the parties to fix the amount of such fees, under the former statute, was abused more or less. Excessive fees were sometimes fixed, and it is contended in the briefs that mortgages under arrangements made with at-

torneys were occasionally foreclosed for a much less sum, the mortgagee retaining the balance. This, certainly, was a reprehensible practice, and one not to be tolerated. The finding of the lower court in this respect is sustained.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

Anders and Gordon, JJ., concur.

Dunbar, J., dissenting:

I am reluctantly compelled to dissent in part, at least, from the majority opinion in this case. So far as the proposition of appraisal is concerned, I am forced to the opinion that the law should be held to be of no force or effect, by reason of its incongruities and contradictory provisions. Section 10 provides that no property shall be sold for a sum less than 80 per cent of the appraised value thereof, except that, when property is not capable of partition or division, then the same may be sold for the amount of the judgment debt or demand. The same section further provides that, when the property is capable of partition, then so much thereof as may be sufficient only shall be sold as will satisfy the judgment; and the further provision of the same section is, in case of foreclosure of mortgages or other liens, nothing shall prevent the sale of the entire premises included within the mortgage or lien. It will thus be seen that the second and third provisions of the section are irreconcilably conflicting, for one provides that so much only of the property as may be sufficient to satisfy the judgment shall be sold, while the next sentence as clearly declares that nothing shall prevent the sale of the entire premises included within the mortgage or lien. I heartily concur in all that is said in the majority opinion concerning the relations existing between courts and legislatures; but when the legislature enacts a law the provisions of which are absolutely conflicting within themselves, then I think it becomes as much the duty of the court to hold the law ineffectual for any purpose as it does to hold the law unconstitutional when it plainly violates a constitutional provision. The section which I have quoted is only one example of the conflicting provisions of this law, if we hold that it applies to mortgages and not to execution sales alone; and an attempt to exempt mortgages from the operation of the bill is rendered as unsuccessful by reason of the provisions of succeeding and preceding sections. There are no rules of statutory construction or of logic which can be brought to bear in construing a statute of this kind. It simply becomes a question of guessing as to what was the intention of the legislature. If, indeed, it does not go further, and compel judicial legislation, which is always to be avoided. This is shown by the majority opinion, which was announced after many weeks of painstaking labor, coupled with an earnest endeavor to bring order out of confusion, and to give some effect to the legislative act. But I think the effort, devoted and praiseworthy as it was, has failed, and that the announcement is really the best judgment of the majority of what the

law ought to be,—a result which, in my opinion, could not be avoided under an attempt to sustain this law; and I think, as a matter of public policy, it is far better that the laws enacted by former legislators, who were the proper lawmaking powers, should be held to be the laws governing transactions of this kind, than a law which is the result of judicial judgment and announcement. I have read with interest the masterly presentation made by the majority of the deficiency judgment law, but am still constrained to believe that on that subject the legislature had a right to act, and that it did act within the scope of its constitutional powers; and, believing that it is a provision which cannot be waived, I think the law should be sustained. I am also of the opinion that the statute in relation to possession cannot be abrogated or modified by the courts. Neither do I think it is a provision that can be waived. The majority opinion expresses my views on the money proposition.

Reavis, J., dissenting:

I cannot assent to several conclusions announced by the majority of the court in this case, and the importance of the questions involved requires further discussion. The question whether an appraisal of real estate provided for in the act of March 10, 1897 (Laws 1897, p. 70), relating to the sale of property under execution, is applicable to mortgages was decided in the case of *Swinburne v. Mills*, 17 Wash. 611; and mortgages were there held to be included within the terms of the act. Upon complete consideration we are all agreed that the conclusion heretofore reached was correct. This litigation arises in the construction of the mortgage in suit, which contains, among its stipulations upon the part of the mortgagor, an express waiver of the law relating to appraisal and time of sale; also, the act of March 16, 1897 (Laws 1897, p. 227), declaring the mortgagor entitled to the possession, and rents, issues, and profits, of real property sold under foreclosure, during the full period for the redemption of the same; also, the act of March 11, 1897 (Laws 1897, p. 98), prohibiting a deficiency judgment in mortgage foreclosures; also, the act relating to the construction of contracts between parties for attorney's fees; and also the act of March 11, 1897, relating to payment of obligations, and declaring that the same may be fully satisfied with any kind of lawful money or currency of the United States. I understand the conclusion of the majority is that the waivers contained in the stipulations of the mortgage are void, and cannot be enforced; but, as there is some intimation that a different state of facts from those found in the present cause might vest in the court the consideration of the enforceability of some of the waivers, I desire to make some observations upon this question.

The learned counsel for the plaintiff contend that the provisions relating to appraisal, and to possession, and the rents, issues, and profits, in the legislation of 1897, do not, in terms prohibit the waiver; that, being solely for the benefit of the debtor, he may lawfully waive the same; that such contract of waiver

is enforceable in the courts; and that public policy does not concern itself with those provisions, intended merely for the benefit of the debtor. I have examined every case cited upon this proposition in the briefs submitted by counsel. *Stockmeyer v. Tobin*, 139 U. S. 176, 35 L. ed. 123, was first determined in the state of Louisiana, and the Supreme Court of the United States merely accepted the construction of the state supreme court in *Broadwell v. Rodrigues*, 18 La. Ann. 68, and its ruling in that case is not authority here in any sense, because the uniform rule in the Federal Supreme Court is to accept the construction of a state statute by the court of last resort of the state, without reference to the correctness of such construction. As the Louisiana case just mentioned, and also *New Orleans Mut. Ins. Co. v. Bagley*, 19 La. Ann. 89, are cases presented where the waiver of an inquisition or appraisalment law has been held a valid contract, it is instructive to review the reasoning of the Louisiana court in an earlier case. *Levicks v. Walker*, 15 La. Ann. 245, 77 Am. Dec. 187. The court there held such a waiver void, and observed: "Parties regulate their own conduct by their stipulations, but they cannot prescribe rules of proceeding for public officers, nor demand that the courts of justice shall depart from the usual modes of enforcing their decrees. If, before judgment, the creditor may stipulate the manner in which the same shall be executed, the principle will sanction an endless variety of modes of execution of judgments." But in the case of *Broadwell v. Rodrigues*, 18 La. Ann. 68, the court again had brought before it the question of waiver in connection with the construction of § 2, art. 11, of the Revised Civil Code of Louisiana, which had not been before them in the former case. Construing this section of the Code, the court said: "The law of France, in its practical application, differs but little from the law of Louisiana, and both rest on the maxim of the Roman law, which lays it down as a rule that everyone is at liberty to renounce what the law has established in his favor and interests but himself. '*Est regula juris antiqui omnes licentiam habere his que pro se indicta sunt renunciare.*' L. 29, C. de Pactis. But individuals cannot, by their conventions, derogate from the force of laws made for the preservation of public order or good morals. I. C. de Pactis 2; 3 L. 45, §§ de R. T. L. 38, §§ de Pactis, 2, 14. Marcadé, commenting on the last rule cited, observes: '*Cet article en nous disant qu'on ne peut par convention déroger aux lois dont il parle, nous indique assez qu'on pourra, par a moyen, déroger aux autres.*' Volume 1, p. 671. And the juriconsults who compiled our Code, while they adopted verbatim the article 6 of the French Code, in article 11 of our own Code, have added to that article a second paragraph, which is a legislative recognition of Marcadé's doctrine, and has removed much of the uncertainty of the French article. (See also the doctrine of Toullier, hereinafter referred to.) The second paragraph of article 11 of our Code is as follows: 'But, in all cases in which it is not expressly or impliedly prohibited, individuals can renounce what the

law has established in their favor, when the renunciation does not affect the right of others, and is not contrary to the public good.' " The court then says: "Aided by the light which the French jurists have afforded us in solving this mooted question, . . . this we apprehend to be the general rule, as relates to the renunciation of private rights. The exceptional cases are those which trench on public order; and within those exceptional cases is not embraced, as we conceive, the stipulation in the mortgage granted by the plaintiff in injunction." It will thus be seen that the present Louisiana doctrine does not in any sense overturn the principle first declared in 15 La. Ann., *supra*, but is founded on a provision of the Louisiana statute, which had theretofore been construed by the French jurists, and such construction was accepted by the court. I do not, therefore, think the cases cited from Louisiana are authority upon the construction of the statutes under consideration here. The case of *Stockwell v. Byrne*, 22 Ind. 6, is founded entirely upon estoppel of the judgment debtor who consented that an officer having charge of a writ of execution should sell without appraisalment, and the court held such estoppel good. The case of *Baker v. Roberts*, 14 Ind. 552, was a suit on a promissory note containing a waiver of valuation laws, and the decision was based upon a statute which declared: "Upon any instrument of writing, made in this state or elsewhere, containing a promise to pay money without relief from valuation laws, judgment shall be rendered and execution had accordingly." It will be noted that the Indiana cases cannot be in point, because special statutory permission authorizes the waiver of valuation laws. The case of *Wray v. Miller*, 20 Pa. 115, was where the defendant was held estopped by a waiver after sale. The sale was made without dissent, and the opinion states the presumption was that defendant received the purchase money. In *Mitchell v. Freedley*, 10 Pa. 198, the defendants had estopped themselves after judgment and sale had been made. Thus the Pennsylvania cases are not in point, but it may be appropriately observed here that the courts of Pennsylvania stand almost alone in their construction of homestead and other exemption laws, and against the almost universal weight of authority in this country. But a Pennsylvania statute of 1836 seemed to authorize the waiver of inquisition or appraisalment. On the validity of a waiver of the right to possession several Iowa cases were cited, but I find in the last of those cases cited the decision based upon the Iowa Code of 1873, § 1938, which declares, in the absence of stipulation to the contrary, the mortgagor of real property retains the legal title and right of possession thereto. Manifestly, the statute of Iowa determines conclusively the construction of such contracts for the waiver of the right to possession. It is a well recognized legal rule that constitutional or statutory benefits may be waived unless such waiver violates some principle of public policy. A number of the states, among which are Pennsylvania, Indiana, Louisiana, Iowa, Kansas, Nebraska, and Illinois, in their early history, adopted what have been very pertinently termed "appraisalment or

valuation laws." Every authority from those states, both in the state and Federal courts, has sustained the validity of these laws when applied to subsequent contracts.

Having thus reviewed the authorities presented by counsel to sustain the validity of a contract of waiver of appraisement, and found that in no instance other than when authorized by statute such waiver was enforced, we may now examine some of the numerous and very eminent authorities which hold that analogous provisions in other laws cannot be waived by private stipulation. Our statutes, it may be mentioned, nowhere authorize a waiver of any of the provisions of the laws under consideration. *Wall v. Equitable L. Assur. Soc.* 32 Fed. Rep. 273, was an action on an insurance policy in the United States circuit court. It involved the question as to the force to be given to a Missouri statute, as against the express language of the policy. The court, by Judge Brewer, declared: "It evidently intended by its [the state's] legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because, if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce.

The legislature has by this language declared a rule in respect to forfeitures in life insurance policies; it has thus established the policy which it believes should obtain in this state, and, though sitting on the Federal bench, it is my duty to administer the laws of this state in the spirit in which they were enacted, and to uphold both their letter and their spirit." This doctrine is also approved by the Supreme Court of the United States in *Equitable L. Assur. Soc. v. Pettus*, 140 U. S. 226, 35 L. ed. 497, and other cases in that court. *State v. Edwards*, 86 Me. 102, 25 L. R. A. 504; *Havens v. Germania F. Ins. Co.* 123 Mo. 416, 26 L. R. A. 107; *Reilly v. Franklin Ins. Co.* 43 Wis. 449, 28 Am. Rep. 552. In the last case the court says: "Now, the law is well settled that, where a statute is founded upon public policy, a party cannot waive its provisions, even by express contract." *Latimer v. Equitable Loan & Invest. Co.* 81 Fed. Rep. 776. In the case of *Minneapolis Threshing Mach. Co. v. Beck*, 64 N. W. 637, 95 Iowa, 725, it was held that, under Code, § 3100, providing that 'personal property levied upon and advertised for sale on execution must be appraised before sale,' etc., such appraisement cannot be waived. Though it was stipulated in a chattel mortgage that the mortgagor waived appraisement, and the mortgagee was present at the foreclosure sale, the mortgagee is not precluded from moving to set aside the sale on the ground that there was no appraisement, as is required by statute." The case of *Equitable Loan & Invest. Co.* 81 Fed. Rep. 776, involved the right of withdrawal of a stockholder in a building association after giving thirty days notice thereof, and to receive back

the amount paid in by him, together with his shares of the profits. The court held: "The statutory right of a stockholder in a building association to withdraw therefrom after giving thirty days' notice, and to receive back the amount paid in by him together with his share of the profits (Mo. Rev. Stat. § 2810), is one evidencing a public policy, and cannot be waived, even by an express declaration in the certificates that there shall be no right of withdrawal until one hundred months from the issuance of the stock." A strong analogy is also found in the uniform rule that the equity of redemption cannot be waived in a mortgage, or in any other instrument executed at the same time. This has been the settled law for over two centuries in English and American courts. The Supreme Court of the United States, in *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775, discussing the waiver of the equity of redemption, said: "This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed. A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interests. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor." *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415.

The language quoted is an answer to the proposition, affirmed by counsel for plaintiff, that the public is not concerned as to how much or when the property of the debtor is taken in foreclosure. The whole reasoning relative to the right to waive the equity of redemption, and the principle upon which it is founded, is applicable to the construction of the statute before us. The rule, also held by the courts of equity from time immemorial, that the mortgagor cannot waive at the time of the execution of the mortgage, the right to the possession of the mortgaged premises during the period of redemption, is analogous. This is for the special benefit of the mortgagor, and the authorities have always been at one in refusing to enforce such waivers. But it has been argued that the statutes of 1897 relating to appraisement do not evince a public policy, or the intention of the legislature to declare a uniform rule relative to sales under execution and foreclosure of all real estate at judicial sales. Laws 1897, p. 71, § 3, is mandatory in its language: "It shall be the duty of the judgment creditor, . . . when the judgment is to be satisfied in whole or in part from real estate, or any interest therein, to deliver to the sheriff a true statement, signed by himself or attorney, containing a description of the property levied upon, the estimated value of each separate description, and serve a copy upon the judgment debtor or his attorney." Thus it will be seen that, before the sheriff can take a single step under his execution after

levy, the appraisement must be made by the judgment creditor. It is a part of the process as necessary as the notice of sale. But, if it were desirable to derive the intention of the legislature from surrounding circumstances and conditions then existing, it is also easy to deduce the rule of public policy. For a few years preceding the legislative session of 1897, it was a matter of universal knowledge in this state that real property exposed to sale under execution was sacrificed. A severe financial stringency and absolute dearth of money in general circulation destroyed the value of real property, and at such sales generally the only bidder was the judgment creditor, who, in effect, could, and did, bid so much as he chose for property, and thus the mortgage which, when executed, was deemed secured by property of thrice its value, frequently was purchased by the mortgagee for a small portion of the amount secured, and a deficiency judgment left standing against the mortgagor for the balance—often the larger portion—of the claim. It is plain to my judgment that the legislature intended by these statutes to prevent the undue sacrifice of property. Whether the statute is the best that could be framed for that purpose, or whether it is a wise legislation, are matters which the courts cannot control. The question at the outset ought to be, Is the statute constitutional? I understand the court is agreed that the legislature has the power to enact such laws. I have examined the numerous cases cited by counsel upon the question of the constitutionality of this statute, and my conclusion is that, with the exception of the mechanic's lien and slaughter-house cases, all the cases cited are those involving class legislation, and as such would probably be held void under article 1, § 12, of our Constitution. These cases hold the acts under consideration void for the reason that they limit the right to contract to certain classes, to wit: *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931 (railroad employees); *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702 (all laborers except on farms); *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325 (weavers); *State v. Goodwill*, 38 W. Va. 179, 6 L. R. A. 621 (laborers in mines and factories); *Millett v. People*, 117 Ill. 204, 57 Am. Rep. 869 (coal miners); *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264 (railroad employees); *Re Jacobs*, 96 N. Y. 106, 50 Am. Rep. 636 (cigarmakers in tenement houses); *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482 (employees on public contracts); *Re Eight Hours Bill* (laborers in mines, factories, and smelters); *Re House Bill No. 203*, 21 Colo. 27 (coal miners). The statutes here in question embrace all those entering into the relation of debtor and creditor, which is not only a relationship based upon its own peculiar characteristics, but is one recognized from the earliest times and under all forms of Constitutions as subject to legislative control, without the suspicion of being answerable to the charge of class legislation. The objection to the constitutionality of the provisions relating to appraisement being untenable, the important duty of the court is their construction.

2. And here I am unable to agree with the construction of the majority of the court. I concede that § 10 of the appraisement

act is inartificially framed, and there is much difficulty in the harmonious construction of the several provisions included in the section. Section 2 provides, when the sale is of real property and consisting of several known lots or parcels, they shall be sold separately when demanded by the judgment debtor or a subsequent encumbrancer. This is merely declaratory of an ancient equitable rule in mortgage foreclosures. The act is clear in the procedure on the appraisement. It is simple and direct. If the judgment creditor's appraisement is satisfactory, notice of sale is given; if not satisfactory to the judgment debtor, then the appraisers are appointed by the clerk of the court, and they shall appraise the real value of the property or interest of the judgment debtor therein. Section 8 seems to commit finally the fairness of the appraisement and the propriety of another valuation of the property to the court. The difficulty in construction is found in § 10. I think this section may be fairly read as follows: "No property shall be sold for a sum less than 80 per cent of the value thereof." All that follows in § 10 are exceptions or provisos. The well-recognized canon of statutory interpretation, that in the event of absolute repugnancy between a proviso and the body of the section and intention of the whole act, the proviso must yield, ought to be applied here, and the exceptions or provisos, taken together, would qualify the section that the property cannot be sold for less than 80 per cent of the appraised value; the whole thereof may be sold, if necessary to pay the debt, at 80 per cent of the appraised value; but if a portion of the property, appraised at 80 per cent, will pay the debt, no more can be sold. *State, Chamberlin, v. Daniel*, 17 Wash. 111. As I view the construction given to § 10 by the court, the whole appraisement is so emasculated that nothing of value is left of it. The plain intention of all the preceding sections of the act is the appraisement of real property so as to avoid its sacrifice at the sale, and, while such legislation relating to execution sales is novel in this state, it is by no means new in the general legislation of our sister states. Very similar provisions relative to appraisement, as we have seen heretofore, existed in a number of the states, and one uniform intention pervaded all of them. There is nothing specially different in the results to the judgment creditor in our statutes from those found in the statutes of the other states. In fact, we have in our probate procedure long recognized a control over sales of property for the satisfaction of debts. An appraisement is mandatory in all administration sales, and the court is by statute authorized to set aside any sales if in its judgment, upon a hearing, a larger amount can be obtained for the property; and, without any statutory provisions, the courts, in the exercise of their equitable powers, continually, in receiverships, fix limits upon the bids which shall be received for property offered at sale. This court has approved such an order when made by a superior court of property under mortgage foreclosure in the custody of its receiver. All the arguments used against the fairness of the statute are equally applicable to probate sales and to receivers' sales. As seen, § 8 of the statute re-

poses in the superior court the final determination of the fairness of the appraisement. Imaginable cases may be suggested where the appraisement might incidentally postpone the sale; but I think the general presumption of fairness in judicial procedure, and that judicial officers will perform their duty, will relieve the statute of any imputation of an intention to postpone collections on execution, or to require anything but a fair sale of property.

8. The act relating to deficiency judgments (Laws 1897, p. 98) is clear and mandatory in its provisions, and therefore not the subject of construction, and the only question litigated here is its constitutionality. As a mere question of procedure in a foreclosure suit, it ought to be controlling. By legislative authority only in this state has the power to enter a deficiency judgment in a foreclosure of a mortgage been found. Without such statutes for authority to enter a deficiency judgment in the same proceeding, or where large discretion is given by equity rules, I think no court has entered such a judgment. But the broader question of the constitutionality of the statute which limits the recovery of the debt to the mortgage security has been fully discussed by counsel and by the court. It is objected that the statute is obnoxious—First, to art. 5, § 1, and art. 14, § 1, of the amendments to the Constitution of the United States, and art. 1, § 3, of the Constitution of Washington (in substance as follows: "No person shall be deprived of life, liberty, or property without due process of law"); and, second, to art. 14, § 1, of the amendments of the Federal Constitution ("No state shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States"). Section 10, art. 1, of the Federal Constitution, that no state shall pass any law impairing the obligation of contracts, has been cited. The latter citation is so manifestly not in point here that I do not deem it necessary to refer to it again. The first provision does not say that the state may not deprive a person of life, liberty, or property, and stop there, but declares that it shall not be done "without due process of law." The state is continually depriving persons of life, liberty, and property, but it must be done according to due process of law. "Due process of law does not mean a statute passed for the purpose of working a wrong." Cooley, Const. Lim. (1st ed.) p. 353. These words are held to be synonymous with the words "law of the land" (Id. p. 352), and this means "general public law, binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals." *Millett v. People*, 117 Ill. 297, 57 Am. Rep. 869. And it is also that law which hears and condemns only according to recognized judicial usages. The second constitutional inhibition, against making or enforcing any law which will abridge the privileges or immunities of citizens of the United States, has been frequently considered by the Supreme Court of the United States. In *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 25 L. ed. 585, Mr. Justice Bradley observes: "I hold that the liberty of pursuit—the right to follow

any of the ordinary callings of life—is one of the privileges of a citizen of the United States." And the application of this article of the Federal Constitution has generally been directed against some discrimination by the state in favor of its own citizens and against other citizens of the United States. The protection of life, liberty, and property, and the enforcement of private rights, has been uniformly held by the Federal Supreme Court to devolve upon the state. The state unquestionably may regulate contracts between its citizens and control them as best accords with its own views of public policy, and it has always done this; and this policy may be changed at the will of the state, so long as it does not impair the obligations of prior contracts. The questions relating to its policy have been, in all our state Constitutions, committed to the legislative department of the government. In fact, I believe, almost without exception, the English-speaking race has entirely placed these questions within the domain of legislation. They belong to the field of political economy, morals, and the general science of government, and people differ materially in their views upon them. At one time the legislature might deem it sound policy to encourage speculative loans of capital in the state. It might deem any exemption laws unwise. It might, as has heretofore been the rule, by legislative enactment in this state, provide that the possession of real property should go to the mortgagee before the period for redemption expired, without such mortgagee's accounting for rents, issues, and profits when redemption was made. It might, as was the law for some time in this state, abolish the equity of redemption in mortgages, and in redemption of real estate sold at execution. And the court has uniformly sustained such enactments as being peculiarly within the power of the legislature. The state may also appropriately, through the legislative department, change such rules. It may deem speculative loans objectionable. It may deem exemption laws wise. It may determine that the equity of redemption in mortgage foreclosures shall be preserved in the future. It may provide for a redemption of property sold on execution, or it may provide that contracts may be made between the borrower and lender of money at such rates as they choose. But, if it should adopt other views, it may appropriately, through its legislative department, limit the right to borrow money to a certain rate of interest, and may, in my judgment regulate and control the contract or mortgage, and limit the amount and value in security embraced in a mortgage, and the amount of the recovery thereon. It has been held that a state might forbid the assignment out of the state of claims against the recovery of which the exemption laws of the state of the residence of the parties would be a protection (*Sweeney v. Hunter*, 145 Pa. 363, 14 L. R. A. 594); declare after what performance contracts of insurance shall be nonforfeitable (*Equitable L. Assur. Soc. v. Pettus*, 140 U. S. 226, 35 L. ed. 497); regulate the weight and price of bread (*Mobile v. Yuille*, 3 Ala. 140, 36 Am. Dec. 441); restrict the removal and sale of cotton in seed (*State v. Moore*, 104 N. C. 714); declare that railroad and telegraph com-

panies cannot, by private agreement, devest themselves of liability for acts as such (*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788).

But many illustrations might be offered of the principle that the regulation and control of contracts, and the procedure for their enforcement, are not inhibited by either of the two provisions of the Federal Constitution heretofore mentioned. I apprehend the true rule can be formulated thus: If a public policy is obvious from the statute, and it is not arbitrary or partial, its validity is assured. The public policy must be such as to induce the legislature to act, and its motives must not be merely whimsical and arbitrary, and the law cannot be merely partial, but must affect all alike. Whether the policy inducing legislative action is wise does not come within the province of judicial inquiry. When the statute fairly discloses such a policy, the act is valid, unless contravening some other constitutional provision. I think the policy of the act prohibiting a deficiency judgment in mortgage foreclosures is fairly deducible from the evident intention of the several acts which have been under discussion here and all enacted by the same legislature. We have seen the legislature repeal the law giving to the mortgagee or judgment creditor the immediate possession after sales of real property, without any liability to account, in the appraisement law to secure fairer sales of real property on execution, and to limit the recovery of a debt secured by mortgage to the property included in the mortgage. The conditions existing in the state were before the legislature. Large numbers of its citizens, many of them active and energetic business men, were retired from business, or from any productive occupations, because of existing deficiency judgments against them after the mortgage foreclosures. The same considerations, from this point of view, might affect the legislative mind that could be adopted in the enactment of a state insolvency law; and the unbroken current of judicial authority in this country now sustains the validity of such insolvency laws enacted by the states, when they do not impair prior contracts. The state is interested in the activity and capacity of its citizens, and if any considerable class of them be deprived of their capacity to engage in productive occupations or business, there is so much loss to the public. Something here of the same principle as underlies the exemption laws is found. A just motive existing in the legislative intent relieves the act of any objection that it is arbitrary.

The next objection that is suggested to this law is that it is class legislation, but no authority has been called to our attention which would suggest such an objection. Mortgages have been the subject of legislative control, both in the terms of the contract and in the procedure enforcing the mortgage contract, throughout our history. It is a general and natural division of the subject of legislation. There can be no doubt of the power of the legislature to fix the rate of interest on money. That is a matter exclusively within its policy. This rate may be made so low as to largely interfere with the power to borrow money. In 40 L. R. A.

a number of the states the power to mortgage a homestead is forbidden, and in the state of Texas, notably, the real-estate homestead is so large that, as has been observed by some jurists, it is a practical inhibition upon the mortgage generally of real property in that state. Yet, though the constitutionality of this law has been challenged, it has uniformly, so far as my examinations have extended, been sustained. I understand, without legislative sanction, the right to mortgage chattels without taking possession is denied in many jurisdictions. The rule in the state of California seems to be that only such chattels as are specified in the various legislative acts are subject to mortgage unless the possession be delivered to the mortgagee. In the case of *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143, the Supreme Court of the United States had under consideration a law, passed in the state of Illinois, which provided that the equitable estate of the mortgagor should not be extinguished for twelve months after sale on decree, and which prevented any sale of the mortgaged property unless two thirds of the amount at which the property had been valued by appraisers should be bid therefor. The question before the court was as to the impairment of existing contracts by the retroactive provisions of the statute. The court, by Mr. Chief Justice Taney, declared: "Mortgages made since the passage of these laws must undoubtedly be governed by them; for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the courts of the United States, as well as in those of the state." This I understand to be the established rule enforced by the Supreme Court of the United States.

4. The effect of the statute making the contract for specific money soluble in lawful money of the United States, involves a Federal question, and seems to have been determined by the controlling authority,—the Supreme Court of the United States. The power of the state to declare a legal tender is limited to gold and silver coin. All "lawful money" of the United States is not a legal tender for private obligations by the laws of the United States; but, under the grant of power to coin money and regulate the value thereof, the Federal Supreme Court has, I think, decided that the question relating to final payment in private contracts is one exclusively of Federal jurisdiction, and vested in Congress. The legal tender and gold contract decisions, taken in connection with the recent case of *Woodruff v. Mississippi*, 162 U. S. 291, 40 L. ed. 973, are controlling here. The jurisdiction of the Federal Court would not, in this case, have been sustained on any other principle than complete Federal control of such contracts. This conclusion, I think, is manifestly apparent from both the majority and minority opinions given in the case. A different ques-

tion would be presented in contracts made by the state, or municipal corporations controlled by the state.

My conclusions are that, with the exception of the solution of the contract in suit in lawful money of the United States, the judgment of the superior court is correct.

STATE of Washington, *ex rel.* F. J. BARNARD, *Appl.*,

BOARD OF EDUCATION of Seattle School District No. 1, *Respts.*

(..... Wash.)

1. **Prohibition may be issued to prevent a board of school directors** from trying charges against a school superintendent when one of the directors is disqualified by enmity and prejudgment of the case, while there is no appeal from the decision of the board.
2. **An order of supersedeas to preserve the status quo of the parties** pending the determination of the appeal upon its merits is within the inherent powers of an appellate tribunal which is authorized to issue all writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.
3. **A school director is disqualified to sit as a member of the board** to try charges of misconduct of a school superintendent, when he has a personal enmity toward him and was a prime mover in the prosecution of the charges, and declared that he should vote for his conviction, while there is no appeal from the decision of the board.

(February 23, 1898.)

A PPEAL by relator from an order of the Superior Court for King County denying a writ of prohibition to prevent defendants from proceeding to try relator upon charges of misfeasance and malfeasance in office. *Reversed.*

The facts are stated in the opinion.

Messrs. Osborn, Steele, & Aust and Donworth & Howe, for appellant:

Under the admitted facts was Mr. Wells disqualified to sit as a member of the board proceeding in a judicial capacity, to try and determine the charges against relator?

The common conscience of all mankind who live under government intuitively responds with an affirmative answer.

Moses v. Julian, 45 N. H. 52, 84 Am. Dec. 118; *Barnett v. Ashmore*, 5 Wash. 164.

Even an act of Parliament cannot make one judge and party.

London v. Wood, 2 Mod. 688; *Williams v. Robinson*, 6 Cush. 333; *Oakley v. Aspinwall*, 3 N. Y. 548.

The right of recusal against members of a tribunal of exclusive jurisdiction is limited by the line of vitality. That is, the right exists until to further proceed would destroy the power of the tribunal; upon the theory that when a tribunal is invested with exclusive jurisdiction to hear and determine a cause, it is better that it should be determined by a par-

tial court than that it should not be heard.

People, Pond, v. Saratoga Springs, 4 App. Div. 399.

The participation of a disqualified member of a tribunal in the judgment vitiates the whole proceeding.

Oakley v. Aspinwall, 3 N. Y. 547; *State, Pond, v. Saratoga Springs*, 4 App. Div. 399.

Although a judgment against the appellant will be vitiated by his participation therein, yet appellant must be subjected to a void and corrupt adjudication of his rights, to a wrongful deprivation of his reputation and employment, and then seek a remedy, if any he has, through certiorari or quo warranto.

These independent proceedings afford no adequate remedy.

North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 326.

Messrs. James F. McElroy and John B. Hart, for respondents:

At common law the only disqualification of a judge was his financial interest.

12 Am. & Eng. Enc. Law, p. 41.

The common law as to what is a disqualification of a judge prevails in this state unless changed by statutory enactment. Prejudice and bias, in the absence of a statutory provision, are not a legal cause of disqualification.

12 Am. & Eng. Enc. Law, 52; *McCauley v. Weller*, 12 Cal. 500; *People v. Williams*, 21 Cal. 81; *Allen v. Reilly*, 15 Nev. 452; *People v. Mahoney*, 18' Cal. 180; *Pearson v. Hopkins*, 2 N. J. L. 185; *Pierce v. Delamater*, 1 N. Y. 17; *Waters-Pierce Oil Co. v. Cook*, 6 Tex. Civ. App. 573.

Even though the board of education had proceeded and had removed the superintendent of schools under the power given them by the law of 1897, still if that removal was illegal, it could be inquired into by the court either by quo warranto proceedings (*State v. Van Brocklin*, 8 Wash. 557), or by a writ of review or certiorari under the law of 1895, p. 114. Having these legal remedies still left to him, it is extremely doubtful whether a writ of prohibition will lie at all.

19 Am. & Eng. Enc. Law, p. 265.

The mere fact that the appellant would be removed temporarily and unjustly as claimed by him from office would not warrant the court in making an order which would prevent the board of education from proceeding further in their investigation.

State, Nooksack River Boom Co. v. Whatcom County Super. Ct. 2 Wash. 15; *Fawcett v. Pierce County Super. Ct.* 15 Wash. 342.

The discretion of the lower court will not be interfered with or inquired into by this court.

State, Gardner, v. Yakima County Super. Ct. 9 Wash. 307; *State, Cline, v. Campbell*; 5 Wash. 517.

No discretion is in any court to stay proceedings of this kind.

19 Am. & Eng. Enc. Law, p. 264; *People, Adams, v. Westbrook*, 89 N. Y. 152; *Fawcett v. Pierce County Super. Ct.* 15 Wash. 345; *Gibbs v. Louisville*, 95 Ky. 471.

Dunbar, J., delivered the opinion of the court:

The appellant, F. J. Barnard, is superintendent of the public schools of the city of Seattle.

NOTE.—As to the disqualification of a judge by prior connection with the case see *State, Ambler, v. Hooker* (Fla.) 25 L. R. A. 114, and *note*.

As to disqualification of member of board, see *State, Getchel, v. Bradish* (Wis.) 37 L. R. A. 289.

40 L. R. A.

Charges were filed with the respondents, as the board of directors of said school district, charging the said Barnard with misfeasance and malfeasance in office, with conduct unbecoming a superintendent of schools, and with disobeying the rules of conduct established by the board of directors. Citation was issued to the appellant, citing him to appear before the board of directors to answer to the charges. The appellant objected to A. J. Wells, one of the board of directors, sitting as a member of the tribunal to hear and determine the charges, on the ground that said Wells was disqualified by reason of bias, prejudice, and personal enmity towards the appellant. On the 17th day of December, 1897, on the application and affidavit of the appellant, Barnard, the superior court of Kings county, Washington, issued its writ of prohibition in the alternative to the respondents, staying proceedings until the further order of the court. On the return of said writ the superior court sustained a demurrer thereto quashing the writ, and entering judgment in favor of the defendants for their costs. The demurrer was sustained upon the ground that no facts were stated sufficient to authorize the issuance of a writ. The appellant forthwith gave notice of appeal, and asked the court to fix the amount of the supersedeas bond. The court fixed the amount of the bond to operate as a supersedeas, but announced to the council for respondents in open court that the bond would operate only to stay execution for costs, because the judgment appealed from was not such a judgment as could be superseded. The appellant forthwith filed his bond on appeal in the amount fixed by the court, and conditioned as a supersedeas bond. The board of education, and Mr. Wells, sitting as a member thereof, proceeded with the hearing of the charges against the appellant. The appellant then applied to this court for an order of supersedeas, on which an alternative writ was granted, and the case is here now for final determination.

We are inclined to think that the bond upon appeal conditioned as supersedeas under our statutes did not operate to suspend and supersede the judgment quashing the alternative writ. But we think that this court, in the exercise of its discretion, by virtue of its inherent powers as an appellate tribunal, can issue an order of supersedeas to preserve the *status quo* of the parties, pending the determination of the appeal upon its merits. Section 4 of article 4 of the Constitution of Washington, after reciting the original jurisdiction of the supreme court, says further: "The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." It is conceded that an appeal lies from the judgment of the court in quashing the writ, and, under the provision just read, for the purpose of making that appeal effective, and to insure the complete exercise of this court over that appeal, it becomes necessary and proper to supersede the judgment, otherwise the right to appeal which the statute has given would be of no avail to the appellant, for if the board of directors in the meantime were to proceed to remove him,

when the case finally reached this court on appeal it would have to be dismissed for want of merit, because the trial on merit would already have terminated. *People, Gould, v. Commissioners of Excise*, 61 How. Pr. 514. We think this is exactly the kind of a case which is contemplated by the Constitution, and that the only way that this court could maintain the complete exercise of its appellate jurisdiction would be by issuing the writ prayed for. There would be no meaning to the provision of the Constitution, and no necessity for it, if it could only be held to apply to cases where supersedeas was provided for by the law. In *Home F. Ins. Co. v. Dutcher*, 48 Neb. 755, it was held that in cases where the statute makes no provision for the supersedeas, as a matter of right, the court may in its discretion, allow a supersedeas upon conditions which it may affix for the protection of the parties, and that it is within the power of the court, in its discretion, after obtaining jurisdiction of a case by appeal, to allow a supersedeas in cases not provided for by statute, and upon terms which the court may prescribe. To the same effect is *Janessville v. Janessville Water Co.* 89 Wis. 159. In that case the court said: "Within the limitation that the appeal is taken and prosecuted in good faith, and that the party asking it gives the reasonable security required for that purpose, a stay of proceedings during the pendency of an appeal is quite of course, and really a matter of right, without which an appeal allowed by law would often prove fruitless, and the appellate jurisdiction of the court be found inadequate to the ends of justice and the proper protection of the rights of parties during the pendency of the appeal." In *Hill v. Finnigan*, 54 Cal. 493, the court said: "We have no doubt but this court has an inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right." And the qualification mentioned by the court in that case is not in point here, for there is nothing to prevent the board proceeding with the trial of the cause without the concurrence of the member objected to. In *Lery v. Goldberg*, 40 Wis. 308, it was held that the power of the court to stay proceedings in any matter appealed to it did not altogether depend upon statutory enactment, but was inherent in the court. The same announcement was made in *Northwestern Mut. L. Ins. Co. v. Park Hotel Co.* 37 Wis. 125.

The substance of the affidavit for the writ is to the effect that A. J. Wells was a personal enemy of the relator, that he was a prime mover in having the charges preferred and prosecuted, that he was biased and prejudiced against relator, that he had no personal knowledge of any of the facts alleged in the charges, that he had publicly announced his intention to vote to find relator guilty, and that he proposed to vote to remove him from his office no matter what the evidence might be, and that his mind was made up and his determination fixed.

The case of *Fawcett v. Pierce County Super. Ct.* 15 Wash. 342, is relied upon by the respondent to maintain his contention that the board of education cannot be restrained from proceeding. That was a *quo warranto* proceeding to try the right to an office. The judg-

ment of ouster had been pronounced against Fawcett, and it was held by this court that the judgment was self-executing, and that without the aid of process or further action of the court it accomplished the object sought to be attained, so that there was nothing upon which the bond could operate except for costs. But that is altogether different from the case at bar. It was the object of the appellant in this case to prevent himself from being placed in the position in which Fawcett was placed by the judgment of ouster. Were he to stand by, and allow the board to proceed and remove him from his office, then he would be as helpless as Fawcett was in the case cited; but it is for the very purpose of maintaining his rights and preventing his being overtaken by that condition that this stay is sought.

It is stoutly contended by the respondents that this case does not fall under any of the disqualifications of the judge provided in subdiv. 4 of § 163 of the Code of Procedure, and that, outside of the provisions of the Code, a judge is only disqualified by having a financial interest in the result of the suit. We have examined with care all the authorities cited by the respondents to sustain this contention, but are of the opinion that they fail to do so. Most of the cases either fall within the doctrine of necessity, which is announced by some of the courts, where to challenge the judge successfully would prevent the hearing of the cause, as in cases where there was no other tribunal to try the case, or where the judge was sitting merely to declare the law and the case was tried by jury, and in all the cases we think an appeal would lie. It may be said here that no appeal lies from the decision of the board of directors, and the judges acting in the capacity of jurors; and, while some courts have decided that the tests of the respective qualifications of judges and jurors are not the same, yet in a case of this kind, where the judges pass upon the facts, and it is a pure question of fact which is presented for their consideration and for their determination, we see no good reason why the test of qualification should be different; for the judge in this case is in reality a juror passing upon questions of fact. It is true that on page 52 of 12 Am. & Eng. Enc. Law, the proposition is announced that, "in the absence of statutory provisions, prejudice not based on property interest in the judge is not assignable as a legal cause of disqualification." But this broad assertion of the text is not borne out by the cases cited to sustain it, many of which are cited by the respondents in this case. For instance, in *McCauley v. Weller*, 12 Cal. 500, it was held by the supreme court of California, through Terry, Ch. J., that "the exhibition by a judge of partisan feeling, of the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly undecorous, improper, and reprehensible, as calculated to throw suspicion upon the judgments of the court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the judge is disqualified from sitting." But, even admitting the correctness of that decision,—which we are not inclined to do,—the court evidently would have come to a different de-

cision in a case of this kind, for they based the decision on the ground that the province of the judge was to decide questions of law alone, and that his decisions upon these points were not final, but, if erroneous, the party had his remedy by appeal. *People v. Mahoney*, 18 Cal. 181, is substantially the same holding, the argument being that, if the judge acted illegally on the trial, or denied the prisoner his legal rights, it could be remedied on appeal. In *People v. Williams*, 24 Cal. 81, the court quotes approvingly § 2945 of Whart. Crim. L. where that author says: "The practice among the civilians extends the right of challenges for cause to the judges as well as the jurors; and the great inclination of authority is, that the same causes which disqualify one disqualify the other. Where the judge, like a chancellor, sits to try both facts and law, as in the case with the civilians, there is peculiar reason for the application to him of a jealous test." But in this case the judges were simply sitting as judges to pass upon the questions of law, and the court discriminated that case from such a case as the one in hand.

Chapman v. Stoneman, 63 Cal. 490, does not seem to us to be in point. It was simply held in that case that the governor had authority and jurisdiction to investigate questions of misconduct on the part of the state board of prison directors. There is no intimation in the case anywhere of any charge of bias or prejudice on the part of the governor. *Allen v. Reilly*, 15 Nev. 452, cited on page 8 of respondents' brief, is evidently a miscitation, as the case is not to be found in that volume. It was probably taken from the citations given by 12 Am. & Eng. Enc. Law to sustain the text announced by that court, which we commented on above but the author was mistaken in the citation; *Pearson v. Hopkins*, 2 N. J. L. 181, was a challenge to a judge who had acted in the circuit court, and had overruled a motion of the defendant for a nonsuit, and it was held that this did not disqualify him from sitting in the case on appeal, the court rightfully taking the view that, if the expression of an opinion by a judge on the law disqualified him, he would be disqualified from trying a case upon the granting of a motion for a new trial. The same was substantially the holding in *Pierce v. Delamater*, 1 N. Y. 17, and the same in substance was decided in *Waters-Pierce Oil Co. v. Cook*, 6 Tex. Civ. App. 573. We do not think the other cases cited in respondents' brief, and commented on therein, are in point. We will, however, especially notice the two which are nearest in point. In *People, Doherty, v. New York Police Comrs.* 84 Hun, 64, it was held that it was not error for a commissioner to sit on the trial of charge against a policeman after he had been challenged on the ground that he had prejudged the case, and did not intend to give the policeman a fair trial, it not being claimed that the commissioner had any interest in the matter, or was disqualified by any statute. This case was based on the doctrine of necessity, and it was asserted by the court that, if the judges who were challenged were thereby rendered disqualified to try the case, the relator could secure himself in office, because it would leave the board without a majority of its members to render a judgment or make a de-

termination. And in *People, Burby, v. Auburn*, 85 Hun, 601, the decision is substantially the same as the one noticed above, where the court quoted approvingly the announcement by the court in *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88, "that it must be the law from these cases, that where the judicial power has been confined to one judge, and if he should fail to act, there would be no means of proceeding in the matter, though interested, he may take such cognizance of the case as is absolutely necessary, so far that the party shall not be without remedy." But the two last cases, as far as they did go on the subject,—and they may be conceded to come nearer sustaining respondents' contention than any other cases cited,—were overruled in *People, Pond, v. Saratoga Springs*, 4 App. Div. 399, where it was held that a village trustee who prefers charges against a village officer is disqualified to sit as a member of the board of trustees on hearing of the charges, as otherwise he would act as both accuser and judge; especially disapproving *People, Burby, v. Auburn*, 85 Hun, 601, and further holding that the removal of a village officer by the board of trustees is illegal where the charges were preferred by one of the trustees who sat on the hearing, and without whom a quorum of the board would not have been present. And, noticing the doctrine of necessity above spoken of, it was held that the exception to the rule that judicial officers shall not act in a matter in which they are interested, in order to prevent a failure of justice, does not apply so as to permit a disqualified member of a board, the powers of which may be exercised by a majority of its members, to take part in a judicial proceeding by the board. This case seems to us to be a parallel case with the one at bar, so far as this question is concerned. The court makes the announcement that one of the rights secured to an accused person by the law of the land is that his accuser shall not be at the same time his judge. "Cases are to be found," says the court in this case, "where judicial officers, or officials acting in a judicial capacity, have been permitted to act notwithstanding the disqualification of interest; but I think, without exception, they have all been cases where, unless such officer was permitted to act, there would have been a failure of justice, for the reason that there was no other person who could act. They have been confined to cases where the judicial tribunal or body to act consisted of but a single person, and there was no other tribunal or officer before whom the proceedings could be taken, and the officer was permitted to act from necessity." It is conceded by the counsel for the respondents that this case overrules the former cases reported in the New York Supplement, but they insist that the reasoning of the former cases is better, and that the decisions are more in consonance with the adjudicated cases. But we cannot agree with them on this proposition. The principles of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty, and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in *People, Ros, v. Suffolk Common Pleas*, 18 Wend. 550, "next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge." The reason that financial interest or near relationship to a litigant is held to be sufficient to recuse a judge is that it is to be presumed that self-interest or natural affection will unconsciously prejudice a judge, and deprive the litigant of a fair trial. This presumption in certain cases may or may not be justified by the truth, but so solicitous is the law to maintain inviolate the principle that every litigant shall be secure in his right to a fair trial that he is accorded the benefit of the presumption. But what does a presumption amount to compared with the admitted fact that the judge will not accord the litigant a fair trial; that he will vote to remove him from his office, no matter what the evidence may be? And this, so far as this case is concerned, the demurrer to the affidavit having been sustained, must be considered the fact. To compel a litigant to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and insist that he will adhere to it, no matter what the evidence may be, would be so farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression "administration of justice." As sustaining this view the following cases, cited by appellant, are found to be in point: *Barnett v. Ashmore*, 5 Wash. 163; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Stocknell v. White Lake Twp. Board*, 22 Mich. 341; *Oakley v. Aspinwall*, 3 N. Y. 547; *Williams v. Robinson*, 6 Cush. 384. A review of the cases cited by appellant is made by the respondents for the purpose of showing that the facts decided in them are not similar to the facts in the case at bar, and, while it is true that in some of the cases financial interest was claimed, yet, as a rule, the decisions are not based upon that ground, but upon the broad ground that the citizen is entitled to a judge who is absolutely impartial. The merits of the case are not now before us.

The permanent writ will issue.

Scott, Ch. J., and Anders, Gordon, and Reavis, JJ., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Alice WALSH *et al.*, Admxrs., etc., of John Walsh, Deceased,

v.

William A. PACKARD, *Appt.*

(166 Mass. 189.)

The administrators may sue upon a covenant to pay rent to their intestate which is appended to a lease made by him, al-

though his heirs are the only persons who would suffer substantial damages by failure to pay it.

(January 11, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Suffolk County in favor of plaintiffs in an action brought upon a covenant of suretyship for the payment of rent. *Affirmed.*

The facts are stated in the opinion.

NOTE.—*Right to rents on lease of intestate's property.*

I. *Classification by states.*

II. *English cases.*

a. *Form of lease.*

b. *Apportionment.*

c. *Summary of English cases.*

III. *Summary as to rents accruing during owner's life.*

IV. *Summary as to rents accruing after owner's death.*

a. *Rights of heir.*

b. *Rights of administrator.*

1. *By statute.*

2. *In a foreign state.*

c. *Liability of administrator.*

1. *Generally.*

2. *For use and occupation.*

3. *Accounting and sureties.*

d. *Rights of creditors.*

e. *Apportionment.*

This note is limited to rents of intestate property, for the reason that where decedent left a will the question is chiefly one of the construction of the terms of the will.

In *WALSH V. PACKARD* it was held that the administrators could sue upon a covenant attached to a lease as follows: "In consideration . . . I do hereby become surety for the prompt and full payment of the rent and performance of the covenants as specified in the above lease to be paid by . . ." It was held that the covenant did not run with the land, and it was said "that the heirs are the only persons interested in the rent, and therefore are the only persons who suffer substantial damages by a failure to pay it. We assume that, if the administrators recover substantial damages, they will receive them as trustees for the heirs." The question decided on the facts of the case seems to be new; but treating this covenant as a purely personal contract the case is sustained by analogous cases.

I. *Classification by states.*

Alabama.

An administrator is authorized by statute to rent the land of the decedent, and to collect the rent. *Patapasco Guano Co. v. Ballard*, 107 Ala. 710; *Vandegrift v. Abbott*, 75 Ala. 487; *Palmer v. Steiner*, 68 Ala. 400; *Leatherwood v. Sullivan*, 81 Ala. 458; *Eubank v. Clark*, 78 Ala. 73; *Long v. McDougald*, 23 Ala. 413.

So, under Ala. Code 1876, § 2446, authorizing an administrator to rent lands of the intestate, it was held that the power to rent lands rendered the administrator liable to the tenant for necessary repairs, in the absence of a stipulation. *Vandegrift v. Abbott*, 75 Ala. 487.

And in *Patapasco Guano Co. v. Ballard*, 107 Ala. 710, an administratrix was allowed credit for rents that she collected and applied to the payment of a mortgage in default on the land, where the land was not equal in value to the mortgage. (Ala. Code 1886, § 2102, authorized an administrator to rent lands.)

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And 1 Brickell (Ala.) Dig. p. 937, §§ 330-333, authorizing the personal representative to intercept the descent of the heir, to take rents accruing, and to rent or sell the land when necessary for the payment of debts, modified the rule of common law that if the lessor dies rent that has accrued, that is due and payable, passes to the personal representative and rent subsequently accruing belongs to the heir; and a claim against the intestate by the lessee was a valid set-off in an action by the personal representative for the rent. *Palmer v. Steiner*, 68 Ala. 400.

In *Leatherwood v. Sullivan*, 81 Ala. 458, it was said that the personal representative was the owner of the land to a certain extent, and that he might destroy the heirs' rights to the rents or income and profits of the land by the commencement and prosecution of an action for them in his name.

In *Eubank v. Clark*, 78 Ala. 73, it was said that if it was not for Ala. Code, § 2446, the administrator would have no authority to rent the lands.

In *Long v. McDougald*, 23 Ala. 413, it was said that under Clay's (Ala.) Dig. 229, § 46, the administrator had no title whatever to the land, but only power to rent, or power to sell when ordered by the probate court.

Some statutes require this to be done by auction. *Martin v. Williams*, 18 Ala. 190; *Long v. McDougald*, 23 Ala. 413; *Harkins v. Pope*, 10 Ala. 493; *Boynton v. McEwen*, 36 Ala. 348.

So, under Ala. Dig. 199, § 6, providing that it shall be lawful for administrators to rent at public outcry the real estate of the decedent until a final settlement of the estate is effected, and the proceeds shall be assets, to entitle the administratrix to rents as assets she should rent the same at public outcry. *Martin v. Williams*, 18 Ala. 190.

On the death of the intestate, the lands belonging to him descend to his heirs, who hold the legal title subject to certain powers conferred by the several statutes on the administrator, as the right to rent them at public outcry if the estate be solvent until the final settlement, and if it be insolvent the personal representative should apply to the orphans' court, within three months after the report of such insolvency, for leave to sell the land. It was said the administrator may recover the rent accruing either before or after the death of the intestate upon the demise of the intestate. *Long v. McDougald*, 23 Ala. 413.

Under Clay's (Ala.) Dig. 199, § 36, authorizing administrators to rent at public outcry the real estate of the decedent until the final settlement of the estate, an administrator is authorized to collect the rent under a lease made with the decedent. *Harkins v. Pope*, 10 Ala. 493.

And where he has the authority under the statute to collect rent, he will be bound to use reasonable diligence. *Patapasco Guano Co. v. Ballard*, 107 Ala. 710; *James v. Faulk*, 54 Ala. 184; *Eubank v. Clark*, 78 Ala. 73.

So, under Ala. Code 1886, § 2102, providing that an administrator may rent lands of the estate without requiring personal security, as under the former law, an administrator was only bound to reasonable

implication the undertaking of a surety or guarantor than they are to enlarge that of the principal party. But perhaps the word "surety," although seemingly inartificially

used, coupled with the nature and object of the contract, makes the collateral undertaking as large as the principal one. We will assume that it is to be read in the broader sense. We

be accountable to any person for the rents and profits. *Howard v. Patrick*, 38 Mich. 795.

In *Campau v. Campau*, 19 Mich. 116, it was said that an administrator was only given the right to receive the rents and profits while the estate was in process of settlement, under Mich. Comp. Laws, § 2904, Rev. 1846, chap. 71, § 7.

Under Mich. Comp. Laws 1857, § 2904, the administrator had the right to the possession of the real estate and rents and profits until the estate should be settled or delivered over by order of the probate court to the heirs or devisees, but this was repealed by act of March 29, 1871, *Sess. Laws* 1871, p. 80. It was held that the legislature could take away from the administrator the power of taking and holding the possession of rents and profits, and that this could be done as well after as before they had taken possession. *Campau v. Campau*, 25 Mich. 127.

Mich. *Sess. Laws* 1871, p. 278, authorizing executors or administrators to take possession of the realty of deceased persons, to lease from year to year and cancel or modify any leases given by the decedent during his lifetime, and to keep property in repair, and to receive rents and proceeds until the estate is settled, changed the rule, as before this statute the personal representative had no control over the realty except as power may be granted in certain cases, and the rents belonged absolutely and completely to the heirs or devisees, and this statute did not take away vested rights that accrued before its passage. *Van Fleet v. Van Fleet*, 49 Mich. 610.

So, where an heir was in possession under a lease made by his father, which was to terminate at his father's death, and the administrator allowed the heir to remain in possession pending probate proceedings of a will, upon his executing an agreement authorizing the administrator to withhold from his share the rent, on the failure of the heir to pay the rent the administrator was entitled to summary proceedings to recover possession, if the share of the assets in case the will was probated would be insufficient, as it was the duty of the administrator to exercise the right which the statute gave him to obtain possession and to collect rents and profits for the executor or for the distribution of the estate in case there was no executor. *Wilmarth v. Reed*, 83 Mich. 44.

Where the widow remained in possession of the real estate of her deceased husband it was held that on a bill of foreclosure, she could not be required to account for the rents and profits. *Kitchell v. Mudgett*, 37 Mich. 87.

Minnesota.

Under the statutes of this state the administrator is entitled to the accruing rents, as against the heirs, during administration.

In *Miller v. Hoberg*, 22 Minn. 249, it was said that under Minn. Gen. Stat. chap. 52, § 6, giving the administrator the right to the possession, and to the rents, issues, and profits, the heirs have the right to the possession as against everyone but the administrator or his tenants, and the administrator has the right to the possession as against the heirs or any other person until the estate is settled or until delivered over by order of the probate court.

And in *State, Beals, v. Ramsey County Probate Court*, 25 Minn. 22, it was said that under Minn. Gen. Stat. chap. 52, § 6, an executor or administrator was entitled to the possession of rents, issues, and profits of real estate until the estate was settled or delivered over by order of the probate court to the heir, and under § 7 he was accountable for the income of the real estate while it remained in his possession,
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In *Smith v. Park*, 31 Minn. 70, it was said that under Minn. Gen. Stat. 1866, chap. 52, § 6, authorizing an administrator to lease land during the period of administration, this right conferred by the statute for the purpose of administration was limited to that period.

Mississippi.

The accruing rents belong to the heirs. But under a statute the administrator by order of the probate court could lease the plantation for three years. The administrator may become liable to heirs for rent collected by him as trustee, or at their election they may charge him for net profits if he works the plantation. An apportionment of rent is provided for by statute if a tenant for life dies before rent matures.

So, where a creditor obtained a judgment against an administrator the latter could not by a bill in equity set off the judgment by an account of rents due from the judgment creditor, as the heirs were entitled to the rents, and the administrator was liable for the debt, and there was no privity. *Bullock v. Sneed*, 13 Smedes & M. 293.

And under Miss. Rev. Code 1871, § 1636, giving a remedy to the executors or administrators of any person unto whom any rent is or shall be due and not paid at the time of his death, by an action of debt, covenant, or assumpsit for all such arrearages of rent, and also the remedy of distress, it was held that this section recognized the right of the personal representative to pursue any of the remedies named to recover rent due and not paid to the lessor at the time of his death, but it had no application to rent which accrued after, and the rule was the same as at common law, that rent due at the time of the death of the lessor goes to his personal representative, but rent which accrues afterwards belongs to the heirs. *Bloodworth v. Stevens*, 51 Miss. 475.

An administrator was probably chargeable with rents where he had voluntarily returned the rents as charges in his annual account, and the commissioners following the interlocutory decree merely transferred to the account stated by them the items in the administrator's own accounts, and he made no objection to the charge. The court said that after receiving rents for over ten years, and professing to account for them in his trustee capacity, it would be monstrous now, after the claim against him in every capacity is barred by limitation, to permit him to raise the objection now insisted on. The court further said that the rents belonged to the distributees, and they had the right to advance them or any other money belonging to them for the payment of debts, so as to protect the specific property. *Crowder v. Shackelford*, 35 Miss. 321.

And where an administrator carried on the plantation without authority for the heirs, he was liable for the net profits or for the reasonable hire and rent at the election of the heirs, and when the heirs made an election it was irrevocable. *French v. Davis*, 38 Miss. 167.

In *Trotter v. Trotter*, 40 Miss. 704, it was said that if an administrator worked a plantation with the assent of the heirs they could not charge him as for the wrongful act with rent, in a petition in the probate court on the ground that he had obtained no order, and if the administrator carried on the business without their consent and without an order of court, he was not amenable to the probate court, but was liable, if at all, to the heir to whom the land descended immediately on the death of the ancestor.

An administrator was not authorized to lease or cultivate wild land, but was entitled to lease and

have no doubt that it continues to run after the death of the original covenantor. But, supposing heirs, executors, and assigns to have been mentioned, it seems to be settled in this

commonwealth that the instrument would not work like a letter of credit offering a new contract to the successors of Walsh (*Saunders v. Saunders*, 154 Mass. 337, 338; *Abbott v. Hills*,

hire the plantation or farm for three years, under Miss. act Nov. 22, 1865, Pamph. Laws 1865, 140, 141, authorizing the personal representative to lease and hire for a term not exceeding three years the plantation. *Murphy v. Thomas*, 41 Miss. 429.

In *Bloodworth v. Stevens*, 51 Miss. 475, it was said that Miss. Rev. Code 1871, § 1639, providing that if the tenant for life die before the day when any rent is to become due, the executor or administrator may recover the proportion of rent which accrued before the time of his death, was an exception to the common-law rule in behalf of a life tenant who had made a demise and died and gave to his personal representatives the rent up to the time of his death proportionately.

Missouri.

The heirs are entitled to accruing rents except in certain cases provided for by statute. And the heirs allowing the administrator to collect rents may be bound by estoppel. A statute authorizes the administrator in certain cases to lease the land for short terms, and an administrator collecting rents is liable therefor. A foreign administrator has no authority to collect accruing rents. An apportionment will be made of accruing and accrued rents.

Unaccrued rent on land after the death of the owner belonged to the heirs and not to the administrator, except in certain cases provided for by the Missouri statute, subjecting real estate to liabilities for debts and the like. *Shouse v. Krusor*, 24 Mo. App. 279.

In *Eoff v. Tompkins*, 2 Mo. App. 461, it was said, under *Wagner's* (Mo.) Stat. 89, § 48, directing that executors and administrators under the direction of the court shall lease the real estate for any term not more than two years, and shall receive and recover rents, the rents so collected are necessarily assets in the hands of the executor or administrator.

And under Mo. act January 12, 1822, authorizing the administrator to lease out the real estate of an intestate who shall have died without leaving any heirs or legal representatives, an administrator could recover in assumpsit for the use and occupation of the house of the intestate after his death. *Rector v. Ranken*, 1 Mo. 371.

And in *Lass v. Eisleben*, 50 Mo. 122, it was said that an administrator under the direction of the probate court or courts having probate jurisdiction could make short leases of the real estate belonging to the decedent.

Where distributees neglected to take possession of land, and allowed the administrator to collect their rents and disburse them as administrator, they could not afterwards prevent the payment by the administrator of a claim against the estate by asserting that the rents belonged to them. The court said, having allowed their rents to remain in the hands of the administrator, and having allowed him to collect the rents and treat them as moneys belonging to the estate, and disburse them as such, they cannot be allowed now to recoup themselves by laying their hands upon this judgment in preference to a creditor of the estate. *Tyler v. Priest*, 31 Mo. App. 272.

Under Mo. Rev. Stat. §§ 70, 129, 130, 146, making it the duty of an administrator to inventory real estate, and providing that he may lease it for short terms under the direction of the probate court, and that whenever the court shall be satisfied that any real estate need not be sold or leased for the payment of debts, the executor or administrator shall be ordered to deliver possession of the same to those entitled to it, rents collected by an adminis-

trator which he was not bound to collect were assets when collected, and if the administrator leased the realty without authority, and received rents, these rents would be assets, and he should account for them. *Lewis v. Carson*, 16 Mo. App. 342.

In *Lewis v. Carson*, 93 Mo. 587, it was said that under Mo. Rev. Stat. §§ 70, 129, 130, 143, an administrator under the order of the probate court may lease the real estate and collect the rents. It was held that "although the executor or administrator takes possession of real estate and collects the rents arising therefrom without an order of the probate court, he and his sureties on his bond must account therefor. This is no longer a debatable question in this state." *Gamble v. Gibson*, 56 Mo. 592; *Dix v. Morris*, 66 Mo. 514."

In *Hartnett v. Fegan*, 3 Mo. App. 1, it is said that an administrator as such had no interest in the real estate of his intestate beyond a naked power to sell or lease under the direction of the probate court for the payment of debts, and that if he leased the land without authority from the court the rents received would be assets in his hands, and he should account in a settlement for rents received, whether with or without the direction of the probate court.

In *McPike v. McPike*, 111 Mo. 216, it was said that under Mo. Rev. Stat. chap. 1, art. 4, § 69; art. 5, §§ 93, 94; art. 7, §§ 129, 130; art. 8, § 145, requiring an administrator to inventory the real estate, and authorizing him under an order of the probate court to lease the real estate and collect the rents, the receiving of rents and sale of realty were clearly within the scope of the lawful exercise of his authority as administrator under certain circumstances, and if without an order of court he assumed to take the rents by color of his office, he was estopped from pleading his own failure to perform the conditions precedent, and the collection of rents and the proceeds of sale were within the scope of his duties, and his sureties were bound.

In this case it was said that "at common law the administrator had nothing whatever to do with the real estate of his intestate. It descended to the heirs. Accordingly at the common law, and in those states generally where the common law has been adopted, and only modified to the extent of permitting a sale of the lands to pay debts, it has generally been held that where an administrator came into the possession of rents from the realty or the proceeds of sale, he was chargeable therefor individually as a trustee or trespasser, but not in his character as administrator."

Under Mo. Rev. Stat. § 129, providing for lease of lands by an administrator in this state, such lands could not be leased by a foreign administrator. *Crockett v. Althouse*, 35 Mo. App. 404.

And in the absence of proof as to what was the law in Illinois the common law was held to control, and under Missouri Revised Statutes, authorizing an administrator under an order of the probate court to lease the real estate and collect the rents, he was not liable as such administrator for rents collected in Illinois, where such rents were received as the attorney in fact or guardian *ad litem* for the heirs, and not as administrator. *McPike v. McPike*, 111 Mo. 216.

Rents accruing prior to the testator's death belonged to the administrator, and those accruing after such death passed to the heirs, unless the probate court directed the administrator to take possession, but such an order of the probate court would not ratify the collection wrongfully made by the administrator previous to such order. *Sealey v. Blake*, 70 Mo. App. 229.

And Mo. Rev. Stat. § 129, providing that no ad-

v. Jackson, 125 Mass. 807; *Cummings v. Watson*, 149 Mass. 262.

Nor can the administrator maintain a suit to recover rent, even as agent of the heirs, in the

absence of an express contract by the tenant with the administrator.

Cummings v. Watson, 149 Mass. 262.

A surety is a favorite of the law, and his

and profits of the decedent's land where he occupied and used it as his own. *Re Missamore*, 90 Cal. 169.

But an administrator occupying land would not be liable to the estate for the value of its use and occupation after the sale of the premises by the sheriff. After such time he would be bound to account to the purchaser for the value of the use and occupation. *Walls v. Walker*, 37 Cal. 424, 90 Am. Dec. 290.

Colorado.

The right to the rents accruing from real estate belong to the heirs, unless land has been leased under an order of court.

Colorado Stat. 1891, §§ 4750, 4761, Rev. Stat. 1893, § 96, p. 670, Gen. Laws 1877, § 2833, p. 964, Gen. Stat. 1893, § 8577, p. 1047, provides that where the personal estate is insufficient to pay the just debts allowed against the estate, the real estate may be leased by the administrator upon the order of the court.

Under Colo. Gen. Stat. § 2270, chap. 72, providing that in case any married man shall deprive his wife of over one half of his property by will, it shall be optional with such married woman after the death of her husband to accept the conditions of the will, or one half of the estate, both real and personal, it was held that one half of a lot devised to one not an heir at law became the property of the widow on the renunciation of a will the estate being insolvent. It was further held that there was no error in decreeing "that the deficit in the widow's allowance should be paid out of the rents of the real estate, including said lot, and that one half of the rents of said lot, in the hands of the administrator, belonged to the widow, as the owner in fee of one half of said lot." *Logan v. Logan*, 11 Colo. 44.

A person who purchased the lands of the estate from the administrator, who was not authorized to sell, was required to account to the heirs for their share of the rents and profits of the property during the period of his possession. *Filmore v. Reithman*, 6 Colo. 120.

Connecticut.

Conn. Gen. Stat. 1888, § 577, provides that "the executors and administrators of deceased persons shall, during the settlement of the estates of such persons, have the possession, care, and control of their real estate, and all the products and income of such real estate during such time shall vest in them as personal property, unless such real estate has been specifically devised or directions given by will in regard to it inconsistent herewith." But the family of such decedent shall be allowed to remain in the dwelling house occupied by him at the time of his death, and may occupy such other lands as the court may consider necessary until the same shall be sold.

In *Remington v. American Bible Soc.* 44 Conn. 512, under Conn. Rev. 1875, title 13, chap. 11, § 28, providing substantially as in Gen. Stat. 1888, § 577, where there was a lapsed legacy, it was said: "Where it is settled that the farm belongs to the heirs at law, and in the supposed case when it is known that the real estate is not needed for the payment of debts, and it goes to those whom the law points out as the owners, there would go with it in each case, as its proper incident, the rent earned by it during the period of litigation, and that they are to profit by the earnings of the land as fully as if no unfounded claim had prevented them from taking possession upon the death of the intestate," and the court held that the realty descended to the 40 L. R. A.

heirs at law of the testatrix, and that they were entitled to the accumulated rents.

In *Staples's Appeal*, 52 Conn. 421, it was said that in 1856 the legislature for the first time provided that the executors and administrators shall have the possession, care, and control of the real estate of the decedent in the same manner as of the personal estate.

Where an estate was solvent the rents and profits of the real estate belonged to the heirs, and the administrator who collected the rents was accountable only to the heirs, and not to the probate court. *Goodrich v. Thompson*, 4 Day, 215.

Where A leased certain premises for one year with the privilege of five years at the same rent, allowing the lessee to improve the premises and charge the expenses to A, and A died insolvent before the expiration of the year, in an action by the heirs to recover for use and occupation it would be presumed that they assented to the occupancy under the term of the original lease, and the expenses of the improvements were deducted. *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 625.

Where a parol lease was made for a year by a guardian of the land of his ward, and the ward died within the year, it was held that by the death of the ward before the expiration of the term, the lease was determined, and no rent became payable, and the heir could not maintain an action of assumpsit for the rent which accrued previously to the death of the ward. *Welles v. Cowles*, 4 Conn. 182, 10 Am. Dec. 115.

Delaware.

Rents which come to the administrator's hands are made assets by statute; but it was held that this statute did not render the sureties on the administrator's bond liable for rents where the administrator had not been charged with the rents in his settlement.

An administrator's bond did not extend to rents. The court said that "the reason was that the condition of the administration bond did not cover rents, but was only for the faithful administration of the goods and chattels, rights and credits, of the decedent. Rents are not such." It was said that under Del. Dig. 228, a recovery might be had in assumpsit. *State, Brown, v. Brown*, 2 Harr. (Del.) 5.

Under Del. Dig. 226, § 13, providing that rents of the real estate of the deceased which shall come to the administrators are made assets for the payment of demands against the deceased; but it is provided that this shall not extend the obligation of the bond, —it was held that an action of assumpsit by a creditor would lie against an administrator for rents. *Davis v. Rawlins*, 3 Harr. (Del.) 346.

In an action of debt on an administration bond to recover the balance on administration accounts and certain rents received by the administratrix, it was claimed that prior to 1837 the administratrix's bond did not cover the rents. It was held that the administratrix should have been charged with rents by citation and account before the register, before they could be recovered in an action on the bond. *State, Giles, v. Waples*, 5 Harr. (Del.) 257.

District of Columbia.

Where the administratrix of a husband alleged in her bill that the deceased wished to make it appear that he was without property in order to avoid being importuned to become surety for others, and that decedent caused his real estate to be placed in his wife's name and asked for an accounting for rents by the widow, it was held that rents and profits that she might have received from the prop-

contract of suretyship is to be strictly construed, and is not to be extended by implication, or by operation of law, beyond the terms in which it is expressed.

Taylor, Land. & T. § 424b; *Miller v. Stewart*, 9 Wheat. 680, 6 L. ed. 189; *Grant v. Smith*, 46 N. Y. 98; *Lafayette v. James*, 92 Ind. 240, 47 Am. Rep. 140.

erty after the conveyance made to her during the life of her husband, and with his permission and consent, formed no part of the personal estate of the deceased, and his administratrix was not entitled to claim them, and was not responsible for them as personal assets, and where the rights of creditors were not prejudiced the personal representative had no claim against the rents. *McCartney v. Fletcher*, 10 App. D. C. 572.

Florida.

In *Sanchez v. Hart*, 17 Fla. 507; *Gilchrist v. Filyau*, 2 Fla. 94; *Union Bank v. Powell*, 3 Fla. 175, 52 Am. Dec. 367; *Deans v. Wilcoxon*, 25 Fla. 980; and *Merritt v. Daffin*, 24 Fla. 320,—it was said that the administrator was entitled to the rents and profits after the death of the intestate until the same has been administered.

Georgia.

In this state the administrator has the authority to collect accruing rents if needed for the purpose of administration.

So, under Ga. Code, 2279, providing that when the owner of real estate grants to another the right to enjoy the use of the same for a fixed time or at the will of the grantor the relation of landlord and tenant exists, and that no estate passes out of the landlord, and the tenant has only the usufruct; where land was rented for one year the right to possession and use for that year was disposed of, and on the death of the landlord intestate within the year the heirs had no right as heirs to rents accruing for that year, but the right to collect and distribute was in the personal representative. *Autrey v. Autrey*, 94 Ga. 579.

And where an intestate left land undisposed of the heirs were entitled to the immediate possession subject to the widow's right and the power of the administrator to administer, and if there were no creditors, and the administrator rented out the lands, the accruing rents not needed for administration belonged to the heirs, although the legal right to collect was in the administrator. *Autrey v. Autrey*, 94 Ga. 579.

A conveyance by an heir to a purchaser of all his interest in the land of the intestate, which is silent as to rents and as to the time of giving possession, passed no title to rents to become due from tenants who at the date of the conveyance occupied for the year in which the intestate died under contracts with the intestate; but if the land was occupied under contracts with the administrator it was otherwise, unless creditors and expenses of administration were unsatisfied. *Autrey v. Autrey*, 94 Ga. 579.

Where a wife held a bond for title, and died, and the husband made a crop on the land for himself and infant children, there being no administrator, whatever was made on the land by the crop belonged to the father subject to the charge for rent. *Gibson v. Carreker*, 82 Ga. 46.

Where a mother was in possession of a farm, and rented it out for the year 1882, and disclaimed title in the spring of that year, and said the same belonged to her son, and she died, and it was claimed that the conveyance by her to her son was to defraud her creditors, it was said that with proper pleadings the rents, as well as the land, might be subjected to the payment of her debts if she had conveyed fraudulently. It was held that if she was entitled to rents for that year, it was not wrong for her son to receive and take care of rents payable in kind, and was not inconsistent with the interest of the creditors or of any legal representative of 40 L. R. A.

the estate that might be thereafter appointed. *Johnson v. Johnson*, 80 Ga. 280.

Illinois.

In this state the heirs are entitled to accruing rents. The administrator is liable as trustee for rents collected.

In *Smith v. McConnell*, 17 Ill. 135, 63 Am. Dec. 340, it was said that the lands of one dying intestate descend to the heir, and although it is subject to the payment of debts, and may afterwards be devested by decree and sale of the administrator, the heir is nevertheless owner, and entitled to rents and profits in the meantime.

So, where a tenant had a lease on the land for two years ending September 1, at \$50 a year, and he held over eight days thereafter, and his landlord died, the accruing rents for that year descended to the landlord's heirs as a chattel real, and with it the administrator had no concern any more than the land in the meantime. *Foltz v. Prouse*, 17 Ill. 487.

And in *Dixon v. Nicolls*, 39 Ill. 372, 89 Am. Dec. 312, it was said that where rent accrued on land in kind upon a lease granted by the owner in fee, and which did not mature until after the death of the lessor, it was a chattel real, and would go to the heirs, and not to the executor or administrator.

And in *Stark v. Brown*, 101 Ill. 395, it was said that it was not the duty of the administrator to pay the taxes on the decedent's land, as it descended to the heirs at law, and they at once became entitled to the rents and profits thereafter maturing.

Where the husband of one of the heirs leased to two parties part of the land for part of the crops as rent, and the administrator sold the land by an order of court to pay debts, the grantee was entitled to accruing rents. *Foote v. Overman*, 22 Ill. App. 181.*

Where a sale made by an administrator to himself was set aside upon a bill filed by the heirs for that purpose, it was held that the administrator was a trustee, and was entitled to have an account stated, and should be charged with the rents and profits received, and credited with moneys paid out on the purchase and applied to the discharge of debts and necessary repairs and reasonable improvements. *Lagger v. Mutual Union Loan & Bldg. Assn.* 146 Ill. 283; *Kruse v. Steffens*, 47 Ill. 112.

Although the heir may question the right of an administrator to collect the rents, and claim the money as his own, yet if he chooses to treat the money received by the administrator as in his hands for the payment of debts, the administrator cannot complain that he is charged therewith. *Goepfner v. Leitzelmann*, 98 Ill. 409.

So, where an administrator purchased property for himself at his own sale in the name of another party, and the sale was set aside at the instance of the heirs, an account was required of the rents and profits from the time of the administrator's purchase. *Miles v. Wheeler*, 43 Ill. 123.

And where an administrator purchased a leasehold estate belonging to his intestate in his lifetime, and charged himself with rents and profits, and treated it as assets, he could not thereafter claim it as his own property, and should account for it as assets. It was said that if the leasehold estate was personal property, of which we have no doubt, it went to him as administrator, and he had control of it, and was bound to dispose of it for creditors and distributees of the estate, and not make a profit out of it for himself. *Willenborg v. Murphy*, 36 Ill. 344.

Where an administrator made an application to sell real estate to pay debts, evidence was admissible

Such a covenant has been held to be a covenant running with the land.

Allen v. Culver, 3 Denio, 284.

ble to show that the administrator had received meane profits from the occupation of the land more than sufficient to pay the debts. *Dorman v. Lane*, 6 Ill. 143.

Indiana.

Ordinarily an administrator has no right to rents accruing after the death of the intestate, but they belong to the heirs. Under a statute, however, the administrator may become entitled to the rent provided that he obtains authority from the court. The administrator is liable to account to the heirs for rents collected accruing after the death of the landlord. It seems under the statute there may be an apportionment where the landlord dies or rent matures.

So, an administrator had no right to the rents accruing after the death of the intestate. *Kidwell v. Kidwell*, 84 Ind. 224.

So, rents which accrued from the real estate of an intestate after his death belonged to his heirs, and not to his administrator. *Evans v. Hardy*, 76 Ind. 527.

And in *Egbert v. Thomas*, 1 Ind. 393, it was said that the remedy of the heir against the widow for rents and profits of the real estate occupied by her was at law.

And an administrator was liable to account to the heirs for rents accruing after the death of the landlord, and it was no defense that the rents were used to pay debts. *Trimble v. Pollock*, 77 Ind. 576; *McClead v. Davis*, 83 Ind. 263.

And under Ind. act 1843, authorizing an administrator to lease property for the payment of debts, giving such power in instances where adversary proceedings were had to the extent of making those interested in such lands parties, it was held that if no such proceedings were had the lease would be no defense in an action by a guardian of minor heirs against a lessee of the administrator for the use and occupation of their property. *Platt v. Dawes*, 10 Ind. 60.

So, under Ind. Rev. Stat. 1881, § 2369, providing that a lease or mortgage executed by the executor or administrator under the authority of the court shall be valid, but before any such order is made a bond must be executed as required previous to making an order for the sale of real estate, an administrator was not entitled to rents and profits of land which descended to the heirs without filing a petition and obtaining an order of the court and giving an additional bond. *State, Homer, v. Barrett*, 121 Ind. 92.

And under 2 Ind. Rev. Stat. 1876, § 34, p. 505, requiring the administrator to make out an inventory of emblements and annual crops, whether severed or not from the land, raised by labor, the rent crop planted after the decedent's death was not part of the decedent's estate, and the administrators were not chargeable as administrators with those crops. *Rodman v. Rodman*, 54 Ind. 444.

In *Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324, it was said that ordinarily an administrator was not chargeable with the rents of real estate accruing during his administration.

Where rents accrued prior to the death of the decedent they belonged to his personal representative, but it was necessary to show that rents did accrue in order to entitle the administrator to sue for them. It was not enough to show mere continued occupancy by one of the heirs. *Humphries v. Davis*, 100 Ind. 369.

So, rents which accrued previous to the death of the lessor were collectible by the personal representative, and those which accrued afterwards by the heir. *King v. Anderson*, 20 Ind. 385.

40 L. R. A.

And it is of no consequence that the covenantor is a mere stranger, and not the person who conveyed the land to the covenantee.

In *Dorsett v. Gray*, 98 Ind. 273, it was said that rents which accrued before the death of the lessor were collectible by his personal representative, and those accruing afterwards were collectible by his heirs.

Under a statute of Indiana an apportionment may be made where rent matures after the death of the landlord.

So, under Ind. Rev. Stat. 1881, § 5223, providing that when a tenant for life, who shall have demise any land, shall die on or after the day when any rent becomes due, his executor or administrator may recover from the under tenant the whole rent due; if he die before the day when any rent is to become due they may recover the proportion of rent which accrued before his death, and the remainderman shall recover the residue,—where the lessor, who was a life tenant, died before the lease expired, his administrator could recover the rent which accrued prior to his death. *Henry v. Stevens*, 108 Ind. 281.

In *Watson v. Penn*, 108 Ind. 21, where a testator made a lease, and left a life estate in the land to his widow, and the widow died before any rent was due, in a contest between the administrator of the widow and the reversion it was held that the accruing rent went to the reversioner.

It was further held in that case that Ind. Rev. Stat. 1881, § 5223, did not apply, as the lease was not made by the life tenant, who took her estate subject to the existing lease; and as the reversion came from the lessor, it gave the right to collect all accruing rents as an incident to the estate.

Iowa.

The heirs are entitled to rents accruing from the lands after the death of the intestate. Under a statute in this state if there are no heirs present or competent to take possession the administrator may do so and receive the rents. The administrator is entitled to rents that accrue before the death of the intestate. If the administrator improperly collects rents belonging to the heirs he is liable to them individually.

So, an administrator was not entitled to the rents of the lands of the intestate, which accrued after the death of the intestate. *Crane v. Guthrie*, 47 Iowa, 542.

And in *Kinsell v. Billings*, 35 Iowa, 154, it was said that an administrator had no right to receive the rents and profits accruing after the death of the intestate.

And an administrator who was also guardian had no right to include in his account as administrator moneys received by him for the rent of the real estate of the decedent after his death, and with which he should properly be charged as guardian. *Foteaux v. Lepage*, 6 Iowa, 123.

And an administrator had no right to the rent of the homestead as against the widow for use and occupancy. *Huey v. Huey*, 26 Iowa, 625.

In *Beezley v. Burgett*, 15 Iowa, 192, it was said that at common law the administrator succeeds to the personal estate, and that the real estate, if not disposed of by will, descends to the heirs, and that the administrator has no right to recover the rents and profits accruing after the death of the intestate, and that under the Iowa statute it is only when it is necessary to procure the payment of debts that he can exercise any control over the real property.

In *Kinsell v. Billings*, 35 Iowa, 154, it was said that at common law the administrator had no control over the rents and profits of the real estate, and such was the law in Iowa except when the statute provided otherwise, and that the law of

Pakenham's Case, 2 Co. Litt. 385; *Spencer's Case*, 5 Coke, 16, 1 Smith, Lead. Cas. *88; *Sharp v. Waterhouse*, 7 El. & Bl. 816.

1886, chap. 139, Rev. § 3954, provided that if there were no heirs or devisees of the testator or intestate present or competent to take possession of real estate, the executor or administrator may, as trustee for the proper heirs or devisees, receive the rents and profits arising therefrom.

And under Iowa Rev. Laws 1886, chap. 139, p. 150, 11th Gen. Assem. §§ 3-5, an administrator could not recover the rents arising from real estate which accrued after the death of the intestate, unless it was shown that there were no heirs who were competent to take possession of the property. *Shawham v. Long*, 28 Iowa, 488, 96 Am. Dec. 164.

Where an administrator showed that there were no heirs present and competent to take possession of the premises, he could recover rents of real estate which accrued after the death of the intestate, under Iowa Code, § 2402, providing that if there be no heirs or devisees present and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate and receive the rents and profits, and § 2403, providing that such executor and administrator, under the order and direction of the court, may apply the profits of such real estate to the payment of the taxes, debts, and claims against the estate in case the personal assets are insufficient. *Toerring v. Lamp*, 77 Iowa, 488.

But under Iowa Code, § 2408, an administrator was not entitled to rents and profits where there was no order of court made to apply the rents and profits under this section. *Dexter v. Hayes*, 88 Iowa, 493.

In *Dexter v. Hayes*, 88 Iowa, 493, the case of *Toerring v. Lamp*, 77 Iowa, 488, was distinguished, as in that case the administrator had an order of court.

A widow and an assignee of heirs could not maintain an action against an administrator for rents and profits collected from the decedent's real estate, as, if he collected the rents, he was individually liable. On the death of an ancestor the heirs were entitled to the possession of the rents and profits. The court said that if this was to be treated as an action against the administrator a recovery could not be had without an allegation that the estate had been settled and there was a surplus. *Lavery v. Woodward*, 16 Iowa, 1.

Rents that accrued before the death of the decedent were assets in the hands of the administrator. *Crawford v. Ginn*, 35 Iowa, 543.

Kansas.

The heirs are entitled to the rents and profits as against the administrator. But where an administrator charged himself with the rents collected he was estopped from denying his authority.

The title to realty descended to the heirs, and they had the right to receive, as against the administrator, all the rents and profits. *Head v. Sutton*, 31 Kan. 616.

And on the death of an intestate the title of lands vested in the heirs, and they were entitled to the rents and profits of the same; but where the administrator had collected the rents, and had charged himself with the same as assets in his settlement, he would be estopped to deny that the rents so collected were assets. *Kothman v. Markson*, 34 Kan. 542.

In *Head v. Sutton*, 31 Kan. 616, it was said that if the administrator had collected the rent, and had charged himself with it as administrator in his accounts, he would have been liable for the same on the ground of estoppel.

Kentucky.

The heir is entitled to accruing rents. The ad-

The assignee must have the same estate as the original covenantor. But the only privity of estate which is required is privity of estate

administrator is liable as trustee for rents collected, but this liability does not attach to the official bond. A statute provides for apportionment of rents on the death of the landlord having an uncertain interest in the land.

The administrator is entitled only to accrued rents. *O'Bannon v. Roberts*, 2 Dana, 54; *Williamson v. Richardson*, 6 T. B. Mon. 603; *Ball v. First Nat. Bank*, 80 Ky. 501.

And the same was said to be the rule in *Wilson v. Unselt*, 12 Bush, 215.

The heirs, and not the administrator, are entitled to accruing rent. *O'Bannon v. Roberts*, 2 Dana, 54; *Ball v. First Nat. Bank*, 80 Ky. 501; *Eastin v. Hatchitt*, 15 Ky. L. Rep. 789; *Atchison v. Lindsey*, 6 B. Mon. 86, 43 Am. Dec. 153; *Rank v. Hill*, 8 Bush, 67.

And the same was said to be the rule in *Slaughter v. Froman*, 2 T. B. Mon. 95; *Smith v. Bland*, 7 B. Mon. 21; *Thomasson v. Lucas*, 4 Ky. L. Rep. 899.

Under Ky. Gen. Stat. 1879, chap. 39, art. 2, § 29, providing that if the tenant for life of land let the same to another for a year, and die after the 1st day of March, the lessee shall hold the land until the last day of December following, but shall pay a reasonable rent from the death of the tenant for life, reasonable rent could be recovered and not that fixed by the contract, and it was not payable for the entire term fixed by the contract, but only to the last of the following December. *Norris v. Cheatham*, 6 Ky. L. Rep. 223.

Where an intestate had made a deed of trust for his creditors on his property, and afterwards had made a lease to another party, who died, the administrator of the first could not maintain an action for rent, as, in order to recover rents by an administratrix, one of two things should have appeared, that the rent was due and in arrear in the lifetime of the decedent, or that the interest of the intestate in the demised premises was a chattel interest which was not claimed by the intestate but came to the administratrix. *Williamson v. Richardson*, 6 T. B. Mon. 603.

In *Ball v. First Nat. Bank*, 80 Ky. 501, which was a suit by an executor to obtain a sale of the real estate to pay debts, it was held that rents which accrued prior to the testator's death vested in the executor as assets, and the legal title vested in the heirs or devisees on the death of the testator, and so remained until it was divested in pursuance of the decree, and they were entitled to the possession and rents during that period, and the rights of creditors and purchasers did not attach to the rents until the date of confirmation of the sale.

In *Thompson v. Bailey*, 1 Ky. L. Rep. 321, it was held that pending an action for a sale to pay debts, the administrator could collect and apply to the debts the rents accruing after the intestate's death. All of the estate, whether descended to the heirs or technically assets in the administrator's hands, could be so applied. This case seems to conflict with the rule laid down in *Ball v. First Nat. Bank*.

So, for all the rent that was due after the death of the decedent the right of action was exclusively in the heirs whether based upon actual lease or for mere use and occupation. *O'Bannon v. Roberts*, 2 Dana, 54.

Where an administrator collects accruing rents the sureties on his official bonds are not liable, but he is liable individually. *Wilson v. Unselt*, 12 Bush, 215; *Eastin v. Hatchitt*, 15 Ky. L. Rep. 789; *Slaughter v. Froman*, 2 T. B. Mon. 95; *Smith v. Bland*, 7 B. Mon. 21; *Atchison v. Lindsey*, 6 B. Mon. 86, 43 Am. Dec. 103; *Thomasson v. Lucas*, 4 Ky. L. Rep. 899.

And the same was said to be the rule in *Heeter*

with the original covenantee, not with the original covenantor.

Allen v. Culver, 8 Denio, 284; *Norcross v. James*, 140 Mass. 188.

Messrs. Owen A. Galvin and James F. Sweeney, for appellees:

The liability of the defendant is dependent

upon a contingency, namely the nonpayment of rent by the lessee.

Viriden v. Ellsworth, 15 Ind. 144; *Leonard v. Vredenburg*, 8 Johns. 29, 5 Am. Dec. 317; *Skelton v. Brewster*, 8 Johns. 376.

The only connection this has with the real estate is that the original indebtedness came

v. Jewell, 6 Bush, 510; *Oldham v. Collins*, 4 J. J. Marsh. 49.

So, under Ky. Rev. Stat. chap. 37, art. 2, § 9, providing for a bond by the administrator to the effect that he will well and truly make a proper distribution of any surplus money, effects, and rents which shall come to his hands by color of his office, it was held that this referred to rent accruing in the lifetime of the decedent, collected by the personal representative, and his sureties would not be liable for rents collected by him on lands leased by him as administrator which descended to the heirs. It was said that where the intestate holds an obligation for rent, and dies before it falls due, that if it is collected by the administrator it would be regarded as assets for which the surety would be liable. *Wilson v. Unsell*, 12 Bush, 215.

In *Wilson v. Unsell*, 12 Bush, 215, it was held that Ky. Rev. Stat. § 28, p. 507, providing that an estate held by a deceased person for the life of another shall be assets in the hands of the personal representative of the deceased, and § 30, providing that when a person who has a freehold or other uncertain estate in lands shall rent out the lands and die before the rent shall become due the rent of the land shall be apportioned unless a will should otherwise direct, changed the common-law rule as to what constituted assets in the hands of an administrator, but did not make the surety of the administrator liable for the rents that did not belong to the intestate.

In *Wilson v. Unsell*, 12 Bush, 215, it was said that the statutory stipulation in the bond to account for rents was made because under Ky. Rev. Stat. § 30, p. 507, the personal representative was entitled to all the rent where his intestate held an estate for the life of another, and to an apportionment of the rent between him and the heir or those entitled, where the owner of a fee or freehold had rented out the land and died before the rent became due.

Rents accruing after the landlord's death belong to the heir, and not to the personal representative, and if collected by the personal representative his sureties were not liable therefor. *Eastin v. Hatchitt*, 15 Ky. L. Rep. 789.

In *Harmon v. Ross*, Mass. Ky. 1899 (see *Wilson v. Unsell*, 12 Bush, 215), it was said that an administrator and his sureties would be liable on his bond for rents which came to his hands by color of his office. In *Wilson v. Unsell*, 12 Bush, 215, the court criticized this *dictum*, and said that "the attention of the court was evidently called more particularly in that case to the state of the pleadings than the liability of the sureties on the administrator's bond. Neither the sureties nor heirs were before the court. . . . The words inserted in the bond . . . 'to make proper distribution of . . . rents which may come to his hands . . . by color of his office,' cannot be held to embrace an estate that has passed to the heirs."

So, the succeeding administrator could not collect from the sureties of his predecessor rents collected by him, as the administrator had no right to receive the rents of land which descended to the heirs of the decedent. *Slaughter v. Froman*, 2 T. B. Mon. 85.

(The decision in 2 T. B. Mon. has not been recognized in later Kentucky cases as authority.)

And an heir could not maintain an action against the justices of the county court for failure to properly certify an administrator's bond, and hold them

responsible as security for rents, as rents were not assets which an administrator had a right to receive. It was said that an administrator might be made personally liable for the same as trustee. *Smith v. Bland*, 7 B. Mon. 21.

In *Heeter v. Jewell*, 6 Bush, 510, it was said that before the passage of the Revised Statutes, rents accruing after the death of an intestate and collected by his administrator were not legal assets, and hence this court decided, in the case of *Smith v. Bland*, 7 B. Mon. 21, that though the administrator might be made personally liable for the same as trustee his sureties could not. (The court in *Heeter v. Jewell* evidently referred to the statutory provision in regard to the administrator's bond.)

Where an administrator in South Carolina had collected rents since the death of the intestate, the heirs could maintain a suit in chancery in Kentucky against such administrator if found in that state, and he would be held to be a trustee and amenable to the heirs in a court of equity. *Atchison v. Lindsey*, 6 B. Mon. 86, 43 Am. Dec. 103.

So, an administrator has no right to rent real estate, but when he does so he is individually liable. *Thomasson v. Lucas*, 4 Ky. L. Rep. 889.

Where the deceased held a leasehold estate on which were furnaces for making salt that were leased after his death by the administrator for rent payable in salt, and the administrator charged himself with the highest cash rent of the furnaces and received the salt and therewith paid the debts, and charged the estate with the salt at \$2 a bushel, thereby making the salt exceed the rent with which he was charged, it was held to be a speculation, and the estate could claim the profits. *Kellar v. Beelor*, 5 T. B. Mon. 573.

In *Oldham v. Collins*, 4 J. J. Marsh. 49, it was said that if the administrator received rents for which he never accounted he was individually liable for the amount so received.

In *Ball v. First Nat. Bank*, 80 Ky. 501, it was said: "Before and since the Revised Statutes, which are the same as the General Statutes on the subject, the common-law rule that rents accruing after the death of the owner, in fee of real estate, are not assets which vest in the personal representative, has been in force in this state, those statutes regulating the apportionment of rent between the personal representative and heir or devisee being regarded as merely declaratory of the common law; hence the judgment giving to the heirs and devisees the rents accruing after the testator's death and before suit was undoubtedly correct."

Ky. Gen. Stat. chap. 39, § 30, provides that "when a person who has a freehold, or an uncertain interest in land, shall rent out the land and die before the rent shall become due, the rent of the land shall be apportioned between the personal representatives of the deceased and the person who shall succeed to the land as heir, personal representative, devisee, or person in reversion or remainder, unless in the case of a devisee the will shall otherwise direct." The annotator of the Kentucky Statutes says that in *Ball v. First Nat. Bank* "the court seems to have overlooked the fact that, in the General Statutes the word 'an' is substituted for the word 'other.' As, according to the common law, a 'freehold' may be either an estate in fee simple or an estate for life, as an estate for life is an uncertain interest, it was, perhaps reasonably, held that a provision concerning 'a freehold or other uncertain interest in

on account of occupancy of real estate, and if a suit is to be brought upon this contract of suretyship after the death of plaintiff's intestate, it can be brought by no one but the administratrix.

Kline v. Guthart, 2 Penr. & W. 491; *Patchen v. Wilson*, 4 Hill, 57.

land,' was not intended to apply to estates in fee simple. But it . . . [may be reasonably supposed] that the framers of the General Statutes changed the provision so as to make it read, 'a freehold or an uncertain interest in land,' for the express purpose of making it apply to certain as well as uncertain interests; to estates in fee as well as estates for life."

Under Ky. Gen. Stat. art. 2, chap. 39, § 30, where wheat was furnished by the life tenant for sowing, and he died before the crop was matured, the value of the wheat furnished by him was deducted and the balance was apportioned between the remainderman and the representatives of the life tenant. *Redmon v. Bedford*, 80 Ky. 13.

Under the common law rents of land accruing after the death of the decedent were not assets in the hands of the administrator, and this was not changed by Ky. Rev. Stat. art. 2, chap. 37, § 30, 1 Stanton, 508, providing that when a person who has a freehold or uncertain interest in land shall rent out the land or die before the rent shall become due the rent of the land shall be apportioned between the personal representatives of the deceased and the person who shall succeed to the land as heir, the personal representative, devisee, or person in reversion or remainder, unless the will shall otherwise direct, which was nothing more than a re-enactment of 2 Stat. Laws, 688, act 1797, § 48. *Rank v. Hill*, 8 Bush, 67.

In *White v. Clarke*, 7 T. B. Mon. 641, the widow was chargeable with rent of land which was not a part of the mansion house and plantation, allowing a suitable deduction for clearing the land and keeping the same in repair.

Louisiana.

In this state it seems that an administrator is authorized to rent out the plantation of the deceased, and is liable for failure to exercise due diligence in securing a tenant.

Where an administrator made no effort to rent the plantation under his administration, he was liable for the rental value of the same during the time he cultivated them for his own account under the law. *Sparrow's Succession*, 39 La. Ann. 696.

In *Sparrow's Succession*, 39 La. Ann. 696, it was said that the case of *Myrick's Succession*, 38 La. Ann. 611, involved the right of the heirs to claim of the administrator the value of the animals that he should have sold and not allowed to die on the plantation, and to enforce the liability of the administrator for five years' rent, and the court exonerated the administrator on the ground that he could not have sold the animals separate from the plantation, and that he tried without success to lease the plantation, and therefore the administrator was legally justified to cultivate it so as to save it from waste; and the administrator in that case did not seek to bind the succession for debts incurred in his planting operations.

An administrator was not liable for rents where he had made proper efforts but had been unable to lease the plantation, and was compelled to work the place on account of the succession, although loss resulted. *Myrick's Succession*, 38 La. Ann. 611.

And where the property could not be rented the administrator could allow some one to use the same under an obligation to keep it in repair. *Triche's Succession*, 39 La. Ann. 289.

An administrator was liable for the value of 40 L. R. A.

Holmes, J., delivered the opinion of the court:

This is an action upon a covenant appended to a lease, brought by the administratrices of Walsh, the lessor and covenantee. The only objection urged to the plaintiff's recovery is that, if the obligation of the covenant did not

rents, and it was held that there was no law requiring an administrator of a succession to lease its property at auction. *Richmond's Succession*, 35 La. Ann. 858.

Maine.

The heirs, and not the administrator, are entitled to the accruing rents. The administrator is made liable by statute for rents collected by him.

An administrator could maintain an action for rent of land where the rents accrued previous to the intestate's death. *Plummer v. Bowie*, 76 Me. 496.

Where an owner of land executed a lease for a series of years, and died, the rent accruing after his death descended to his heirs, and not to his administrator. *Stinson v. Stinson*, 38 Me. 593.

And in *Fuller v. Young*, 10 Me. 365, it was said that it was a familiar and established principle of law that when a man dies seised of real property of an intestate it descends to his heirs, subject to the payment of his debts, if there be a deficiency of personal estate. His administrator has no right to enter into the lands or take the profits.

Under Me. Rev. Stat. chap. 64, § 19, providing, as a condition of the administrator's bond, treble damages for waste or trespass, and § 54, providing that the administrator shall be chargeable with all interests, profits, and income that come to his hands from any estate of the deceased, and chap. 66, § 20, providing that an administrator may recover damages even against an heir or devisee for waste or trespass, an administrator was liable to the heirs for rents collected by him, as the administrator has no right of possession under these statutes. *Kimball v. Sumner*, 62 Me. 305.

So, under Me. Rev. Stat. chap. 64, § 54, rents and profits did not go to the administrator, but as an account of the heirs to whom they belonged. It was said that, by consent of the heirs, they might be used as assets, in which case the administrator should account for them. Section 55 provides that if the administrator himself occupies he shall account for the rents to the heirs. It was said that there would not be any different liability where he collects the rents of another. *Kimball v. Sumner*, 62 Me. 305.

In *Dennett v. Hopkinson*, 63 Me. 350, it was said that Me. Rev. Stat. chap. 64, § 33 provided that where from any cause there is a delay in granting letters testamentary or of administration, a special administrator may be appointed to collect the rents and profits of the real estate and preserve them for the executor or administrator, and § 55, provided that if any part of the real estate is used or occupied by the executor or administrator he shall account for the income thereof to the devisee or heirs.

And under Me. Stat. chap. 51, § 22, it was held that although an administrator has no legal right to enter into possession of the real estate of which his intestate died seised because it descended to his heirs at law, still when he does so enter and improve it he is accountable to those heirs for the rents and profits. *Heald v. Heald*, 5 Me. 387.

Maryland.

In *Getzandaffer v. Caylor*, 38 Md. 280, it was said that rents accruing after the death of an owner of land do not pass into the hands of an executor or administrator as a part of his personal property, but go to the heirs at law or devisee.

Massachusetts.

The heirs, and not the administrator, are entitled

cease with the life of Walsh, his heirs, and not his administrators, were the proper persons to sue upon it. The covenant is as follows:

"In consideration of the letting of the above-

to accruing rents. The statute provides that if the administrator uses or occupies the same he must account for the rents.

The heirs are entitled to accruing rents. *Brigham v. Hunt*, 152 Mass. 257; *Cummings v. Watson*, 149 Mass. 262; *Jaques v. Gould*, 4 Cush. 384; *Foster v. Gorton*, 5 Pick. 185; *Gibson v. Farley*, 16 Mass. 280; *Lobdell v. Hayes*, 12 Gray, 238; *Alden v. Stebbins*, 99 Mass. 616.

So, where a demandant conveyed premises in 1887, and the tenant received the rents and profits, and the writ of entry was filed in June, 1888, and the demandant died in July, 1888, leaving heirs, the administrator could not prosecute an action for mesne profits from the time of the conveyance to the tenant to the death of his intestate, as heirs or devisees are the only persons who can maintain and prosecute a real action, under Mass. Pub. Stat. chap. 165, §§ 14, 15, chap. 173, § 12, and there was no statute authorizing an administrator who has not been licensed to sell the real estate of his intestate to appear and prosecute a real action. The court said in what way the rents and profits should be recovered in a case of this kind is a question not before us. It was further said there is strong ground for contending that if the heirs had seasonably come in and prosecuted this suit they might have recovered all the rents and profits to which their ancestors would have been entitled if they had not died. *Brigham v. Hunt*, 152 Mass. 257.

And where a tenancy at will had terminated by the death of the owner, and the tenant continued to occupy a part of the real estate and paid to the administratrix rents accruing before and after the intestate's death, but made no further contract, the administratrix could not maintain an action for subsequent use and occupation, as the occupants would be liable to pay rent to the heirs at law as owner, under Mass. Pub. Stat. chap. 121, § 3, Gen. Stat. chap. 90, § 25, providing that persons in possession of lands and tenements as tenants at sufferance shall be liable to pay rent therefor for such time as they may occupy or detain the same. *Cummings v. Watson*, 149 Mass. 262.

So, where rent by the terms of the lease was reserved generally, and was not made payable to any particular person, and it was expressly agreed to be paid quarterly yearly during the whole term of three years, it was held that the lease did not terminate on the death of the lessor. It was further held that the agreement to deliver up the premises to the lessor or his attorney peaceably and quietly at the end of the term meant at the end of three years, and the heirs were entitled to the rent after the death of the intestate. *Jaques v. Gould*, 4 Cush. 384.

Until the executor or administrator sold the real estate according to license obtained from the court, the heirs rightfully in possession were entitled to rents and profits, and rents accruing after the decease could not be said to be the goods, chattels, rights, or credits of the deceased, as they were incident to the reversion. *Gibson v. Farley*, 16 Mass. 280.

Mass. Stat. 1789, chap. 11, § 2, providing that the judge of probate should appoint referees to ascertain what the executor or administrator ought to credit in his account for the use and occupation of the real estate did not give executors and administrators the right to have the rents of the real estate for the use of creditors, but was a provision for a case where they might happen themselves to be occupants, by providing a mode in which they ought to account for the use of those to whom the same might belong, and where the estate was insolvent 40 L. R. A.

described premises and one dollar to me paid, the receipt of which is hereby acknowledged, I do hereby become surety for the prompt and full payment of the rent and performance of

the heirs were entitled to rents until the estate was sold for the payment of debts or entered by the mortgagee. *Gibson v. Farley*, 16 Mass. 280.

In *Drinkwater v. Drinkwater*, 4 Mass. 353, it was said that "at law the lands descend to the heir subject to the payment of debts, if there be a deficiency of personal assets. The administrator frequently enters on the land, and accounts for the rents and profits in the probate court; and this practice may not be inconvenient to the heirs. For the profits become a part of the fund, if wanted, for the payment of the debts; and, if not wanted, they form a part of the distributive shares of the personal estate. But in law the administrator has no right to enter into the lands, or to take the profits. He has no interest in them, but a naked authority to sell them on license to pay the debts, when the personal estate is insufficient."

In *Lobdell v. Hayes*, 12 Gray, 236, it was said that "upon the decease of the owner of real estate, it descends to and vests in his heirs at law, unless otherwise disposed of by his will. It vests in his heirs, however, subject to the payment of his debts. But until a sale is lawfully made for that purpose the heirs may enter upon the estate and receive the rents and profits."

Where the widow of an intestate before the appointment of an administrator leased land and animals belonging to the intestate's estate, it was held that the widow had no right to lease the estate of the intestate and the lease was void and the tenants acquired no rights under it, and the administrator could recover the increase of chattels, and the heirs could recover the share of the products in trover as against the attaching creditors of the tenant. *Foster v. Gorton*, 5 Pick. 185.

In *Cummings v. Watson*, 149 Mass. 262, it was said that whether the administrator could sue as such if, while in possession of the realty, she had let the premises to the defendant and they had promised to pay rent to her, need not be decided.

An administrator who collects accruing rents is liable to the heirs for the same. *Lobdell v. Hayes*, 12 Gray, 236.

And the same was said to be the rule in *Drinkwater v. Drinkwater*, 4 Mass. 353.

An administrator is liable to account in the probate court for accruing rents collected by him. *Brooks v. Jackson*, 125 Mass. 307; *Stearns v. Stearns*, 1 Pick. 157.

And the same was said to be the rule in *Palmer v. Palmer*, 13 Gray, 326.

Upon the decease of the owner of real estate until a sale was lawfully made to pay his debts, the heirs could enter upon the estate and receive the rents and profits, and their interest was determined only by the sale. In this case as shown by the agreed statement of facts the administrator collected the rents and managed the estate as agent for the parties in interest. *Lobdell v. Hayes*, 12 Gray, 236.

In *Brooks v. Jackson*, 125 Mass. 307, it was said that, under Mass. Gen. Stat. chap. 98, § 8, Rev. Stat. chap. 87, § 6, Stat. 1789, chap. 11, § 2, providing that if the executor or administrator uses or occupies any part of the real estate he shall account for the income thereof as ordered by the probate court, with his assent and the assent of such other parties interested as are present at the rendering of the account: "This provision has always been construed as applying as well to rents received by the executor or administrator as to the use of real estate occupied by him in person; and we can have no doubt that it extends to his occupation or receipt of rents from the time of the death to which his

the covenants as specified in the above lease to be paid by Ida E. Small to John Walsh. Witness my hand and seal, the twenty-eighth day of November, A. D. 1892.

"Wm. A. Packard.

[Seal.]"

appointment relates. It requires him to account for rents and profits received or enjoyed by him to none but those to whom they belong; and if he is himself the heir or devisee he is not obliged to account for them at all. When he is not himself heir or devisee, he is required by the statute to account for them in the probate court, but to the heirs or devisees only, unless they, either expressly, or by implication from assenting to his accounts in which he charged himself with rents as part of the general assets, have agreed that they shall be applied to the payment of debts, legacies, and expenses of administration, in which case he is chargeable accordingly."

Where an administrator gave bond, made an inventory and included real estate in his inventory, filed an account showing personal assets and real estate, and sold the real estate and received \$50 for rents before the time of sale, and a creditor brought suit, it was held that the \$50 received for rent after two years had expired from giving his bond did not appear to be assets, but belonged to the heir. *Alden v. Stebbins*, 99 Mass. 416.

In *Palmer v. Palmer*, 13 Gray, 326, it was said that strictly an administrator has nothing to do with the real estate of his intestate except to execute the power to sell it for the payment of debts when necessary and he has obtained the authority, but sometimes by an arrangement with heirs he takes the profits of the whole for the benefit of the estate, and if so he must account for what he may receive as assets. But it was held that if one of the heirs has been in possession the fact that he is also one of the administrators will not impose upon him the obligation to account for profits which any of the heirs may rightfully take and retain so long as their title is not divested by the sale.

(Mass. Stat. 1836, chap. 67, § 6, provides that if any part of the real estate shall be used or occupied by the executor or administrator he shall account for the income thereof.)

And an administrator could occupy the real estate of his intestate with the consent of the heirs, accounting for the rents as might be agreed on by the parties or as should be determined by commissioners, under Mass. Stat. 1789, chap. 11, authorizing the appointment of three disinterested persons as commissioners to inquire and determine what was the annual value of the estate, and the sum justly chargeable in that behalf to the administrators, and where administrators had voluntarily credited rents in their first account, and the administrators continued to occupy the lands without notice to the heirs of any change, the latter had the right to consider that they were still holding on the same terms, and would be chargeable in the same manner as before. *Stearns v. Stearns*, 1 Pick. 157.

But an action could not be maintained on an administrator's bond against his sureties for rents of the real estate received by the administrator, under Mass. Pub. Stat. chap. 144, § 5, providing that "if the real estate has been used or occupied by an executor or administrator, he shall account for the income thereof as ordered by the probate court with the assent of the executor or administrator and of such other parties interested as are present at the rendering of the account." It was held that the administrator was to account for the rents to the heirs only, unless they, either expressly, or by implication from assenting to his accounts in which he has charged himself with rents as assets, have agreed that they shall be applied to the payment of legacies and expenses of administration, in which case he is to be charged accordingly; and that as

The contract raises a question of construction as well as a question of law when the construction is settled. It does not mention heirs, executors, administrators, or assigns, and courts are a little slower to enlarge by

the administrator might have received these rents with the consent of the heirs, a decree was necessary to determine whether he was to account for them to the heirs only, as well as to determine their rights, and until this was done the suit would not lie on the bond. *Choate v. Jacobs*, 136 Mass. 297.

And where an administrator before the death of his intestate purchased property by title bond, and took possession and occupied the same, and accounted in his inventory for the agreed price and interest, no action could be maintained against him by the heirs at law for any portion of the rents and profits. *Chenery v. Davis*, 16 Gray, 89.

Under Mass. Gen. Stat. chap. 93, § 8, providing that if the real estate has been used or occupied by the executor or administrator he shall account for the income thereof as ordered by the probate court with the assent of the executor or administrator and of such other parties interested as are present at the rendering of the account, where a widow who was also one of the administrators occupied the homestead since the death of her husband jointly with two minor heirs of whom she was the guardian, and one adult heir, and a part of the time with two others of seven heirs, the administrators were not required to account for use and occupation. *Almy v. Crapo*, 100 Mass. 218.

Where a decedent owned a lease for 99 years, it was held to be a chattel which an administrator could dispose of in the same manner as the personal property of the intestate. *Gay's Petition*, 5 Mass. 419.

Michigan.

Under a statute the administrator was entitled to the accruing rents, if he asserted his right against the heirs. This statute was repealed in 1871 but was substantially re-enacted in 1881.

So, under Mich. Comp. Laws, § 2904, providing that the executor or administrator shall have a right to the possession of all the real estate, and may receive the rent until the estate shall have been settled or delivered over by order of the probate court to the heirs or devisees, the administrator had no power to sell the land, but he was authorized to receive the rents, issues, and profits for which he was required to account, and he may let the real estate, or, if it was let by the decedent, he may receive the rents, but he could make no disposition of it by letting or otherwise to interfere with the settlement of the estate or the sale for that purpose. *Kline v. Moulton*, 11 Mich. 370.

Michigan Comp. Laws, § 2904, merely permitted the representatives to claim possession if they saw fit to demand it, and did not deprive the heirs of the right. It was said that previous to the Revision of 1846, the personal representative had nothing to do with the real estate except to sell it under an order of the probate court, and that the real estate descended to the heir, who alone was entitled to subsequent rents and profits. *Streeter v. Paton*, 7 Mich. 341.

In *Baxter v. Robinson*, 11 Mich. 520, it was said that in *Streeter v. Paton*, 7 Mich. 341, it was said by Manning, J., that the heir was entitled to the possession unless possession was taken or claimed by the administrator under a statute giving him the right of possession and of the rents and profits until the estate was settled.

Mich. Comp. Laws 1857, § 2904, did not deprive the heirs of their right to the possession of real estate, and to the rents and profits. They were entitled to the same until the executor or administrator took possession or claimed the right thereto under the statute, and until such action would not

implication the undertaking of a surety or guarantor than they are to enlarge that of the principal party. But perhaps the word "surety," although seemingly inartificially

used, coupled with the nature and object of the contract, makes the collateral undertaking as large as the principal one. We will assume that it is to be read in the broader sense. We

be accountable to any person for the rents and profits. *Howard v. Patrick*, 38 Mich. 795.

In *Campau v. Campau*, 19 Mich. 116, it was said that an administrator was only given the right to receive the rents and profits while the estate was in process of settlement, under Mich. Comp. Laws, § 2904, Rev. 1846, chap. 71, § 7.

Under Mich. Comp. Laws 1857, § 2904, the administrator had the right to the possession of the real estate and rents and profits until the estate should be settled or delivered over by order of the probate court to the heirs or devisees, but this was repealed by act of March 29, 1871, Sess. Laws 1871, p. 80. It was held that the legislature could take away from the administrator the power of taking and holding the possession of rents and profits, and that this could be done as well after as before they had taken possession. *Campau v. Campau*, 25 Mich. 127.

Mich. Sess. Laws 1871, p. 278, authorizing executors or administrators to take possession of the realty of deceased persons, to lease from year to year and cancel or modify any leases given by the decedent during his lifetime, and to keep property in repair, and to receive rents and proceeds until the estate is settled, changed the rule, as before this statute the personal representative had no control over the realty except as power may be granted in certain cases, and the rents belonged absolutely and completely to the heirs or devisees, and this statute did not take away vested rights that accrued before its passage. *Van Fleet v. Van Fleet*, 49 Mich. 610.

So, where an heir was in possession under a lease made by his father, which was to terminate at his father's death, and the administrator allowed the heir to remain in possession pending probate proceedings of a will, upon his executing an agreement authorizing the administrator to withhold from his share the rent, on the failure of the heir to pay the rent the administrator was entitled to summary proceedings to recover possession, if the share of the assets in case the will was probated would be insufficient, as it was the duty of the administrator to exercise the right which the statute gave him to obtain possession and to collect rents and profits for the executor or for the distribution of the estate in case there was no executor. *Wilmarth v. Reed*, 83 Mich. 44.

Where the widow remained in possession of the real estate of her deceased husband it was held that on a bill of foreclosure, she could not be required to account for the rents and profits. *Kitchell v. Mudgett*, 37 Mich. 87.

Minnesota.

Under the statutes of this state the administrator is entitled to the accruing rents, as against the heirs, during administration.

In *Miller v. Hoberg*, 22 Minn. 249, it was said that under Minn. Gen. Stat. chap. 52, § 6, giving the administrator the right to the possession, and to the rents, issues, and profits, the heirs have the right to the possession as against everyone but the administrator or his tenants, and the administrator has the right to the possession as against the heirs or any other person until the estate is settled or until delivered over by order of the probate court.

And in *State, Beals, v. Ramsey County Probate Court*, 25 Minn. 22, it was said that under Minn. Gen. Stat. chap. 52, § 6, an executor or administrator was entitled to the possession of rents, issues, and profits of real estate until the estate was settled or delivered over by order of the probate court to the heir, and under § 7 he was accountable for the income of the real estate while it remained in his possession,

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In *Smith v. Park*, 31 Minn. 70, it was said that under Minn. Gen. Stat. 1866, chap. 52, § 6, authorizing an administrator to lease land during the period of administration, this right conferred by the statute for the purpose of administration was limited to that period.

Mississippi.

The accruing rents belong to the heirs. But under a statute the administrator by order of the probate court could lease the plantation for three years. The administrator may become liable to heirs for rent collected by him as trustee, or at their election they may charge him for net profits if he works the plantation. An apportionment of rent is provided for by statute if a tenant for life dies before rent matures.

So, where a creditor obtained a judgment against an administrator the latter could not by a bill in equity set off the judgment by an account of rents due from the judgment creditor, as the heirs were entitled to the rents, and the administrator was liable for the debt, and there was no privity. *Bullock v. Sneed*, 13 Smedes & M. 298.

And under Miss. Rev. Code 1871, § 1636, giving a remedy to the executors or administrators of any person unto whom any rent is or shall be due and not paid at the time of his death, by an action of debt, covenant, or assumpsit for all such arrearages of rent, and also the remedy of distress, it was held that this section recognized the right of the personal representative to pursue any of the remedies named to recover rent due and not paid to the lessor at the time of his death, but it had no application to rent which accrued after, and the rule was the same as at common law, that rent due at the time of the death of the lessor goes to his personal representative, but rent which accrues afterwards belongs to the heirs. *Bloodworth v. Stevens*, 51 Miss. 475.

An administrator was probably chargeable with rents where he had voluntarily returned the rents as charges in his annual account, and the commissioners following the interlocutory decree merely transferred to the account stated by them the items in the administrator's own accounts, and he made no objection to the charge. The court said that after receiving rents for over ten years, and professing to account for them in his trustee capacity, it would be monstrous now, after the claim against him in every capacity is barred by limitation, to permit him to raise the objection now insisted on. The court further said that the rents belonged to the distributees, and they had the right to advance them or any other money belonging to them for the payment of debts, so as to protect the specific property. *Crowder v. Shackelford*, 35 Miss. 321.

And where an administrator carried on the plantation without authority for the heirs, he was liable for the net profits or for the reasonable hire and rent at the election of the heirs, and when the heirs made an election it was irrevocable. *French v. Davis*, 38 Miss. 167.

In *Trotter v. Trotter*, 40 Miss. 704, it was said that if an administrator worked a plantation with the assent of the heirs they could not charge him as for the wrongful act with rent, in a petition in the probate court on the ground that he had obtained no order, and if the administrator carried on the business without their consent and without an order of court, he was not amenable to the probate court, but was liable, if at all, to the heir to whom the land descended immediately on the death of the ancestor.

An administrator was not authorized to lease or cultivate wild land, but was entitled to lease and

have no doubt that it continues to run after the death of the original covenantor. But, supposing heirs, executors, and assigns to have been mentioned, it seems to be settled in this

commonwealth that the instrument would not work like a letter of credit offering a new contract to the successors of Walsh (*Saunders v. Saunders*, 154 Mass. 337, 338; *Abbott v. Hills*,

hire the plantation or farm for three years, under Miss. act Nov. 22, 1865, Pamph. Laws 1865, 140, 141, authorizing the personal representative to lease and hire for a term not exceeding three years the plantation. *Murphy v. Thomas*, 41 Miss. 429.

In *Bloodworth v. Stevens*, 51 Miss. 475, it was said that Miss. Rev. Code 1871, § 1639, providing that if the tenant for life die before the day when any rent is to become due, the executor or administrator may recover the proportion of rent which accrued before the time of his death, was an exception to the common-law rule in behalf of a life tenant who had made a demise and died and gave to his personal representatives the rent up to the time of his death proportionately.

Missouri.

The heirs are entitled to accruing rents except in certain cases provided for by statute. And the heirs allowing the administrator to collect rents may be bound by estoppel. A statute authorizes the administrator in certain cases to lease the land for short terms, and an administrator collecting rents is liable therefor. A foreign administrator has no authority to collect accruing rents. An apportionment will be made of accruing and accrued rents.

Unaccrued rent on land after the death of the owner belonged to the heirs and not to the administrator, except in certain cases provided for by the Missouri statute, subjecting real estate to liabilities for debts and the like. *Shouse v. Krusor*, 24 Mo. App. 279.

In *Eoff v. Tompkins*, 2 Mo. App. 464, it was said, under Wagner's (Mo.) Stat. § 48, directing that executors and administrators under the direction of the court shall lease the real estate for any term not more than two years, and shall receive and recover rents, the rents so collected are necessarily assets in the hands of the executor or administrator.

And under Mo. act January 12, 1822, authorizing the administrator to lease out the real estate of an intestate who shall have died without leaving any heirs or legal representatives, an administrator could recover in assumpsit for the use and occupation of the house of the intestate after his death. *Rector v. Ranken*, 1 Mo. 371.

And in *Lass v. Elsleben*, 50 Mo. 122, it was said that an administrator under the direction of the probate court or courts having probate jurisdiction could make short leases of the real estate belonging to the decedent.

Where distributees neglected to take possession of land, and allowed the administrator to collect their rents and disburse them as administrator, they could not afterwards prevent the payment by the administrator of a claim against the estate by asserting that the rents belonged to them. The court said, having allowed their rents to remain in the hands of the administrator, and having allowed him to collect the rents and treat them as moneys belonging to the estate, and disburse them as such, they cannot be allowed now to recoup themselves by laying their hands upon this judgment in preference to a creditor of the estate. *Tyler v. Priest*, 31 Mo. App. 272.

Under Mo. Rev. Stat. §§ 70, 129, 130, 146, making it the duty of an administrator to inventory real estate, and providing that he may lease it for short terms under the direction of the probate court, and that whenever the court shall be satisfied that any real estate need not be sold or leased for the payment of debts, the executor or administrator shall be ordered to deliver possession of the same to those entitled to it, rents collected by an adminis-

trator which he was not bound to collect were assets when collected, and if the administrator leased the realty without authority, and received rents, these rents would be assets, and he should account for them. *Lewis v. Carson*, 16 Mo. App. 342.

In *Lewis v. Carson*, 93 Mo. 587, it was said that under Mo. Rev. Stat. §§ 70, 129, 130, 143, an administrator under the order of the probate court may lease the real estate and collect the rents. It was held that "although the executor or administrator takes possession of real estate and collects the rents arising therefrom without an order of the probate court, he and his sureties on his bond must account therefor. This is no longer a debatable question in this state." *Gamble v. Gibson*, 59 Mo. 592; *Dix v. Morris*, 66 Mo. 514."

In *Hartnett v. Fegan*, 3 Mo. App. 1, it is said that an administrator as such had no interest in the real estate of his intestate beyond a naked power to sell or lease under the direction of the probate court for the payment of debts, and that if he leased the land without authority from the court the rents received would be assets in his hands, and he should account in a settlement for rents received, whether with or without the direction of the probate court.

In *McPike v. McPike*, 111 Mo. 216, it was said that under Mo. Rev. Stat. chap. 1, art. 4, § 69; art. 5, §§ 93, 94; art. 7, §§ 129, 130; art. 8, § 145, requiring an administrator to inventory the real estate, and authorizing him under an order of the probate court to lease the real estate and collect the rents, the receiving of rents and sale of realty were clearly within the scope of the lawful exercise of his authority as administrator under certain circumstances, and if without an order of court he assumed to take the rents by color of his office, he was estopped from pleading his own failure to perform the conditions precedent, and the collection of rents and the proceeds of sale were within the scope of his duties, and his sureties were bound.

In this case it was said that "at common law the administrator had nothing whatever to do with the real estate of his intestate. It descended to the heirs. Accordingly at the common law, and in those states generally where the common law has been adopted, and only modified to the extent of permitting a sale of the lands to pay debts, it has generally been held that where an administrator came into the possession of rents from the realty or the proceeds of sale, he was chargeable therefor individually as a trustee or trespasser, but not in his character as administrator."

Under Mo. Rev. Stat. § 129, providing for lease of lands by an administrator in this state, such lands could not be leased by a foreign administrator. *Crockett v. Althouse*, 35 Mo. App. 404.

And in the absence of proof as to what was the law in Illinois the common law was held to control, and under Missouri Revised Statutes, authorizing an administrator under an order of the probate court to lease the real estate and collect the rents, he was not liable as such administrator for rents collected in Illinois, where such rents were received as the attorney in fact or guardian *ad litem* for the heirs, and not as administrator. *McPike v. McPike*, 111 Mo. 216.

Rents accruing prior to the testator's death belonged to the administrator, and those accruing after such death passed to the heirs, unless the probate court directed the administrator to take possession, but such an order of the probate court would not ratify the collection wrongfully made by the administrator previous to such order. *Sealey v. Blake*, 70 Mo. App. 229.

And Mo. Rev. Stat. § 129, providing that no ad-

158 Mass. 896), if that would make any difference when there has been no purchase on the faith of it; and therefore, apart from other reasons, the only ground on which the heirs

can be preferred to the administratrixes as the proper plaintiffs is that the covenant runs with the land, or, more accurately, runs with the estate of the covenantee, and that the heirs are

administrator or executor except an executor acting under a will shall rent or control the real estate of the deceased, unless the probate court shall be satisfied that it is necessary to rent said estate for the payment of debts, and make an order of record requiring such administrator or executor to take possession of and rent the same for a period not exceeding two years, did not have a retrospective effect, and was only intended to affect future rents. *Bealey v. Blake*, 70 Mo. App. 229.

Where a deed reserved to the grantor the use of the land or the rents and profits arising from it during his life and the life of his wife, the personal representative of the grantor was entitled to money for the use and occupation after the death of the grantor and before the death of his wife. It was said that the deed did not create the relation of landlord and tenant, as a rent strictly speaking must be certain, and here there was no reservation of anything certain. The entry of the defendant under the deed impliedly raised a promise to pay for the use and occupation, and that promise to the grantor was transmissible to his personal representative. *Logan v. Caldwell*, 23 Mo. 373.

New Hampshire.

Where the estate is solvent the heirs are entitled to the rents, and also in cases of insolvent estates, unless proper proceedings are taken by the administrator under the statute.

So, where an estate was solvent the administrator was accountable to the heirs, and not to the judge of probate, for the rents and profits. *Lucy v. Lucy*, 55 N. H. 9.

And where an intestate was solvent and his real estate vested in heirs at law, the administratrix improperly charged herself with the income arising after the intestate's death. *Perkins v. Perkins*, 58 N. H. 406.

In *Lucy v. Lucy*, 55 N. H. 9, it was said: "It is well settled that in this state real estate of the intestate, immediately upon his death, vests in the heirs, subject to be divested by proper proceedings for the payment of the intestate's debts. If the estate is insolvent and settled in the insolvent course it is the duty of the administrator to take possession of it, take care of it, and take the rents and profits. But the mere fact that the estate is settled in the insolvent course does not authorize the administrator to have possession of the real estate."

In *Gregg v. Currier*, 36 N. H. 200, it was said that under N. H. Rev. Stat. chap. 159, § 10, authorizing and requiring executors and administrators to receive the rents and profits of the real estate in case the estate is insolvent, and to account for the net proceeds thereof in his administration account, generally the land in other cases descends to the devisees or heirs with no right or duty on the part of the executor or administrator as such in any way to intermeddle therewith.

In *Plumer v. Plumer*, 30 N. H. 558, it was said that under N. H. Rev. Stat. chap. 159, § 10, Comp. Stat. 168, § 10, if the estate was actually insolvent no possession of the real estate could have been taken by the heirs, and the rents and profits would go to the administratrix.

In *Bergin v. McFarland*, 26 N. H. 533, it was said that by Stat. 5 Geo. II., Prov. Stat. of N. H. 1771, p. 233, lands in the colonies were subjected equally with the personal estate of the debtor to the payment of debts, and by statutes of Massachusetts and by these provinces (N. H. Prov. Stat. 1771, p. 90, 4 Geo. I.; Mass. Prov. Stat. 1742, p. 75, 8 Wm. III.) power was conferred upon executors and administrators to sell the real estate to pay debts if deemed

necessary by the proper court, but until the estate was thus taken from them the heirs were entitled to enter upon the property and to take the profits to their own use, but that a change was made by N. H. Rev. Stat. 1829, chap. 159, § 10, providing that the administrator shall receive the rents and profits of the real estate in case the estate is insolvent, and shall account for the net proceeds in his administration account.

In *Lane v. Thompson*, 43 N. H. 320, it was said that "until the decree of insolvency, the heirs are to be considered as in the rightful possession of the premises. After the decree the administrator is entitled to the possession; his title commences at the date of the decree."

New Jersey.

Where the rent did not become due until three or four days after the intestate's death, it could not be recovered by the administrator, but belonged to the heir at law and could not be apportioned. *Allen v. Van Houten*, 19 N. J. L. 47.

Where a lease was made by J. B. and S., his wife, and the lessee covenanted to pay to J. B. and S., his wife, annual rent, and the said S. survived her husband and thereafter married J. Scott, who survived his wife, the rents which accrued under the lease after the decease of J. Scott did not belong to his representatives. *Condit v. Neighbor*, 13 N. J. L. 83.

In *Search v. Search*, 27 N. J. Eq. 137, it was said that it will be presumed until otherwise shown that rents taken possession of by the administrator were part of the assets and received rightfully in the due administration of the estate.

New Jersey Gen. Stat. 1895, § 20, p. 1208, provides that whereas by common law the executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of life, of rent service, rent-charge, rent-seck and fee farms, have no remedy to recover such arrearages of the said rents or fee farms as were due unto their testators or intestates in their lives, nor may the heirs nor any person having the reversion distrain for such arrears, it is enacted that the executors or administrators of any such person unto whom rent is due and unpaid at the time of his death may have an action of debt for such arrearages, and may distrain for the same.

New York.

Under a statute accrued rent passes to the administrator. Rent payable in advance is held to be assets. Accruing rent belongs to the heirs. Apportionment of rent is provided for by statute.

Rents which accrued subsequent to the intestate's death by right went to the heirs, and the administrator would have nothing to do with them. *Kohler v. Knapp*, 1 Bradf. 241.

So rent belonged to the heirs where a testator died intestate as to realty and rents, and an administrator *cum testamento annexo* should not account in the surrogate's court for rents. It was further held that 3 N. Y. Rev. Stat. 5th ed. § 78 (71), p. 182, empowering the surrogate to distribute what shall remain of an estate in the hands of an administrator to and among creditors, legatees, widow, and next of kin, did not give him authority to add to the classes of persons whose interest he was to supervise on a final accounting, and to distribute to heirs. *Levy's Estate*, Tucker (N. Y.) 148.

Where the intestate made a contract with another to work his farm and to sell the milk at a cheese factory and divide the profits, it was said that if it was a lease and the relation of landlord and tenant was created, and the money which the intestate was to receive, rent, then the administrator was not entitled to the money, under N. Y.

successors to that estate. The covenant is collateral to the lease (*Virden v. Ellsworth*, 15 Ind. 144), and is not affected by Stat. 32 Hen. VIII. chap. 84; *Harbeck v. Sylvester*, 18 Wend.

608. See *Jones v. Parker*, 163 Mass. 564, 568.

In *Allen v. Culver*, 3 Denio, 284, 301, a similar covenant was held by the supreme court of New York to pass to assigns, but the

Rev. Stat. chap. 6, title 3, art. 1, §§ 6, 7, providing that rents reserved to the deceased which had accrued at the time of his death are assets, and if not accrued belong to the heirs. But it was held not to be a lease. *Re Strickland*, 10 Misc. 486.

In *Griffith v. Beecher*, 10 Barb. 432, where the decedent had a title bond to land on which there was some money due, and the administrator collected the rents for two years and sold the interest of the decedent in the contract, and used part of the money for paying the debts, it was held that the interest in the contract, which was about \$1,400 over and above the money due upon it, was real estate and descended to the heirs. It was said: "Again, the statute (2 Rev. Stat. 82, § 6) points out explicitly what are assets, and land contracts are not enumerated; while § 8 declares that the right of the heir to any property not enumerated in the 6th section shall not be impaired by the general terms of the section."

An administrator had no authority to make an agreement as to rents with a party who married the widow, that in consideration of the administrator paying him \$250 a year for boarding his wife's children he would release all claim to the rent of the real estate of the intestate which he had in right of his wife, so long as the agreement in respect to board should be executed. It was held that the administrator was deemed to have acted in his personal right, and that the children could not require the administrator to account for rents under that agreement. *Hillman v. Stephens*, 16 N. Y. 278.

Accrued rents should go to the administrator, and rents payable in advance, which were due or had accrued, under N. Y. Rev. Stat. (3 Banks, 7th ed. 2296), title 3, chap. 6, pt. 2, § 6, providing that there shall be included among the property of a decedent's estate which shall be assets and pass as such to his executors and administrators as part of the personality, rents reserved to the deceased which had accrued at the time of his death. *Miller v. Crawford*, 26 Abb. N. C. 376.

In *Miller v. Crawford*, 26 Abb. N. C. 376, it was said it would seem that the common-law rule still prevailed as to rents which were not payable in advance, and which did not become due until after the intestate's death, but which were partly earned before his death, if N. Y. Acts, chap. 542, § 1, providing that all rents reserved on any lease granted after the passing of this act shall be apportioned so that on the death of any person interested in such rents or in the estate or fund from which the same shall issue or be derived, or on the determination by any other means whatever of the interest of any such person, he or she and his executors, administrators, or assigns shall be entitled to a proportion of such rents, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, did not apply.

On the death of the landlord and severance of the reversion by act of law, by descent to his sister and nieces, it became necessary to apportion the rent, and the heirs could separately bring an action for their several proportions. *Cole v. Paterson*, 26 Wend. 456.

New York Code Civ. Proc. § 2712, amended 1893, provides that the following shall be deemed assets and go to executors or administrators to be applied and distributed as part of the personal property of the testator or intestate and be included in the inventory: Leases for years; rents reserved to the deceased which had accrued at the time of his death. The right of an heir to any property not

enumerated in this section which by the common law would descend to him is not impaired by the general terms of this section.

New York Code Civ. Proc. § 2720, amended in 1893, provides that all rents reserved on any lease made after June 7, 1875, shall be apportioned so that on the death of any person interested in such rents or in the estate in respect to which the same issues, or on the determination of the interest of any such person, he or his executors, administrators or assigns shall be entitled to a proportion of such rents according to the time which shall have elapsed from the commencement or last period of payment thereof as the case may be, including the day of the death of such person or of the determination of his interest.

North Carolina.

The heirs, and not the administrator, are entitled to accruing rents. But the creditors are entitled to the rents as against the heirs. The administrator is entitled to accrued rents.

The administrator could not enter upon and make leases of land which have descended, under N. C. Code, § 1413, directing the personal representative to make his rentings of real property by auction, as this referred only to leasehold estates in land which an intestate might own. *Reeves v. McMillan*, 101 N. C. 479.

And a collector appointed to take charge of an estate had no power to enter upon and make leases of land which descended to the heirs-at-law, under N. C. Battle's Rev. chap. 45, § 11, providing for the appointment of a collector, and § 12, giving the collector power to take possession and receive rents and profits of real property, and § 37, providing that renting of real property by public auction shall be secured by bond, and § 38, providing for the time when sales or rentings shall be made. It was said that this statute was intended to apply where the lessee for years died intestate leaving the term unexpired, or if a collector was appointed pending a contest as to who should be administrator *cum testamento annexo* or executor under a will which directed renting, but that the statute did not confer upon a collector a greater power than that possessed by an administrator. *Lee v. Lee*, 74 N. C. 70.

Where an administrator took possession of the land and collected the rent for eleven years, he was liable for the same in an action by the heirs, and he was held to be an agent of the heirs to collect their rent in order that he might apply them to the payment of debts of his intestate in exoneration of their land, and that having failed to apply this fund he should pay it to whom it belonged. It was further held that the statute of limitation did not bar this action because the statute did not run until demand and refusal, and the action was brought within three years after he gave up possession. *Shuffler v. Turner*, 111 N. C. 297.

So, where the purchaser under a title bond died, and the heirs afterwards recovered the property, the administrator was entitled to the rents which accrued in the lifetime of the purchaser, and the heirs were entitled to the rent for the term between their father's death and the surrendering of the premises to them. *Fleming v. Chunn*, 57 N. C. (4 Jones, Eq.) 422.

The creditors of the ancestor were entitled to all the rents and profits received by the heir since the descent cast. It was said that if the heir be an infant and the guardian in ignorance of the insolvency of an estate has expended the rents and profits or a part of them in his maintenance, only the

point was decided without discussion on the supposed analogy of *Pakenham's Case* (a covenant on the part of a convent that the convent should sing every week in a chapel in the

plaintiff's manor), Y. B. 42 Edw. III. p. 8, pl. 14. The reference to this case showed that the court did not have in mind the distinction pointed out by Lord Coke [*Chudleigh's Case*]

part remaining unexpended would be liable to the creditors. *Moore v. Shields*, 68 N. C. 327.

So, in *Hinton v. Whitehurst*, 71 N. C. 66, it was said that a creditor was entitled to rents and profits actually received by the heirs from the lands descended.

And on a creditor's bill in equity it was held that rents and profits derived from lands by heirs could be applied to the payment of the decedent's debts. *Washington v. Sasser*, 41 N. C. (6 Ired. Eq.) 336.

In *Moore v. Shields*, 68 N. C. 327, it was said that previous to the decision in *Washington v. Sasser*, 41 N. C. (6 Ired. Eq.) 336, it was the general opinion of the profession, founded on *Harrison v. Wood*, 21 N. C. (1 Dev. & B. Eq.) 437, that the heir might hold against the creditors of his ancestors all the profits of the land which accrued from the time of the decedent up to a sale under process at law or to a decree in equity. The reverse of this is established now by *Washington v. Sasser*.

In *Harrison v. Wood*, 21 N. C. (1 Dev. & B. Eq.) 437, it was said that "a creditor cannot enter upon the lands of a deceased debtor, and keep out the heir upon any principle recognized by this court, more than he can by any rule of law. The heir is, at law, entitled to the issue and profits and also to the lands until a judgment against him, and a sale under it; and likewise in equity, until his liability has been ascertained by a decree." The late cases deny this doctrine and give the creditors the rents.

The rents of land during the years in which the administrator of a guardian had it in charge were assets for which he was accountable. It was said that when rents were collected by the guardian of an infant heir or devisee and spent in his maintenance they were not recoverable by the representative, but when he possessed himself of them they constituted a part of the estate and were liable to the claims of creditors of the deceased. *Jennings v. Copeland*, 90 N. C. 572.

Ohio.

The heirs, and not the administrator, are entitled to accruing rents, and the creditors have no claim on the rents until after a sale. It seems that where the administrator collects rents that he may be required to account for the same. He will be allowed for necessary disbursements.

The heir is entitled, as against the administrator, to the rents and profits of the land during the continuance of the possession by the heir until the actual sale of the land by the administrator for the payment of the debts of his intestate, and the filing of the petition by the administrator to sell land before the rents commenced accruing, or the order of sale after they began to accrue, or the declaring of the estate probably insolvent by the proper court, had the effect of enlarging the rights of the administrator in reference to the accruing rents. *Overturf v. Dugan*, 29 Ohio St. 230. In this case the court said: "The heirs were still legally in possession as owners of the land, and entitled to the rents; and, as has been said, the lien in favor of the creditors was upon the land itself, and not upon the rents accruing during the time intervening between the death of the intestate and the sale by the administrator. Rents thus accruing are not, and cannot be said to be, assets belonging to the administrator of the intestate's estate, for they were not in existence at his death, and the creditors of the intestate cannot claim them for the payment of his debts, for they never belonged to him."

An administrator was not authorized to go into a court of equity to compel the heirs to give up rents that they had collected that belonged to them, un-

der *Swan & C. (Ohio) Stats.* 567, 572, §§ 3, 29, providing that an administrator may be ordered by the court to include in the inventory and appraisal the real estate, and *Swan & C. Stats.* 576, 587, §§ 57, 113, requiring the administrator to account for after-acquired assets. *Overturf v. Dugan*, 29 Ohio St. 230.

In *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 462, it was said that an administrator who without authority collected rents of his intestate's estate and used them as assets in paying the debts was liable therefor to the party entitled to the rents, and an action for their recovery could be maintained against him in his representative capacity.

And rents collected by the administrator and used to pay debts, the heirs not excepting to the items, may be treated by the court as assets, and a correct accounting of them compelled. *Campbell v. McCormick*, 1 Ohio C. C. 504.

And if administrators were permitted to collect rents they were entitled to a credit for paying taxes, repairs, a necessary survey, and gathering crops, as these are debts of the estate. *Turpin's Estate*, *Goebell*, 124.

And where an administrator, through a family arrangement and by advice of friends of an infant heir, received the rents and applied them to the payment of debts instead of selling the infant's land, and the arrangement would have been beneficial to the heir if he had lived, his administrator could not recover such rents from the administrator of his ancestor, although by this arrangement it worked a loss to the infant's mother and a gain to his uncles, where the mother did not object. *White v. Turpin*, 18 Ohio St. 270.

An administrator's action for rent on a parol lease made by him was not demurrable. The court said that as there were several cases in which the administrator is entitled to the possession of land the action is possible, and he need not set up the exceptional matter. *Bowler v. Erhard*, 1 Clev. 173. **Pennsylvania.**

The heirs, and not the administrator, are entitled to accruing rents, and if the rent matures after the decedent's death it will go to the heirs. The administrator is entitled to accrued rents. If the administrator collects accruing rent he is liable as trustee to the heirs.

So, where a party in possession took a lease from the administrator after the death of the landlord, the lease was void and the payment of the rent was no defense to an action by the guardian of the heirs for the recovery of rent. *Haslage v. Krugh*, 25 Pa. 97.

So, an administrator had no right to demand and recover from the heirs of the intestate the rents, issues, and profits of the real estate descending to them from their ancestors, which accrued and was received by them since his death for the purpose of paying the debts of the deceased or reimbursing himself moneys which he paid out of his own funds in discharge of the same. *Adams v. Adams*, 4 Watts, 160.

And the heir was entitled to the lands of the estate and the administrator could not by virtue of his office occupy or lease them, and the rents and profits maturing from them after the death of the owner belonged to the heir, and the administrator was not authorized to receive them. The court said that the powers and duties of an administrator with reference to the rent were limited to an application for an order of sale and the proper execution of that order when it was obtained. *Merkel's Estate*, 131 Pa. 584.

In *Young's Estate*, 4 Pa. Dist. R. 44, it was said:

(1 Coke, 120a, 122b), and discussed in *Norcross v. James*, 140 Mass. 188, between those covenants which create, or follow the analogy of, easements, and go with the land even to dis-

seisors, and those pure contracts, like covenants for title, upon which no one can sue except parties and privies. *Pakenham's Case* was of the former class. The argument for the plain-

"Nor has an administrator any such authority. It is no part of their duty to intermeddle with the real estate until necessary for the payment of debts or legacies under an order of the court or authority contained in the will, and for the reason that the lands are vested in the devisees or heirs, and they being the owners, are entitled to the rents, and the same cannot be applied to the payment of debts without their consent. An executor or administrator who assumes charge and control of the real estate is liable to account to the devisees or heirs as a trustee or agent, not in the orphans' court, but in another forum. *Landis v. Scott*, 32 Pa. 486; *Myers's Estate*, 9 Phila. 310; *Haslage v. Krugh*, 26 Pa. 97; *Fross's Appeal*, 105 Pa. 258; *Merkel's Estate*, 131 Pa. 584.

In *Urban's Estate*, 17 Phila. 429, it was said that an heir of the decedent who was in possession of the land sold was not liable for rent or for use and occupation, but was bound to pay taxes accruing during his ownership and interest on fixed encumbrances.

In *Bank of Pennsylvania v. Wise*, 8 Watts, 399, it was said that if the person entitled to receive rent outlived the day on which it became due, and then died, it belonged to his executor or administrator as a part of his personal estate, but if he died on the day preceding the day of payment, the rent belonged to the heir as incident to the reversion and as a part of the real estate.

And a mortgagee had no claim upon rents collected by an administrator as they were not assets in his hands to pay debts. It was said that an administrator who collected rents from the real estate of a decedent was only the trustee for the widow and heirs. *Robb's Appeal*, 41 Pa. 45.

An administratrix assuming the charge of real estate was answerable for the exercise of due diligence in collecting rent for the heirs, and where such was exercised she would not be chargeable with what she was unable to collect. *Burns v. Cox*, 10 Phila. 8.

Where an administrator collected rents and profits of property which had been leased by the intestate in his lifetime the money belonged to the heirs. *M'Coy v. Scott*, 2 Rawle, 222, 19 Am. Dec. 640.

But an administrator was not properly chargeable with the rents of real estate as they constituted no part of his account. It was further held that the administrator in taking charge of realty and in receiving the rents and income was merely the agent for the heirs, and it was of no importance that he assumed to transact the business in his capacity as an administrator, as he was in fact but an agent. *Fross's Appeal*, 105 Pa. 258.

And where an administrator mined ore on the estate, he could not be charged in his accounts with the same, as the ore was the product of lands, and rents and profits of real estate were not assets for the payment of debts, and the administrator could not be charged them. It was held that ore received under the terms of the lease was in the nature of rent, and belonged to the heirs, and for it the administrator would be accountable to them. *Merkel's Estate*, 131 Pa. 584.

And the sureties on an administrator's bond given for the sale of real estate could not be held liable on an account settled by the administrator in which he charged himself with the amount of the inventory, the proceeds of real estate, and the rents and profits, but did not show any specific appropriation of any part of the assets to any particular debts. The sureties in this case were only bound to account for and pay over the proceeds of real estate. *Com. v. Hilgert*, 55 Pa. 236.

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Rhode Island.

The heirs are entitled to the accruing rents and in case of a sale to pay debts are entitled to the rents until the estate is sold. If the administrator is allowed by the heirs to collect the rents, he is not amenable to the probate court.

The heirs were entitled to take the rents until the estate was sold to pay debts, under R. I. Gen. Stat. chap. 176, § 10, providing that no person shall have a right to demand his share of the deceased's personal estate within three years unless he give bond, to refund his proportion of the share of said estate if debts appear, providing that the heirs at law or devisees may during said term take the rents and profits of said real estate as heretofore. *Draper v. Barnes*, 12 R. I. 156.

But an administrator was not accountable to the probate court for rents received, where an administrator with the will annexed did not have power over the realty given to an executor by the will, but exercised those powers with the assent of the *cestui que trust*. *Belcher v. Branch*, 11 R. I. 226.

South Carolina.

The heirs are entitled to accruing rent. The administrator is liable as trustee for accruing rent collected by him, but the sureties on his bond are not liable. An administrator was allowed to recover rent in a suit to set aside a deed obtained by fraud from the intestate. The administrator is entitled to accrued rents, but cannot distrain.

The rents and profits which accrued after the lifetime of the intestate accompanied the inheritance. *Kirkpatrick v. Atkinson*, 11 Rich. Eq. 27.

And where an intestate had contracted for a tract of land with an unexpired ferry charter annexed, and after his death the ferry was rechartered in the name of his wife who was his administratrix, she was held accountable by Harper, Ch., for the rents and profits. *Huson v. Wallace*, 1 Rich. Eq. 1.

So, where an administrator collected rents from lands of his intestate he was held liable for the rents although it was held that the sureties might not be. It was said that "the statute of 12 Geo. II., chap. 5 [5 Geo. II., chap. 7 (7)] 2 S. C. Stat. 570, making real estate equally liable with personality, for debts, has produced a very common interference of administrators with the renting of land; and it would be mischievous to hold that where they do interfere, they can take the rents to themselves, without responsibility." *Jewell v. Jewell*, 11 Rich. Eq. 296.

But the sureties of an administrator were not liable to the heirs for rent of land belonging to an estate of which their principal was the administrator, as the duties of an administrator related only to the personal estate. It was said that sometimes in this state the administrator hires out the negroes and rents the land, and then the land rent is received by him in money, but how far his securities would be responsible for the money thus received would not be decided, as it was not involved in this case. It appears that the rent in this case was received by the party who was guardian as well as administrator. *Allen v. Bruton*, 1 McMull. L. 249.

As to whether an administrator was to be charged for rent of land and hire of slaves instead of keeping the slaves upon the land and accounting for crops, it was said by Harper, Ch.: "It has often been decided that an executor may keep slaves employed upon the land, and I know of no decision or suggestion to the contrary. In some cases when the executor has failed to return an account of crops he has been charged as for rent and hire, but never when he has accounted, and I think executors or administrators are to be encouraged by this

tiff in that case of most weight in the mind of the court was that the plaintiff was tenant of the land, and that the service claimed was a thing annexed to the land, being of a kind

that could be created by prescription, or, as it was stated by Fitzherbert, everyone who has the land shall have the covenant. Fitzherbert, *Abr. Covenant*, pl. 17. Those who are

course, and very indulgently considered when they adopt it." *Huson v. Wallace*, 1 Rich. Eq. 1.

In an avowry by an administratrix for rent in arrears which set forth the demise under which the tenant held, made in her own name as administratrix after the intestate's death, it was held that no further title need be shown. It was said that stat. 11 Geo. II., chap. 19, § 22 (2 S. C. Stat. 579), providing that an avowant in replevin is not bound to state anything more in his avowry than the lease or demise under which the tenant held, has not been expressly made of force in this state, but its provisions have been so uniformly observed that it might be said to be a part of the law of the land. *Moorhead v. Barrett, Cheves*, L. 99.

Where an administrator obtained a decree setting aside for fraud deeds made by his intestate of real estate and slaves, in which the grantor reserved to himself the use for life, the grantee was required to account with the administrator for the rent of the land and the hire of the slaves from the date of the deeds, where the grantee had obtained control over the property during the grantor's life. *Kirkpatrick v. Atkinson*, 4 S. C. N. S. 126.

The rents and profits which accrued during the lifetime of the intestate belonged to his personal representative, and not to his heirs. *Kirkpatrick v. Atkinson*, 11 Rich. Eq. 27.

An administrator could not distrain for rent due at the death of the intestate. It was said that at common law neither the heirs, executors, nor administrators of a man entitled to rents had any remedy for arrears incurred in the lifetime of the owner of such rent, and Stat. 32 Hen. VIII., chap. 37, providing that the executors and administrators might distrain for rents due their testator or intestate, at the time of the death upon the land charged with rent, and a latter Statute of Wm. IV., extending this right of the representatives of a deceased landlord, were not in force in this state. *Bagwell v. Jamison, Cheves*, L. 249.

Tennessee.

The heir is entitled to the accruing rent, and the creditors have no lien on the rents. Where rent is partly accrued there should be an apportionment between the heir and personal representative.

After the death of the ancestor the estate descended to the heir, and the accruing rents belong to the heir discharged of any liability for the debts of the ancestor. *Boyd v. Martin*, 9 Heisk. 382.

And the creditor had no right against the heir to the rents and profits of the estate, as the creditor had no lien on the rents, under Tenn. act 1874, chap. 11, providing that execution shall issue against the real estate of the deceased debtor in the hands of the heir against whom judgment shall have been given. *Combs v. Young*, 4 Yerg. 218, 26 Am. Dec. 225.

And a creditor has no lien on rents. *Smith v. Thomas*, 14 Lea, 324.

In *Smith v. Thomas*, 14 Lea, 324, it was said that under T. & S. Code, 2256, §§ 1764, 1765, making real estate (unless specially exempt) an asset for the payment of debts of a decedent, the title subject to this liability goes directly to the heir or to the devisee where there is a will. The court said that "it has always been held in this state that while the heir or devisee is owner, and is entitled to the rents and profits, he is so far owner that if he bona fide alien the land, the bona fide purchaser gets a good title, and the creditor's remedy is against the heir or devisee, who is answerable for the ancestor's debts to the value of the land aliened."

The heir was entitled to accruing rents where a

sole heir sued in trespass for the eviction of her mother who had died, and for rents. It was held that as to the portions of the rent which were due and payable before the death of her mother the plaintiff could not sue; but a suit for such portion of the rent should have been in the name of the personal representative, and not of the heir. *Rowan v. Riley*, 6 Baxt. 67.

Texas.

In Texas by statute the administrator is authorized to rent out the property, but he is personally responsible for the reasonable value of the hire or the rent of such property unless he obtains an order of court.

In an action by an administrator *de bonis non* against his predecessor on his bond for a devastavit, it was held that where the administrator rented the property without the authority of the probate court he became responsible to the estate for the reasonable value of the rent, under Tex. Rev. Stat. art. 2063, providing that when an executor or administrator hires or rents property belonging to an estate without an order of the court authorizing him to do so, he shall be held responsible for the reasonable value of the hire or rent of such property. *Oglesby v. Forman*, 77 Tex. 647.

In *Reinstein v. Smith*, 65 Tex. 247, it was said that Tex. Rev. Stat. § 1931, providing that if the real estate be not required to be at once sold for the payment of debts, it shall be the duty of the executor or administrator to carry on the plantation, manufactory, or business, or cause the same to be done, or to rent the same, as shall appear to him to be most for the interest of the estate, and providing that he shall not extend the time of renting any of the property beyond what may consist with the speedy settlement of the estate; and § 1932, providing that any person interested upon complaint in writing and notice upon good cause being shown, may obtain an order of the court controlling the action of such executor or administrator,—confer upon executors and administrators extreme power, and make it the duty of such persons to carry on the plantation, unless in the exercise of a sound discretion they deem it improper to do so.

Virginia.

It seems that by a statute the heir is entitled to accruing rents, and the administrator is entitled to rents that were due at the time of the death of the landlord. A creditor has no lien as against the heirs for rent.

Va. Code 1887, § 2788 (Code 1849, chap. 138), provides that "he to whom rent or compensation is due, whether he have the reversion or not, his personal representative or assignee may recover it as provided in the preceding section [remedy by distress or action], and when the owner of real estate in fee, or holder of a term, yielding him rent, dies, the rent thereafter due shall be recoverable by such owner's heir or devisee, or such term holder's personal representative."

Upon a bill against an heir at law to subject real estate to a debt of the ancestor, the heir at law was not accountable for rents and profits of the real estate that accrued before the decree. *Blow v. Maynard*, 2 Leigh, 20.

Where an administrator failed to render any account of rents and profits, made by him in the occupation of an estate, evidence of the net annual income was competent to ascertain the amount for which he was chargeable. *Wills v. Dunn*, 5 Gratt. 284.

Wisconsin.

Under a statute of this state the administrator is entitled to the possession of the real estate, pro-

curious to verify the fact assumed in *Pakenham's Case*, that such services from a stationary ecclesiastical corporation might be due by prescription, may consult Y. B. 22 Hen. VI. p. 46,

vided he asserts his rights and the same are needed to pay debts.

The administrator was entitled to the rents of the real estate until the estate was settled or turned over to the heirs by order of the county court, under Wis. Rev. Stat. chap. 100, § 7, providing that the executor or administrator shall have a right to the possession of all the real estate of the deceased, and may receive the rents, issues, and profits of the same until the estate shall have been settled or delivered by the order of the county court to the heirs or devisees. *Edwards v. Evans*, 16 Wis. 182.

And under Wis. Rev. Stat. § 2823 (3823), same as Rev. Stat. chap. 100, § 7, the administrator was entitled to the possession of rents as against a mortgagee, where the mortgagee had not begun any proper proceeding for foreclosure, and to have the rents applied upon his mortgage. *Crow v. Day*, 69 Wis. 637.

But under Wis. Rev. Stat. chap. 100, § 7, authorizing the administrator to take possession of the real estate and rents and profits, the heir was entitled to the possession of real estate unless the administrator asserted his rights. *Jones v. Billstein*, 28 Wis. 221.

And under Wis. Rev. Stat. chap. 100, § 7, the administrator had no right to the possession of real estate and rents where there were no debts due from the estate, and no claims against the estate, and no personal property belonging to it, and nothing to administer. *Flood v. Pilgrim*, 32 Wis. 376.

An administrator was not entitled to recover from the widow for the use and occupation of the land, where the administrator had not taken possession and it was not shown that the rent was needed in the settlement of the estate, or that the occupant was the tenant of the plaintiff, under Wis. Rev. Stat. chap. 102, § 7, providing that the administrator shall be accountable for the income of the real estate while it shall remain in his possession, and if he shall use or occupy any part of it he shall account for it as may be agreed upon or adjudged by the county court. *Filbey v. Carrier*, 45 Wis. 460.

II. English cases.

a. Form of lease.

It appears that where rent is reserved generally it will go to the heir, where the lessor was possessed of a freehold interest. So, where the rent is reserved during the term it will go to the heir; but if the lessor had a chattel interest only it will go to his personal representative, and the reservation to the lessor or to the lessor and assigns will cease at the death of the lessor.

If rent is reserved generally during the term without saying to whom, it will belong to the owner of the reversion after the lessor's death, to his heirs if he be seised in fee, and to his executor or administrator if he have a chattel interest only. *Kingsmill, J.*, 21 Hen. 26, pl. 2.

So, in 1 Dyer, 45a, it was agreed by Shelley & Coningsby that if a man make a lease for years rendering certain rent without saying to the lessor or to his heirs, yet the lessor and his heirs shall have this rent because it is reserved as long as the estate shall continue.

"If a man make a lease reserving rent to the lessor, if he say no more, the rent shall go but to the lessor; but if it be reserved generally, and do not say to whom, it shall go as well to the heir of the lessor, as to the lessor himself." Per Gawdy, *Gouldesborough*, 148.

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pl. 36; Id. 21 Hen. VII. p. 5, pl. 2; *William's Case*, 5 Coke, 72b, 73a; *Slipper v. Mason*, Nelson's Lutwyche Rep. 48, 45 [47]; *Rastell*, Entries of Declarations, pl. 2b. See further *Middlefield*

In *Whitlock's Case*, 8 Coke, 70b, it was said that the most clear and sure way was to reserve rent yearly "during the term," and leave the law to make the distribution without any express reservation to any person.

So, where J. S. leased lands to the defendant for twenty-five years rendering and paying for each year during said term to J. S. and his assigns so much rent, and J. S. transferred the lands by fine to the plaintiff who brought suit for rent in arrear, and the declaration did not allege that the lessor was alive, and it was objected that by the lessor's death the rent was gone, the plaintiff recovered. *Whitlock, J.*, said: "In this case the reservation is rendering rent annually during the term; it is plain that the contract is that the rent shall continue during the term; and the intention was not that it should continue only for life. But if the reservation had been to the lessor only, it would be otherwise. Here it is reserved to the lessor and his assigns. 14 Hen. VI. 26, is an express authority that the heir shall have the rent." And *Jones, J.*, said: "A number of various discordant adjudications, on this point, are to be found in the books; and the line betwixt express and implied reservations is not yet precisely drawn. The first case is 11 Edw. III. Ass. 6, 10 Edw. IV. 18, per Littleton. If I lease land for years, rendering rent to me, without mentioning my heirs, still they shall have it; for it is annexed to the reversion. Mayle denies this, 27 Hen. VIII. 19, per Audley. If rent be reserved on a lease for years to the lessor, without saying during the term, or to the heirs; they shall not have it; for the reservation is the source of the rent; and it may be reserved determinable for life. 1 Dyer, 45, is like this. But there is a very narrow distinction, viz., where rent is reserved generally, it shall go to the heir; but when it is to the lessor, the heir shall not have it. Yet this is only when the words 'during the term' are omitted." *Sury v. Brown, Latch*, 99.

And where the rent was reserved to the lessor, his heirs and assigns, the heir, and not the executor, was entitled to the rents after the death of lessor and such rents were not assets. 3 Dyer, 382, pl. 15.

And where a tenant in special tail leased for years reserving the rent to himself, his heirs and assigns, and the lessor died, and the estate descended to a person who was not an heir at law to the lessor, it was held that the rent should go with the reversion to the special heir in tail though it was reserved to the heirs generally, for the word "heir" should be taken in that sense which would best answer the nature of the contract, which was that those who would have succeeded to the estate if the lease had not been made should enjoy the rent. *Cother v. Merrick, Hardres*, 89.

Where Cleaved premises to the defendant reserving rent to herself, her executors, administrators and assigns, and C afterwards by lease and release conveyed the reversion to D and another, in trust for the wife of the defendant, the deed containing a power to the trustees to receive and retain their trust expenses and the defendant underlet the premises, and the trustees assented to his receiving rent in behalf of his wife, and D, the surviving trustee, died, his widow and administratrix was entitled to recover the arrears of rent accruing in the lifetime of the trustee. *Dollen v. Batt*, 4 C. B. N. S. 760.

Where a tenant for three lives to him and his heirs assigns over his whole estate in the premises by lease and release to J. S. and his heirs, reserving a rent to the assignor, his executors, administrators and assigns, with proviso that upon nonpay-

v. *Church Mills Knitting Co.* 160 Mass. 267.

The case at bar, on the other hand, is more analogous to the covenants for title; for, al-

though rent savors of the realty, any warranty of insurance of rent is a purely personal contract, of which another than the original contractee can avail himself only on principles

ment the assignor and his heirs may re-enter, and the assignee covenants to pay the rent to A, the assignor, his executors and administrators, and the assignor died, his executors, and not his heir, are entitled to the rent. *Jenison v. Lord Lexington*, 1 P. Wms. 555.

But where a termor S possessed of a lease for a hundred years, by indenture between him and his wife of the one part not signed by the wife, and T on the other part, assigned all their estate in the lease to T *reddendo et solvendo*, to him and his wife *duranté termino prædicto* to them and the survivor of them if they shall live so long, with a proviso on nonpayment of the rent to him or his wife, or the survivor, that S and his wife and the survivor and their assigns, and the assigns of the survivor, may re-enter, and the husband died and the wife demanded the rent, and the administrator of the husband also demanded the rent, it was held that the reservation of rent was void as to the wife because she omitted to execute the deed, and that the rent will continue no longer than the life of the husband. *Richardson, Jones, and Croke* said "that although the *reddendo et solvendo durante termino*, if there had been no more said, had been a reservation during the term, yet when he doth not rest upon the exposition of the law, but it is 'rendering to him and his wife, and the survivor of them, if they live so long,' that is an express reservation that it shall not be during all the term, but to him and his wife and the survivor of them; and the reservation to his wife is void, because she is no party in interest or to the deed," and the rent endures no longer than during the life of the husband. *Bland v. Inman*, Cro. Car. 288.

In *Sacheverel v. Frogate*, Vent. 161, 2 Wms. Saund. 367, Ray. 213, 2 Lev. 13, it was said by Hale, Ch. J., that "if tenant in fee makes a lease, and reserves the rent to him and his executors, the rent cannot go to them, for there is no testamentary estate. On the other side, if lessee for a hundred years should make a lease for forty years, reserving rent to him and his heirs, that would be void to the heir."

In this case, Hale, Chief Justice, said: "'Tis true, if the lessor reserves the rent to himself 'tis held, it will neither go to the heir or executor. But in 27 Hen. VIII. 19, where the reservation is to him and his assigns, it is said that it will go to the heir."

In *Sacheverel v. Frogate*, Vent. 161, 2 Wms. Saund. 367, Ray. 213, 2 Lev. 13, it was said: "In *Wotton & Edwin's Case*, 5 Jac. the words of reservation were yielding and paying to the lessor and his assigns. And resolved, that the rent determined upon his death. In that case there wanted the effectual and operative clause 'during the term.'"

In *Sacheverel v. Frogate*, Vent. 161, 2 Wms. Saund. 367, Ray. 213, 2 Lev. 13, it was said that in 12 Edw. III. Fitz. Assize, 86, the case was a man seised of 2 acres let one reserving rent to him, and let the other reserving rent to him and his heirs, and resolved that the first reservation should determine with his life, for the antithesis in the reservation makes a strong implication that he intended so.

b. Apportionment.

It seems that the heirs, and not the personal representative, are entitled to the rent where the landlord holding the fee dies before midnight on the day rent is due. So, if the tenant in tail dies before midnight on the day that rent is due the heirs shall have the rent. In such a case if a tenant for life make a lease under a power, the personal represen-

tative will not be entitled to the rent. But if the tenant for life with power to lease makes a lease not in accordance with the power, the personal representative is entitled to an apportionment, and the rent shall cease at the death of the tenant for life.

The English statutes now provide for an apportionment.

By Stat. 33 & 34 Vict. chap. 35 (enumerating the evils arising under 11 Geo. II. chap. 19, 4 & 5 Wm. IV. chap. 22, 6 & 7 Wm. IV. chap. 71, 14 & 15 Vict. chap. 25, 23 & 24 Vict. chap. 154), provides, § 2, that all rents shall be considered as accruing from day to day, and shall be apportionable in respect of time accordingly; section 3, the apportioned part of any such rent shall be recoverable in the case of a continuing rent, where the entire portion of which such apportioned part shall form part shall become due and payable and not before, and in the case of rent determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined and not before; section 4, all persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns of all persons whose interests determine with their own death, shall have the same remedy for recovering such apportioned part as they would have had for recovering such entire portions if entitled thereto, provided that persons liable to pay rent shall not be resorted to for any such apportioned part forming part of an entire or continuing rent; but the entire rent including such apportioned part shall be recovered by the heir or other person, who if the rent had not been apportioned would have been entitled to such entire rent and such apportioned part shall be recovered from such heir or other person by the executors or other parties entitled under this act to the same.

11 Geo. II. chap. 19, provided that after the 24th of June, 1738, where any tenant for life shall happen to die before or on the day on which any rent was reserved upon any demise or lease of any land which determined on the death of such tenant for life, that the personal representative of such tenant for life may in an action on the case recover from the under tenant on the day on which the same was made payable, the whole, or if before such day then a proportion of such rent according to the time such tenant for life lived of the last year or a quarter of a year, or other time in which the said rent was growing due as aforesaid, making a just allowance or a proportionable part thereof respectively.

Where a tenant for life made a lease for fifty years if she live so long rendering annually during the term £200 quarterly, at Michaelmas, Christmas, Annunciation, and Midsummer by equal portions, or within thirteen weeks after every of said feasts, and died after Michaelmas and within the thirteen weeks, and for the rent due at Michaelmas before her death the action was brought, it was held by Fleming and Williams, that this rent was not due. "Nothing is due until the end of the thirteen weeks, but there is only an election given to the lessee to pay it at the feasts, if he will, but until the end of the thirteen weeks he cannot demand it by distress or action of debt, and therefore is not any duty, and if the ancestor make such a lease, and die after Michaelmas, before the end of the thirteen weeks, this rent shall go to the heir, and not to the executor." *Croke J.*, to the contrary holding that the rent was due to the executor, and not to the heir. *Clun v. Fisher*, 9 Jac. 1, Cro. Jac. 300.

In *Duppa v. Mayo*, 1 Wms. Saund. 232, Hale said

of contract. The true question is whether such a guaranty is wholly analogous to covenants for title. In the case of some of these, at least, assigns of the covenantee are treated

as privy to the contract and can sue in their own names; and, when this is so heirs also can sue in their own names for breaches happening while they hold the estate of the covenan-

if a man seised in fee makes a lease for years rendering rent at the Feast of St. John the Baptist, upon condition of re-entry for nonpayment, now the lessor, if he will take advantage of the condition, must demand it at sunset; yet if he dies after sunset and before midnight his heir shall have this rent, and not his executors, which proves that the rent is not due until the last minute of the natural day.

In *Rockingham v. Penrice*, 1 P. Wms. 177, 2 Saik. 578, the tenant for life died before sunset on Michaelmas day, and it was held that the person in remainder was entitled to the rents that became due that day. One tenant had paid his rent to the tenant for life in the morning, and it was held that though this was a good payment to discharge the tenant, the executor should account for it to the party in remainder.

Where the tenant for life in accordance with a power granted several leases to different persons of different parts of the estate dated on Christmas, with rents reserved quarterly upon Lady day, Midsummer day, Michaelmas day, and Christmas day in every year, and at the time of his decease on the 29th of September at 9 o'clock at night there were two quarter's rent due from the several tenants, it was held "the last quarter rent from Michaelmas day to Christmas day goes without doubt to the defendant, W." (W. was the remainderman.) *Norris v. Harrison*, 2 Madd. 268.

Where a tenant for life made a lease for years reserving the rent at Lady day and Michaelmas by half-yearly payments, and died on Michaelmas day about 12 o'clock at noon, the rent belonged to the executor, and not to the remainderman. But it was held that as to rents made under a power of leasing they still existed and continued after the death of the lessor in the same manner as they had during his life, and the tenants had until the last instant of those days to pay the rents, and then when the lessor dies before, the rent goes along with the reversion to those who are entitled to it. *Earl Strafford v. Lady Wentworth*, Prec. in Ch. 556.

In *Earl Strafford v. Lady Wentworth*, Prec. in Ch. 556, it was said that in the case of Lady Cole, in King William's reign it was held that where the lessor or tenant for life died about 6 o'clock in the evening that the rent was become completely due and belonged to his executor, else he himself could not give a proper discharge for it until the last instant, which most certainly he may do at any time of the day whereon it is payable, and it was said that this did not contradict *Baskerville v. Mayo*, 1 Wms. Saund. 282. (*Duppa v. Mayo*.)

In *Glover v. Archer*, 4 Leon. 247, it was said that "the case was, tenant for life made a lease for twenty-one years, rendering rent at Michaelmas and the Annunciation, or within thirteen weeks of any of the said feasts; after Michaelmas and before the thirteen weeks past, the lessor died; and the plaintiff, his executor, brought debt for the rent; it was adjudged by Cooke and the other justices, that the action did not lie for the rent." The court said: "For the rent being to be paid at Michaelmas or within thirteen weeks after, the lessee hath election to pay it at any of the days, and before the last day it is not due, and when the lessor dieth before that day, his executors have not any right to the rent, but after the death of the lessor, having but an estate for life, the rent is gone. But if the lessor had a fee simple in the land, and had died before the last day, the heir should have had the rent, as incident to the reversion; but if the lessor had survived both days, the rent had been a thing vested in him, and his executors should have had

it; but if the rent had been reserved at Michaelmas, and if it be behind by thirteen weeks, that then it should be lawful for the lessor to enter; if the lessor survive Michaelmas his executors shall have debt for the rent, for then the rent is due, and the thirteen weeks are but a dispensation of the entry of the lessor until that time, and in this case as well as where the rent is reserved at two days in the disjunctive it is sufficient that the rent be demanded at the latter day without demanding of it at the first day."

In *Clun's Case*, 10 Coke, 127a, where rent was upon lease for fifty years if the lessor should so long live, reserved payable at the four usual feasts or within thirteen weeks after, and after Lady day but within thirteen weeks the lessor died, the executor could not recover against the lessee for the rent due at Lady day.

In *Barwick v. Foster*, Cro. Jac. 227, Fleming, J., said: "If a lessee for life make a lease for years, rendering rent at Michaelmas and the Annunciation, or within ten days after every of the said feasts; if he die after Michaelmas before the ten days be expired, it was resolved that the rent was lost: for it was not due until the tenth day, and before that time he died. Also if a man reserve rent in such manner, and die after Michaelmas, and before the tenth day, this rent shall go to the heir, and not to the executor."

Where by a deed and fine a term of 500 years was created to the lessors of the plaintiff for securing an annuity of £500 a year and all arrears thereof payable to C. during his life, and after his death £200 per annum and all arrears payable to Lady C. for her life, and after the death of C. the arrears of rent due in his lifetime were paid and Lady C. survived him, and afterwards Lady C. died on Michaelmas day at 9 o'clock at night, being the first day of payment after C.'s death, and the plaintiff was her administrator, it was held that the money was due when by law it ought to have been paid, and since Lady C. lived beyond sunset, which was the time when the money was demandable, the money was due to her and her administrator was entitled to the same. *Southern v. Bellasis*, 1 P. Wms. 170, *note*.

Where a tenant for life with a power to lease made a *parol* demise from year to year payable half yearly, and died between the times of payment, it was held that the rent could be apportioned between her administrator and the reversioner. The court said before the statute 11 Geo. II. chap. 19, if the tenant for life died while the half year was incomplete the rent was lost, his representatives not being entitled to recover a part. *Ex parte Smyth*, 1 Swanst. 338.

Where H. V. was seised as tenant in tail male and died on the 17th of March an infant and intestate, and J. V. became tenant in tail, and one of the guardians of H. V. had let some leases of the estate of which he was tenant in tail, but other tenants who had no leases continued as tenants from year to year, and their rents were payable half yearly at Lady day and Michaelmas, and the demises expired on the day of the death of H. V., these rents having been paid into the hands of receivers, and the question was whether the administratrix of H. V. the deceased tenant in tail was entitled to the proportions of rents from Michaelmas to the 17th day of March the day of his death, or J. V., remainderman in tail, was entitled to the whole of the rents, it was held that they should be apportioned between the representative and the remainderman. *Vernon v. Vernon*, 2 Bro. Ch. 659.

In *Vernon v. Vernon*, 2 Bro. Ch. 659, the counsel

tee. *Lougher v. Williams*, 2 Lev. 92; Rawle, Covenants, 5th ed. § 816.

But this right thus given to assigns only shortened up the old process by which, within

certain limits, each purchaser looked in turn to his vendor to make good the warranty imported by a sale. It is a doctrine of tradition and history (*Norcross v. James*, 140 Mass. 189),

cited the case of *Whitfield v. Pindar*, C. P. Hil. 1781, where the tenant in tail remainder to others in tail made a lease and died three days after the rent day, and it was ruled that there should be an apportionment, though the lease was void as to the remainderman. 4 Evans, Eng. stat. 177, n, says this is a decision of law upon the express effect of 11 Geo. II., chap. 19, and stands upon much better ground than the attempt in the cases before alluded to, to apply the principles of the statutes to cases assumed not to be within the operation of it.

Where A was seised of 1 acre in fee and possessed of another for twenty years, makes a lease of both for ten years reserving rent, and dies, the rent shall be apportioned with the reversion, and the heir and executor shall have each his portion. *Dubitatur* Pasc. 14 Jac. B. R. enter *Moodye* and *Garnon*. Rolle, Abr. 237. See S. C. F. Moore, 848, 3 Bulst. 153.

In *Doe, Vaughan, v. Meyler*, 2 Maule & S. 276, where a "lease of lands of which lessor was seised in fee, and other lands of which he was seised for life with a power of leasing, at one entire rent, and the lease not well executed according to the power,—held, that the lease was good after the death of lessor for the lands in fee, though not for the other lands, for the rent may be apportioned."

In *Paget v. Gee*, 1 Amb. 198, where a tenant in tail leased, but not according to the statute, and died without issue between the days of payment, and the remainderman received the whole rent, on a bill by executors of tenant in tail for an apportionment, it was held that under 11 Geo. II., chap. 19, § 15, on the death of the tenant in tail the land should be apportioned. Lord Hardwicke said before the statute the rent to the death of the tenant for life was lost, and the law would not suffer his representative to bring an action for use and occupation, much less could he if there was a lease, and the remainderman could not because the rent was not due in his time, so the rent was lost and real injustice arose; and the court held that a tenant in tail *après* possibility of issue extinct ought to be so construed as tenant for life within this statute.

But where a father was tenant for life remainder in tail to the son the plaintiff, and the father was indebted by several judgments, and his land extended by a judgment creditor who leased the same to the defendant rendering £100 per annum payable quarterly, and the father the tenant for life died in the middle of the half year, the rent could not be apportioned in equity, and as to the profits from the end of the last quarter to the death of the tenant for life, the tenant should pay nothing, but for the profits from the death of the tenant for life the tenant, the underlessee, was to account to the plaintiff. *Jenner v. Morgan*, 1 P. Wms. 392.

Where an administrator made an under lease of the intestate's term rendering rent to himself, his executors, administrators, and assigns, and died, his executor, and not the administrator *de bonis non*, was entitled to the rent. The court said that in this case where the executor of an administrator recovers the rent he shall be chargeable with it as assets in the nature of an executor *de son tort*, for the administrator having power to dispose of the term which he had in right of the intestate, this rent which is reserved to him and his executor is a continuing interest in them in the same right. *Drue v. Baylie*, Freeman. C. L. 402.

Where A was indebted to B for rent, and the landlord died, and the tenant A gave a note to C, the administrator of the landlord for the rent in arrears, and C died intestate, it was held that this note 40 L. R. A.

was an alteration of property, and the rent belonged to the administrator of C, and not to the administrator *de bonis non* of B. *Barker v. Talbot*, 1 Vern. 473.

In *Doyle v. Maguire*, Ir. L. R. 14 C. L. 24, it was held that an administrator *de bonis non* was entitled to the arrears of rent where his predecessor made a lease of premises forming a part of the intestate's estates for a term of twenty-one years, and the lease did not purport to be made in her representative capacity, and the lessee took possession but never paid rent.

Where a widow, an administratrix, had made an agreement with the children to divide the farm and other personal property, a lease made by her of land held by the intestate under a lease for a term of years then unexpired was set aside, where the lessee had notice of the contract with the family. *Drohan v. Drohan*, 1 Ball & B. 185.

c. Summary of English cases.

The personal representative was not entitled to rent where the landlord died between pay days, and the lease was made by tenant for life. *Clun v. Fisher*, Cro. Jac. 309; *Clun's Case*, 10 Coke, 127a; *Glover v. Archer*, 4 Leon. 247; *Barwick v. Foster*, Cro. Jac. 227.

And where the landlord in such a case died on pay day before sunset. *Rockingham v. Penrice*, 1 P. Wms. 177, 2 Salk. 578.

The personal representative was not entitled to rent made under a power of lease (continuing), where landlord died at 12 o'clock at noon on pay day. *Earl Strafford v. Lady Wentworth*, Prec. in Ch. 555.

The personal representative was not entitled to rent where the landlord died at 9 o'clock at night on pay day. *Norris v. Harrison*, 2 Madd. 268.

And where the landlord died after sunset and before midnight. *Duppa v. Mayo*, 1 Wms. Saund. 282.

The rent belonged to the executor where the landlord died at 12 o'clock at noon on pay day. *Earl Strafford v. Lady Wentworth*, Prec. in Ch. 555.

The personal representative was entitled to rent where it was payable to life tenant who died at 9 o'clock at night on pay day, as she lived beyond sunset. *Southern v. Belassis*, 1 P. Wms. 179, note.

Apportionment was made where life tenant made a lease and died between the time of payment. (Statute.) *Ex parte Smyth*, 1 Swanst. 338.

And where tenant in tail made a lease and died between pay days. (Statute.) *Vernon v. Vernon*, 2 Bro. Ch. 659.

And where tenant in tail leased and died between days of payment. (Statute.) *Paget v. Gee*, 1 Amb. 198.

This note is not intended to include cases of wills, although a few cases in a contest by an heir and an executor are included to show the law in such a case; and it is not intended to include the right of doweress to mesne profits or damages for detention of dower, which cases affect rents in certain cases, as this matter is covered by a note of Roan v. Holmes (Fla.) 21 L. R. A. 180.

III. Summary as to rents accrued during owner's life.

An administrator is entitled to accrued rents. *Humphries v. Davis*, 100 Ind. 369; *King v. Anderson*, 20 Ind. 385; *Crawford v. Ginn*, 35 Iowa, 543; *O'Bannon v. Roberts*, 2 Dana, 54; *Ball v. First Nat. Bank*, 80 Ky. 501; *Plummer v. Bowie*, 76 Me. 496; *Fleming v. Chunn*, 57 N. C. (4 Jones, Eq.) 422; *Rowan v. Riley*, 6 Baxt. 67.

And the same was said to be the rule in the fol-

and cannot be extended to new cases by analogy without legislation. The old cases, so far as we know, even the most extreme, are all cases of warranties or covenants by owners of

the land. *Fitzherbert*, Nat. Brev. 145c. Lord St. Leonards says that "there appears to be no direct authority that a stranger to the land can enter into covenants respecting it, which will

lowing cases: *Dorsett v. Gray*, 98 Ind. 276; *Williamson v. Richardson*, 6 T. B. Mon. 603; *Wilson v. Unsell*, 12 Bush, 215; *Bank of Pennsylvania v. Wise*, 3 Watts, 399; *Blow v. Maynard*, 2 Leigh, 29.

By statute. *Miller v. Crawford*, 26 Abb. N. C. 376.

IV. Summary as to rents accruing after owner's death.

a. Rights of heir.

The general rule is that heirs are entitled to accruing rents, in the absence of a statute to the contrary. *Foltz v. Prouse*, 17 Ill. 487; *O'Bannon v. Roberts*, 2 Dana, 54; *Bail v. First Nat. Bank*, 80 Ky. 501; *Eastin v. Hatchitt*, 15 Ky. L. Rep. 789; *Atchison v. Lindsey*, 6 B. Mon. 86, 43 Am. Dec. 153; *Rank v. Hill*, 8 Bush, 67; *Flimore v. Reithman*, 6 Colo. 120; *Trimble v. Pollock*, 77 Ind. 578; *Foteaux v. Lepage*, 6 Iowa, 123; *Kothman v. Markson*, 34 Kan. 542; *Shouse v. Krusor*, 24 Mo. App. 279; *Stinson v. Stinson*, 38 Me. 593; *Alden v. Stebbins*, 99 Mass. 616; *Bullock v. Sneed*, 13 Smedes & M. 293; *Bloodworth v. Stevens*, 51 Miss. 475; *King v. Anderson*, 20 Ind. 385; *Allen v. v. Van Houton*, 19 N. J. L. 47; *Reeves v. McMillan*, 101 N. C. 479; *Lee v. Lee*, 74 N. C. 70; *Fleming v. Chunn*, 54 N. C. (4 Jones, Eq.) 422; *Kohler v. Knapp*, 1 Bradf. 241; *Overturf v. Dugan*, 29 Ohio St. 230; *Haslage v. Krugh*, 25 Pa. 97; *Adams v. Adams*, 4 Watts, 160; *Merkel's Estate*, 131 Pa. 584; *Kirkpatrick v. Atkinson*, 11 Rich. Eq. 27.

And the same was said to be the rule in the following cases: *Bank of Pennsylvania v. Wise*, 3 Watts, 399; *Smith v. McConnell*, 17 Ill. 136, 63 Am. Dec. 340; *Evans v. Hardy*, 76 Ind. 527; *McCleod v. Davis*, 83 Ind. 263; *Egbert v. Thomas*, 1 Ind. 393; *Crane v. Guthrie*, 47 Iowa, 542; *Kinsell v. Billings*, 35 Iowa, 154; *Thomasson v. Lucas*, 4 Ky. L. Rep. 889; *Kidwell v. Kidwell*, 84 Ind. 224; *Slaughter v. Froman*, 2 T. B. Mon. 95; *Smith v. Bland*, 7 B. Mon. 21; *Beezley v. Burgett*, 15 Iowa, 192; *Lucy v. Lucy*, 55 N. H. 9; *Perkins v. Perkins*, 58 N. H. 405; *Dixon v. Niccolis*, 39 Ill. 372, 69 Am. Dec. 312; *Stark v. Brown*, 101 Ill. 395; *Getzandaffer v. Caylor*, 38 Md. 280; *Fuller v. Young*, 10 Me. 365; *Kimball v. Sumner*, 62 Me. 305; *Brigham v. Hunt*, 152 Mass. 237; *Cummings v. Watson*, 149 Mass. 292; *Lobdell v. Hayes*, 12 Gray, 236; *Drinkwater v. Drinkwater*, 4 Mass. 363.

So where a statute gave the accruing rents to the heirs they were entitled to the same. *Draper v. Barnes*, 12 R. I. 156; *Re Strickland*, 10 Misc. 496; *Griffith v. Beecher*, 10 Barb. 482.

And were entitled to the same until the land was sold, where the estate was insolvent. *Gibson v. Farley*, 16 Mass. 280.

So, the heirs were entitled to accruing rents where the administrator did not assert his right under the statute. *Jones v. Billstein*, 28 Wis. 229; *Streeter v. Paton*, 7 Mich. 341; *Baxter v. Robinson*, 11 Mich. 520; *Howard v. Patrick*, 38 Mich. 795; *Miller v. Hoberg*, 22 Minn. 249.

And the heirs were entitled to accruing rents if the administrator does not act. *Gayle v. Johnson*, 80 Ala. 388; *Materson v. Girard*, 10 Ala. 60; *Upchurch v. Norwathory*, 12 Ala. 532; *Chighizola v. Le Baron*, 21 Ala. 406; *Branch Bank v. Fry*, 23 Ala. 770.

The heir is entitled to rent when not needed to pay debts. *Remington v. American Bible Soc.* 44 Conn. 512; *Stewart v. Smiley*, 46 Ark. 373.

Some cases hold also that the administrator cannot collect accruing rents. *Brigham v. Hunt*, 152 Mass. 257; *Kidwell v. Kidwell*, 84 Ind. 224; *Cummings v. Watson*, 149 Mass. 292; *Adams v. Adams*, 4 Watts, 160; *Merkel's Estate*, 131 Pa. 584.

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b. Rights of administrator.

1. By statute.

In some cases the administrator is entitled to accruing rents by statute.

Patapeco Guano Co. v. Ballard, 107 Ala. 710; *Vandegrift v. Abbott*, 75 Ala. 487; *Palmer v. Steiner*, 68 Ala. 400; *Leatherwood v. Sullivan*, 81 Ala. 458; *Eubank v. Clark*, 78 Ala. 73; *Long v. McDougald*, 23 Ala. 413; *Doolan v. McCauley*, 86 Cal. 472; *Re Woodworth*, 81 Cal. 596; *Re Moore*, 96 Cal. 522; *Staples's Appeal*, 52 Conn. 421; *Reinstein v. Smith*, 65 Tex. 247; *Edwards v. Evans*, 16 Wis. 182; *Crow v. Day*, 69 Wis. 637; *Kline v. Moulton*, 11 Mich. 370; *Van Fleet v. Van Fleet*, 49 Mich. 610; *Wilmarth v. Reed*, 83 Mich. 44.

If he asserts his right. *Howard v. Patrick*, 38 Mich. 795.

In the following cases it was said that under a statute the administrator was entitled to the accruing rent: *Sheppard v. Tyler*, 92 Cal. 552; *Jones v. Billstein*, 28 Wis. 229; *Smith v. Park*, 31 Minn. 70; *Lass v. Elaleben*, 50 Mo. 122.

But during the time the statute was repealed he was not entitled to accruing rents. *Campau v. Campau*, 19 Mich. 116.

By statute he could collect accruing rents for one year. *Autrey v. Autrey*, 94 Ga. 579.

And in *Eoff v. Tompkins*, 2 Mo. App. 484, it was said that by statute he could collect accruing rent for two years.

An administrator was entitled to rents of plantation for three years under a statute, but not to rents of wild lands. *Murphy v. Thomas*, 41 Miss. 429.

In some cases an administrator is authorized by statute to collect accruing rents, under an order of probate court. *Oglesby v. Forman*, 77 Tex. 647.

In *Hill v. Mitchell*, 5 Ark. 608, it was said that an administrator was entitled to accruing rents on order of court.

An administrator authorized by statute was held to be not entitled to rents without court proceedings. *State, Homer v. Barrett*, 121 Ind. 92; *Dexter v. Hayes*, 88 Iowa, 493; *Bealey v. Blake*, 70 Mo. App. 229; *Platt v. Dawes*, 10 Ind. 60.

And the administrator has no right to the same under the statute if not needed. *Flood v. Pilgrim*, 32 Wis. 378; *Filbey v. Carrier*, 45 Wis. 469.

Under a statute an administrator was entitled to rents if no heir was present. *Toerring v. Lamp*, 77 Iowa, 488.

And the same was said to be the rule in the following cases: *Kinsell v. Billings*, 35 Iowa, 154; *Shawhan v. Long*, 26 Iowa, 488, 96 Am. Dec. 164.

And in the following cases it was said that an administrator of an insolvent estate by statute may collect accruing rents. *Gregg v. Currier*, 36 N. H. 200; *Plumer v. Plumer*, 30 N. H. 558.

And the same was said to be the rule after a decree of insolvency was made. *Lane v. Thompson*, 43 N. H. 320; *Lucy v. Lucy*, 55 N. H. 9.

Some statutes provide that the administrator should lease by auction. *Martin v. Williams*, 18 Ala. 190; *Long v. McDougald*, 23 Ala. 413; *Harkins v. Pope*, 10 Ala. 493; *Boytnton v. McEwen*, 36 Ala. 348.

But not in Louisiana. *Richmond's Succession*, 35 La. Ann. 858.

The statute authorizing the administrator to have accruing rents is not retrospective. *Philips v. Gray*, 1 Ala. 236.

It was said that an administrator is entitled to accruing rents. *Sanchez v. Hart*, 17 Fla. 507; *Gil-*

run with the land in the hands of assignees." Vol. 2, Vend. & P. 14th ed. 587. And, although he seems to have missed the distinction between the two classes of covenants to which we have adverted, this statement we believe to be correct with regard to covenants for title and many others, if others there be, which are governed by the same rules. *King v. Wight*, 155 Mass. 444, 447.

We do not argue from the rule that new and unusual incidents are not to be annexed to land, because that rule seems to belong

rather to the law of easements and the like than to the class under discussion. See *Norcross v. James*, 140 Mass. 188, 192.

It is true, no doubt, that the heirs are the only persons interested in the rent, and therefore are the only persons who suffer substantial damages by a failure to pay it. We assume that, if the administratrices recover substantial damages, they will receive them as trustees for the heirs. We agree, as suggested by Lord Ellenborough in a different case, that a recovery by them would bar the heirs from recovery

obrist v. Filyau, 2 Fla. 94; Union Bank v. Powell, 3 Fla. 175, 52 Am. Dec. 387; Deans v. Wilcoxon, 25 Fla. 980; Merritt v. Daffin, 24 Fla. 820.

2. In a foreign state.

An administrator has no right to accruing rents in a state where he was not appointed. *Smith v. Smith*, 13 Ala. 329; *Smith v. Wiley*, 22 Ala. 396, 58 Am. Dec. 262; *Fairchild v. Hagel*, 54 Ark. 61; *Crockett v. Althouse*, 35 Mo. App. 404; *McPike v. McPike*, 111 Mo. 216.

c. Liability of administrator.

1. Generally.

An administrator is liable for accruing rents collected by him. *Wills v. Dunn*, 5 Gratt. 684.

So, an administrator is liable to heirs as trustee where he collected accruing rent. *Shuffler v. Turner*, 111 N. C. 297; *McClead v. Davis*, 83 Ind. 263; *McCoy v. Scott*, 2 Rawle, 222, 19 Am. Dec. 640; *Fross's Appeal*, 105 Pa. 258; *Huson v. Wallace*, 1 Rich. Eq. 1; *Jewell v. Jewell*, 11 Rich. Eq. 296; *Laggar v. Mutual Union Loan & Bldg. Assn.* 148 Ill. 233; *Kruse v. Steffens*, 47 Ill. 112; *Geppner v. Leitzelmann*, 68 Ill. 409; *Atchison v. Lindsey*, 6 B. Mon. 86, 43 Am. Dec. 153; *Thomasson v. Lucas*, 4 Ky. L. Rep. 889; *Trimble v. Pollock*, 77 Ind. 578; *Terry v. Ferguson*, 8 Port. (Ala.) 500.

And the same was said to be the rule in the following cases: *Young's Estate*, 4 Pa. Dist. R. 44; *Smith v. Bland*, 7 B. Mon. 21; *Oldham v. Collins*, 4 J. J. Marsh. 49; *Trotter v. Trotter*, 40 Miss. 704.

An administrator is liable to heirs where he collected accruing rents. *Kimball v. Sumner*, 62 Me. 305; *Heald v. Heald*, 5 Me. 387; *Loddell v. Hayes*, 12 Gray, 236; *Palmer v. Palmer*, 13 Gray, 326; *Huson v. Wallace*, 1 Rich. Eq. 1; *Goodrich v. Thompson*, 4 Day, 215.

An administrator is liable to heirs for collection of accruing rents, and must exercise due diligence. *Burns v. Cox*, 10 Phila. 8.

And an administrator was liable to heirs for rents collected where he charged himself with the same in his account. *Head v. Sutton*, 31 Kan. 616; *Kothman v. Markson*, 34 Kan. 542.

Where he has the authority he is bound to reasonable diligence in collecting rents. *Patapsco Guano Co. v. Ballard*, 107 Ala. 710; *James v. Faulk*, 54 Ala. 184; *Eubank v. Clark*, 78 Ala. 73; *Re Moore*, 96 Cal. 522.

And was held liable only for the amount collected. *Re Moore*, 96 Cal. 522.

2. For use and occupation.

An administrator is liable for use and occupation. *Sparrow's Succession*, 39 La. Ann. 696; *Stearns v. Stearns*, 1 Pick. 157; *Henderson v. Simmons*, 33 Ala. 291; *Stewart v. Stewart*, 31 Ala. 207, 70 Am. Dec. 590; *Coester v. Brack*, 19 Ala. 210; *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290; *Re Misamore*, 90 Cal. 169.

Where he had no order of court. *Steele v. Knox*, 10 Ala. 608; *Benford v. Daniels*, 13 Ala. 667; *Harrison v. Harrison*, 39 Ala. 489.
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And where he made an illegal sale. *Anderson v. McGowan*, 42 Ala. 280; *Miles v. Wheeler*, 43 Ill. 123.

An administrator was held liable for profits made by use and occupation. *Kellar v. Beelor*, 5 T. B. Mon. 573; *French v. Davis*, 38 Miss. 167.

But he was not liable after sale of land. *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93; *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290.

An administrator was not liable for rents where he could not lease the plantation. *Triche's Succession*, 39 La. Ann. 289; *Myrick's Succession*, 38 La. Ann. 611.

3. Accounting and sureties.

Generally in the absence of a statute the sureties on an administrator's bond are not liable for accruing rents collected by him. *Com. v. Hilgert*, 55 Pa. 236; *Jewell v. Jewell*, 11 Rich. Eq. 296; *Allen v. Bruton*, 1 McMull. L. 249; *Wilson v. Unselt*, 12 Bush, 215, overruling *Harmon v. Ross*, MSS.; *Easton v. Hatchitt*, 15 Ky. L. Rep. 789; *Slaughter v. Froman*, 2 T. B. Mon. 95; *Smith v. Bland*, 7 B. Mon. 21; *Atchison v. Lindsey*, 6 B. Mon. 86, 43 Am. Dec. 153; *Thomasson v. Lucas*, 4 Ky. L. Rep. 889; *State, Brown, v. Brown*, 2 Harr. (Del.) 5.

An administrator's bond was held not liable until after an account in probate under a statute making rents assets. *State, Giles, v. Waples*, 5 Harr. (Del.) 257.

In *Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324, it was said that an administrator was not chargeable for accruing rents.

An administrator should not account in the probate court for rents. *Levy's Estate, Tucker* (N. Y.) 148.

An administrator cannot be required to account in the probate court for accrued rents collected by him. *Belcher v. Branch*, 11 R. I. 226; *Fross's Appeal*, 105 Pa. 258; *Merkel's Estate*, 131 Pa. 584.

And the same was said to be the rule in *Trotter v. Trotter*, 40 Miss. 704.

Where the estate was solvent the administrator could not be required to account in the probate court. *Lucy v. Lucy*, 55 N. H. 49; *Perkins v. Perkins*, 58 N. H. 405; *Goodrich v. Thompson*, 4 Day, 215; *Fross's Appeal*, 105 Pa. 258.

But in *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 462, it was said that an administrator was said to be liable as administrator for accruing rents collected by him.

And in *Brooks v. Jackson*, 125 Mass. 307, it was said that an administrator must account in the probate court for rents collected by him. (By statute.)

An administrator may be required to account in the probate court for accruing rents collected by him where the heirs allow him to collect the rents. *Campbell v. McCormick*, 1 Ohio C. C. 504.

An administrator is liable for rents, and should account for the same as assets. *Willenborg v. Murphy*, 36 Ill. 344; *Dorman v. Lane*, 6 Ill. 143.

And where he had charged himself with the same in his account. *Crowder v. Shackelford*, 35 Miss. 321.

An administrator should account in the probate court for accruing rents collected where he was

ering at all. But we do not agree to his further suggestion that they could recover, at most, but nominal damages. *Kingdon v. Nottle*, 1 Maule & S. 355, 362. At the present day a trustee may recover damages to the extent of the interest of his *cestuis que trust*. *Drummond v. Crane*, 159 Mass. 577, 580, 28 L. R. A. 707; *Lloyd's v. Harper*, L. R. 16 Ch. Div. 290. Executors or administrators represent the person of the deceased "more actually" than do the heirs. Co. Litt. 209a; *Bullard v. Moor*, 158 Mass. 418, 425. Unless we are prepared to hold that assigns could sue in their own names upon this contract, we ought to adhere to the general rule, and to allow the administratrices to maintain the action. For the reasons which we have given, we are of opinion that the plaintiffs can maintain this suit. In *Harbeck v. Sylvester*, 18 Wend. 608, 609, not noticed in *Allen v. Culver*,

authorized to collect by statute. *State, Beals, v. Ramsey County Probate Court*, 25 Minn. 22; *Hartnett v. Fegan*, 3 Mo. App. 1.

And an administrator was held liable on his bond under a statute authorizing him to collect accruing rents where he rented without authority. *Oglesby v. Forman*, 77 Tex. 647.

The sureties on an administrator's bond were held liable for accruing rents where the administrator was authorized by statute to collect. *McPike v. McPike*, 111 Mo. 216.

And the same was said to be the rule in *Lewis v. Carson*, 93 Mo. 587.

d. Rights of creditors.

Creditors were entitled to rents where the heirs allowed the administrator to collect and disburse rents. *Tyler v. Priest*, 31 Mo. App. 272.

And an administrator was held liable to creditors under a statute. *Davis v. Rawlins*, 3 Harr. (Del.) 346.

In some states a creditor may subject accruing rents. *Moore v. Shields*, 68 N. C. 327; *Washington v. Sasser*, 41 N. C. (6 Ired. Eq.) 336; *Jennings v. Copeland*, 90 N. C. 572.

And the same was said to be the rule in *Hinton v. Whitehurst*, 71 N. C. 66.

In *Harrison v. Wood*, 21 N. C. (1 Dev. & B. Eq.) 437, the contrary was held, but this was overruled by the subsequent cases.

But other cases hold that a creditor has no lien on the accruing rents. *Robb's Appeal*, 41 Pa. 45; *Boyd v. Martin*, 9 Helak. 382; *Combs v. Young*, 4 Yerg. 218, 26 Am. Dec. 225; *Smith v. Thomas*, 14 Lea, 324; *Crow v. Day*, 69 Wis. 637; *Bail v. First Nat. Bank*, 80 Ky. 501.

Where they were applied for their benefit. *Reynolds v. New Orleans Canal & Bkg. Co.* 30 Ark. 520.

e. Apportionment.

It was held that accruing rents go to the reversioner on the death of the life-estate holder. *Watson v. Penn*, 108 Ind. 21.

Where a guardian leased his ward's land by parol for one year, on the death of the ward during the year the heir could not recover accrued rents as the lease was determined. *Welles v. Cowles*, 4 Conn. 189, 10 Am. Dec. 115.

Where the tenant for life died the rent was apportioned by statute. *Bloodworth v. Stevens*, 51 Miss. 475.

In some cases an apportionment of rent is provided for by statute. *Norris v. Cheatham*, 6 Ky. L. Rep. 233; *Redmond v. Bedford*, 80 Ky. 13.

On death of life tenant. *Henry v. Stevens*, 108 Ind. 281; *Miller v. Crawford*, 26 Abb. N. C. 376; *Cole v. Patterson*, 25 Wend. 456.

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an opposite decision was reached from that in *Allen v. Culver*. See also, as to collateral covenants, *Raymond v. Fitch*, 2 Crompt. M. & R. 588, 599, 5 Tyrw. 985, 996.
Judgment for the plaintiffs.

William THOMPSON

v.

LOWELL, LAWRENCE, & HAVERHILL
STREET RAILROAD COMPANY.

(170 Mass. 577.)

1. That an independent contractor is in charge of an entertainment at grounds provided by a street-car company for free entertainment of patrons will not entirely relieve the company from liability for injuries to patrons if the entertainment is of such a character that it will probably cause injury to spectators unless due precautions are taken to guard against them.
2. A street-car patron attending a free entertainment given by the company to its patrons may hold the company liable for an accident which happens from a cause which might have been prevented and ought to have been foreseen and guarded against, if due care was not taken by the company with reference to possible accidents of the kind.
3. The arrangement of the stage and target at which an exhibition of marksmanship is given by an independent contractor to street-car patrons upon grounds of the street-car company is not, as matter of law, so much a matter of detail that the company will not be liable in case it is so negligently arranged that a patron is injured by a shattered bullet.
4. The risk of injury from careless handling of the implements used by the performers is not, as matter of law, assumed by a street-car patron who attends a free exhibition given by the company upon its grounds.

(April 1, 1896.)

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Mr. J. P. Sweeney, for defendant:

The defendant was engaged in a lawful business, and as the existence of negligence is an affirmative fact to be established by him who alleges it as a foundation of his right to

NOTE.—For negligence in respect to safety of persons at a public entertainment or exhibition, see *Hart v. Washington Park Club* (Ill.) 29 L. R. A. 422; *Lane v. Minnesota State Agri. Soc.* (Minn.) 29 L. R. A. 708; and *Richmond & M. R. Co. v. Moore* (Va.) 37 L. R. A. 258.

For exceptions to the rule as to independent contractors, see *note* to *Hawver v. Whalen* (Ohio) 14 L. R. A. 828; *Negus v. Becker* (N. Y.) 25 L. R. A. 667; *Colgrove v. Smith* (Cal.) 27 L. R. A. 590; *Smith v. Milwaukee Builders' & T. Exchange* (Wis.) 80 L. R. A. 504; *Cabot v. Kingman* (Mass.) 83 L. R. A. 45; *Sanford v. Pawtucket Street R. Co.* (R. I.) 33 L. R. A. 564; and *Leavitt v. Bangor & A. R. Co.* (Me.) 36 L. R. A. 382.

recover, it is incumbent upon the plaintiff to point out, by evidence, the defendant's fault.

Cosulich v. Standard Oil Co. 122 N. Y. 118; *Loose v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Kendall v. Boston*, 118 Mass. 284, 19 Am. Rep. 446.

The exhibition of marksmanship was being performed under a contract between the defendant and one Gorman; the person who did the shooting was not an agent or servant of the defendant; all the instruments and appliances were furnished either by Gorman or by some servant or subcontractor under Gorman, and the defendant neither had the right nor attempted to exercise any control or supervision over the performance. These facts bring the case within the rule of law that where lawful work is being done by an independent contractor, who has general control of the work, the contractee is not liable for an injury resulting from the negligence of such contractor or his servant in the doing of the work.

Hilliard v. Richardson, 3 Gray, 349, 63 Am. Dec. 748; *Forsyth v. Hooper*, 11 Allen, 419; *Connors v. Hennessey*, 112 Mass. 96.

The obligation imposed upon the defendant was to exercise ordinary care, and there is no evidence which would justify a jury in finding that it failed to discharge that obligation.

In this case there was nothing concealed from the plaintiff. He was invited to witness an exhibition of marksmanship, the nature of which he knew before he came upon the defendant's premises and the method of which he saw before the accident, and he must be held to have assumed the risk of any misadventure that could not have been reasonably foreseen or contemplated by the defendant.

Pollock, Torts, Am. ed. p. 190.

Messrs. Charles A. De Courcy and Walter Coulson, for plaintiff:

There was clearly evidence of due care on the part of the plaintiff, for the consideration of the jury.

Fox v. Dougherty, 2 W. N. C. 417; *Colvin v. Peabody*, 155 Mass. 104; *Whitten v. Martin*, 163 Mass. 39.

The defendant advertised and supplied the entertainment. The plaintiff and the public generally knew no one else in the affair. As between this defendant and plaintiff, it was the defendant's entertainment; and the marksman, those who constructed, arranged and inspected the paraphernalia, and those who took part in the performance, were for the time being the servants or agents of the defendant. And these servants and agents did only what they were expressly authorized to do by the defendant.

Conrad v. Clauve, 93 Ind. 476, 47 Am. Rep. 388; *Texas & P. R. Co. v. Juneman*, 30 U. S. App. 541, 71 Fed. Rep. 939, 18 C. C. A. 394; *Fox v. Dougherty*, 2 W. N. C. 417; *Samuelian v. American Tool & Mach. Co.* 168 Mass. 12.

The defendant cannot relieve itself from responsibility by delegating its duty.

Verona Central Cheese Co. v. Murtaugh, 50 N. Y. 814; 2 Bailey, *Personal Injuries Relating to Master & Servant*, §§ 2566, 2594; *Fowler v. Holmes*, 24 N. Y. S. R. 299; *Carlson v. Stocking*, 91 Wis. 432; *Colvin v. Peabody*, 155 Mass. 104.

A person who, for reward, invites large

numbers of the public to commit their lives and the safety of their persons to his custody owes them a higher duty than that implied by the term "ordinary care."

1 *Thomp. Neg.* p. 311; *Francis v. Cockrell*, L. R. 5 Q. B. 184.

When the owner of premises which are under his control employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner is not relieved by reason of the contract from the obligation of seeing that due care is used to protect such persons. The owner cannot continue to hold out the invitation without being bound to exercise due care in keeping the premises reasonably safe for use according to the invitation.

Curtis v. Kiley, 153 Mass. 123; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 213; *Conrad v. Clauve*, 93 Ind. 476, 47 Am. Rep. 388; *Hart v. Washington Park Club*, 157 Ill. 9, 29 L. R. A. 492; *Lane v. Minnesota State Agri. Soc.* 62 Minn. 175, 29 L. R. A. 708; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 308, 87 Am. Dec. 644; *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311; 2 *Jaggard, Torts*, p. 889 (c); *Selinas v. Vermont State Agri. Soc.* 60 Vt. 249; *Richmond & M. R. Co. v. Moore*, 94 Va. 483, 37 L. R. A. 258.

Allen, J., delivered the opinion of the court:

Statute 1895, chap. 316, authorizes street-railway companies to acquire, hold, equip, and maintain real estate to be used for purposes of recreation and for pleasure resorts, the admission being free. By virtue of this statute the defendant maintained such a place on the line of its railway which contained a large platform or stage for exhibitions. The defendant entered into a written contract with a manager under which the latter furnished and managed various entertainments there, and, among them, an exhibition of marksmanship by a man born without hands. The defendant paid for advertising these exhibitions, and carried posters on its cars. The plaintiff, having seen an advertisement, was a spectator at an exhibition of marksmanship, having come on one of the defendant's cars. A butt was provided to receive the bullets. All the appliances were furnished by the manager or the performer, and nobody in the defendant's employment exercised any supervision or control over the performance. Immediately after a shot had been fired, something struck the plaintiff in the eye. It is not made plain just how the accident occurred, but on the evidence the jury might find that the plaintiff was struck in the eye by a small fragment of a bullet or other metallic substance which flew from the impact when the bullet hit the butt. There was no suggestion that he was not himself in the exercise of due care, or that he was not in the place provided for spectators. The defendant asked for an instruction to the jury that it "was not responsible unless the exhibition was in its nature such that it would necessarily bring wrongful consequences to pass, unless guarded against, and the defendant failed to exercise due care to prevent

harm." The judge, instead thereof, instructed the jury that the "defendant was not responsible unless the exhibition was in its nature such that it would necessarily or probably cause injury to some person present under defendant's invitation, unless guarded against, and the defendant failed to exercise due care to prevent harm." The fact that the exhibition was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm. *Curtis v. Kiley*, 153 Mass. 123; *Richmond & M. R. Co. v. Moore*, 94 Va. 483, 87 L. R. A. 258; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701; *Hawyer v. Whalen*, 49 Ohio St. 69, 14 L. R. A. 828; *Bower v. Peate*, L. R. 1 Q. B. Div. 321. The instruction as given was right. But, even under this rule, the defendant contends that there was no evidence upon which the jury was justified in finding that the plaintiff was injured by any negligent act or omission on its part; or, in other words, that there was no evidence of any failure on its part to perform its duty in the premises. The question is suggested how far the defendant was bound to go in supervising the instruments and appliances used, and the other details of the exhibition. Should it be held to inspect the rifle and the cartridges, to see if they were safe? Without undertaking to go into unnecessary detail, it is apparent that there was evidence tending to show that the accident happened from a cause which might have been prevented and that it ought to have been foreseen and guarded against by somebody, either by the defendant or by the manager; and the jury might come to the conclusion that in the general arrangements for an exhibition of this nature the butt should be so placed that fragments which might fly from the impact of the bullets could not reach the spectators, and that due care was not taken in the arrangement of the stage, with reference to possible accidents of this kind, and that the defendant itself failed in its duty in this respect. We cannot say that this was so much a matter of transitory detail that the manager alone was responsible for an omission to pay proper attention to securing the safety of spectators from such a risk. The case, therefore, was rightly submitted to the jury. Nor can it be held that the plaintiff assumed the risk. He might well rely on those who provided the exhibition, and invited him to attend, to take due care to make it safe from such an injury as he received.

Exceptions overruled.

Clemence LORENZO

v.

Maria WIRTH.

(170 Mass. 506.)

Injury by stepping when it was dark into a coal hole about 2 feet back from

NOTE.—As to liability for dangerous condition of premises beside highway, see note to *Lepnick v. 40 L. R. A.*

the street line, in a space paved like the sidewalk in front of a house which stands 3 or 4 feet from the street, while a coal wagon was standing by the curb, and coal extended therefrom nearly to the house, and two employees of a coal dealer were preparing to put in the coal, will not render the occupant of the house liable to the injured person, although she was a foreign woman, ignorant of the custom of delivering coal through such holes, and did not see the coal hole but stepped upon the coal from the steps of the next house, which came out to the street line.

(*Knowlton and Allen, JJ., dissent.*)

(April 11, 1898.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict in plaintiff's favor. *Sustained.*

The facts are stated in the opinion.

Messrs. Nason & Proctor for defendant.

Messrs. Richard H. Dana and Hollis R. Bailey, for plaintiff:

On the question of whether or not the plaintiff was in the exercise of due care, it was competent to show that she was a foreigner and had never seen coal put in through a hole in the sidewalk.

Bethman v. Old Colony R. Co. 155 Mass. 352.

On the question of invitation and of the right of the public to travel upon that part of the sidewalk near the building, it was competent to show fully the character and construction of the entire sidewalk from the curbstone to the building and also to show how long it had been open to public travel.

Sweeney v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; *Murphy v. Boston & A. R. Co.* 133 Mass. 125; *Holmes v. Drew*, 151 Mass. 578; *Plummer v. Dill*, 156 Mass. 426; *Hanton v. Thompson*, 167 Mass. 190.

These cases hold that an invitation to walk outside the line of the street may be implied from various circumstances, and that of these circumstances a very important one is the construction upon land adjacent to the street of a sidewalk of such a character as to give the appearance of a widening of the sidewalk proper.

Valentine v. Boston, 23 Pick. 75, 33 Am. Dec. 711, holds that a user by the public for twenty years of private land for purposes of travel raises a presumption of dedication to public use.

See also *Oliver v. Worcester*, 102 Mass. 489, 8 Am. Rep. 485.

On the question of Mrs. Wirth's occupation of the premises in question the written lease under which she was in possession was clearly competent to show that she, and not her landlord, had the whole control of the premises and the entire responsibility for their safe condition.

Stewart v. Putnam, 127 Mass. 403; *Boston v. Gray*, 144 Mass. 53.

The fact that Mrs. Wirth employed the coal

Gaddis (Miss.) 26 L. R. A. 686; also *Dobbins v. Missouri, K. & T. R. Co. (Tex.)* 38 L. R. A. 573.

company to deliver the coal does not free her from liability.

Pickard v. Smith, 10 C. B. N. S. 470; *Woodman v. Metropolitan R. Co.* 149 Mass. 385, 4 L. R. A. 213; *Curtis v. Kiley*, 153 Mass. 123; *Blessington v. Boston*, 153 Mass. 409; *Pye v. Faxon*, 156 Mass. 471.

Holmes, J., delivered the opinion of the court:

This is an action for personal injuries suffered by the plaintiff in consequence of her stepping into an open coal hole. The coal hole was situated about 18 inches in front of a house held by the defendant under a lease, and upon land embraced in the lease. The house was set back from the street, and the coal hole was 2 feet or more outside the street line. But the paving over the space between the street line and the house was continuous with that of the street, and there was nothing in the usual conditions to give notice that it was not part of the street, except the way in which it generally was used by tenants for the deposit of barrels, etc., and the fact that the steps of the house next to it on the side from which the plaintiff was coming came out to the line of the street.

At the time of the accident a coal wagon was backed up to the side wall in front of the premises, and coal which had been ordered by the defendant was being delivered from it by the servants of a coal dealer. One of these had uncovered the coal hole, and was shoveling the last of the coal out of the wagon upon the sidewalk. The other stood by the hole, doing such work as was necessary to help the coal pour down the hole. The coal covered the whole sidewalk from the wagon to near the house. The plaintiff, a Spanish woman, who, according to her own testimony, never had seen coal put through a coal hole before, stepped upon the steps of the next building above mentioned, thence stepped upon the coal, and then with her other leg went into the coal hole, which was 30 inches from the corner of the steps. The judge was asked to direct a verdict for the defendant, which he refused to do, and the defendant excepted.

The question in its common form is whether these facts show any evidence of negligence proper to be left to the jury. But it will be seen that it is not a question of evidence, in the ordinary sense. It is not whether there is anything tending to prove a disputed fact. The acts and omissions of the defendant as to the plaintiff are fully known and undisputed. The question is whether those acts and omissions made the defendant liable for the plaintiff's hurt,—in the common language of the law, whether they constituted a breach of duty to the plaintiff. It will be observed, further, that the facts on which the question arises are quite simple and are likely to be repeated with slight variations, as long as coal holes exist; that they are all matters of eyesight, capable of being photographed; and that theory must recognize that at some point the visible situation would be such as to warrant the defendant in assuming that the public were sufficiently warned, or, in other words, that the defendant

would have done her whole duty. *Chenery v. Fitchburg R. Co.* 160 Mass. 211, 214, 22 L. R. A. 575. It is true that blind men, and foreigners unused to our ways, have a right to walk in the streets, and this fact must be taken into consideration in drawing the line of the defendant's duty; but the line, when drawn, is a physical line, so to speak,—it is a visible situation, in which all the arrangements or precautions which the law requires of a defendant are there, upon the ground.

In simple cases of this sort, courts have felt able to determine what, in every case, however complex, defendants are bound at their peril to know, and are presumed to know, namely, whether the given situation is on one or the other side of the line. The examples are numerous, and we take the first that come to our hand. *Barron v. Eldredge*, 100 Mass. 455, 460, 461, 1 Am. Rep. 126; *Pinney v. Hall*, 156 Mass. 225; *Crafter v. Metropolitan R. Co.* L. R. 1 C. P. 300. We think that the case at bar is not beyond our competence to decide. The greatest danger in attempting to do so is that of being misled by ready-made generalizations, and of thinking only in phrases to which, as lawyers, the judges have become accustomed, instead of looking straight at things, and regarding the facts in all their concreteness, as a jury would do. Too broadly generalized conceptions are a constant source of fallacy. Thus it is easy to say that the continuity of the sidewalk was an invitation, and then to discuss in universals the duty of one who invites the public upon his land. But, invitation or no, the invitation is not the same, and the responsibility is not the same, when the place is seemingly in the middle of a clear highway, and looks safe and ready for travel to one who is walking straight along the open road, that it is where the place is in a snug corner, and is capable of being reached only by going over steps which manifestly are not a part of the highway, and then by stepping into a pile of coal which surrounds the spot in question. Without considering whether under such circumstances, the defendant would be freed from all duty in respect of the temporary dangers created by the coal dealer while he was doing his work (*Clapp v. Kemp*, 122 Mass. 481), it is the opinion of a majority of the court that she was not called on to stand guard, and to tell the public that they must not understand the continuity of the pavement under the coal, if they happen to know of it, as a present assurance that they might step blindly into the coal, and as a warranty that there was no coal hole in the place where the coal was pouring down. A heap of coal on a sidewalk in Boston is an indication, according to common experience, that there very possibly may be a coal hole to receive it. But, without saying that it always is a sufficient warning to look out for one, we are of opinion that as against a person coming from where the plaintiff came from, with a coal hole situated as this was, the coal in the condition shown, and the business of delivery then going on, in the absence of men with baskets, or other indication of a different means of making the delivery, the defendant cannot be said to have been wanting in due care.

Exceptions sustained.

Knowlton, J., dissenting:

I am unable to agree to the opinion of the majority in this case. The building occupied by the defendant, and the adjoining buildings for a considerable distance towards the west, stood back from the line of the street about 3 feet and 8 inches. The buildings in the other direction, with their projections, came out to the line of the street. The space in front of the defendant's building, and of the adjoining buildings towards the west, was paved with the same kind of material, and on the same level, all the way from the buildings to the curbstone and was used as a sidewalk. The walk was not very wide, and there was nothing to mark the line of the street. In *Holmes v. Drew*, 151 Mass. 580, is this language: "The jury might have inferred from the facts stated that the defendant laid out and paved the sidewalk on her own land in order that it should be used by the public as the sidewalk of the street, and allowed it to remain apparently the part of the street that was intended to be used by foot passengers. This would amount to an invitation to the public to enter upon, and use as a public sidewalk, the land so prepared, and the plaintiff, so using it, would have gone upon the defendant's land by her implied invitation, and she would owe him the duty not to expose him to a dangerous condition of the walk which reasonable care on her part would have prevented." In *Plummer v. Dill*, 156 Mass. 426-430, the court says, referring to cases of this kind: They "stand on a ground peculiar to themselves. They are where the defendant by his conduct has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The inducement or implied invitation in these cases is not to come to a place of business fitted up by the defendant for traffic, to which those only are invited who will come to do business with the occupant; nor is it to come by permission or favor or license; but it is to come as one of the public and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability in such a case should be co-extensive with the inducement or implied invitation." I think that the jury might have found the circumstances under which the plaintiff was walking upon the sidewalk at the time of the accident to be such as entitled her to protection or warning against openings in it. At the time of the accident the coal hole was being used for the defendant's benefit, by her authority. If this use would ordinarily be attended with danger to the public, the defendant was bound to see that proper precautions were taken for their safety, even if the work was being done by an independent contractor. *Curtis v. Kiley*, 153 Mass. 123; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 213; *Pye v. Frazon*, 156 Mass. 471-474; *Pickard v. Smith*, 10 C. B. N. S. 470. The opinion in *Clapp v. Kemp*, 122 Mass. 481, does not purport to state the rule of law applicable to such cases, but only decides that the instruction given was sufficiently favorable to the defendant. Although the men who delivered the coal, and their employer, might be liable over to the defendant if she should be held liable

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on account of their negligence, the defendant is herself liable as if they had been her own servants, if, while using the coal hole under her authority, they exposed the plaintiff to danger by negligently leaving an unguarded opening in the sidewalk. *Curtis v. Kiley*, 153 Mass. 123. There was testimony from several witnesses that the coal covered the sidewalk from the curbstone to the coal hole, and two others testified that it extended from the curbstone to the line of the defendant's house. The accident occurred at a little before 6 o'clock on the evening of November 15, and there was testimony that it was dark, and that there was no daylight. There was evidence from the plaintiff, and from another witness who was present, that they saw nobody about the coal hole before the accident. One of the two men who were delivering the coal was in the wagon from which he had just shoveled the last of the coal, and was busy with his team, and he did not see the plaintiff until she was being lifted out of the hole. The other testified that he was about 3 feet from the coal hole; that he could not say what he was doing; that he thought his head was turned around, looking up Eliot street towards Tremont street, which was in the direction opposite to that from which the plaintiff was coming. He also said in his testimony: "I was not shoveling coal at that time. I was trying to keep myself on my feet. There was a throng of people going up there, each way." Apparently, the plaintiff was going as others were, except that they did not happen to step into the hole. According to her testimony, she had just come from Spain, and had never seen coal put into a cellar through a coal hole. Eliot street is traveled by many persons. Besides the plaintiff, others might have been expected there who had never seen coal put in through holes in sidewalks. The wagon was backed up to the curbstone, and there were electric cars and teams passing through the street. I think that the jury well might have found that a coal hole on a public sidewalk where a throng of persons was passing in each direction was left open on a dark evening, with coal scattered about it from the curbstone to the side of the defendant's building, with a large two-horse wagon backed up against the curbstone, with nothing to indicate to pedestrians that there was an opening there and with nobody to guard the hole or to warn them of danger. It seems to me that there was evidence of negligence on the part of those who left the hole open and unguarded. What kind of conduct is required under complex conditions to reach the usual standard of due care, namely the ordinary care of persons of common prudence, is a question of fact, to be determined according to the observation and experience of common men. Even when there is no conflict of testimony, if there are acts and omissions, of which some tend to show negligence, and others do not, the question whether there was negligence or not is, in my judgment, a question for a jury. This proposition I deem to be established by such unanimity of decision as to need no citation of authorities in support of it. I think the case was rightly submitted to the jury.

Allen, J., concurs in this dissent.

CALIFORNIA SUPREME COURT.

R. W. PIERCE, *Respt.*,
v.

SOUTHERN PACIFIC COMPANY, *Appt.*

(.....Cal.....)

1. **The right of a foreign corporation to plead** the statute of limitations under act April 1, 1872, depends upon its compliance with the statute in respect to the designation of the person upon whom process may be served.
 2. **A complaint giving the whole history of a shipment of goods**, deviation from the proper route, and the damage resulting thereby, is not insufficient to state a cause of action as against a general demurrer, even if it might be subject to a demurrer on the ground of ambiguity or uncertainty.
 3. **A carrier which sends a carload of orange trees** early in March from New Orleans, Louisiana, to Riverside, California, by the way of Denver, Colorado, and Ogden, Utah, without notifying the consignee or consignor and taking directions from them, is liable for the loss of the trees by freezing, although its own route through Texas, New Mexico, and Arizona was temporarily interrupted by storms and washouts.
 4. **A stipulation against liability** except for gross negligence will not relieve a carrier from liability for negligence, although it may not be gross negligence.
 5. **A contract fixing the measure of damages** for the loss of goods at the actual invoice cost at point of shipment, if fairly made, in consideration of a lower freightage, is not invalid.
- On rehearing.*
6. **Loss of freight by freezing caused by its being sent by direction of the carrier** over a route which subjected it to such peril is not within a clause in the shipping contract exempting the carrier from liability for loss from any "cause arising out of responsibility as master over its agents or servants incident to said shipment."
 7. **Absence of an invoice will not prevent the operation of a stipulation** in a carriage contract that the carrier's liability for loss shall be limited to the invoice price at the point of shipment, but the value of the property at that point will be the measure of damage.

(February 17, 1897.)

APPEAL by defendant from a judgment of the Superior Court for the County of San Bernardino in favor of plaintiff in an action brought to recover damages for the destruction of orange trees by frost while in defendant's possession for transportation.

Reversed.

The facts are stated in the Commissioner's opinion.

Mr. A. B. Hotchkiss, for appellant:

The statute of limitations attaches and begins to run from the time when the injury (*i. e.*, the cause of loss) was first inflicted, and not

NOTE.—As to carrier's liability for freezing of goods, see also *Fox v. Boston & M. R. Co.* (Mass.) 1 L. R. A. 702.

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from the time when the full extent of the damages sustained has been ascertained.

Wood, Limitations of Actions, § 179; *Wilcox v. Plummer*, 4 Pet. 179, 7 L. ed. 828; *Belcher v. Chambers*, 53 Cal. 635; *McCusker v. Walker*, 77 Cal. 208; *Raynor v. Mintzer*, 72 Cal. 585; *Lattin v. Gillette*, 95 Cal. 323; *Wood v. Currey*, 57 Cal. 210; *Anderson v. Coleman*, 56 Cal. 124; *Piller v. Southern P. R. Co.* 52 Cal. 43.

Defendant was the agent of the Florida Midland Railway Company, the first carrier receiving the property, and which alone executed the contracts and bills of lading declared upon, and which, upon the uncontradicted testimony, undertook to carry the trees through to Riverside from the place of shipment, and guaranteed the payment of through freight.

Ogdensburg & L. C. R. Co. v. Pratt, 23 Wall. 181, 22 L. ed. 830; *Pereira v. Central P. R. Co.* 66 Cal. 91; *Palmer v. Atchison, T. & S. F. R. Co.* 101 Cal. 187; *Wheeler v. San Francisco & A. R. Co.* 31 Cal. 46, 39 Am. Dec. 147.

Contracts made in one place and to be performed in another are to be governed by the law of the place of performance.

Miller v. Tiffany, 1 Wall. 810, 17 L. ed. 543; *Scudder v. Union Nat. Bank*, 91 U. S. 411, 23 L. ed. 248.

It is a condition precedent to plaintiff's right to sue anyone except the first carrier in this case, that he make the demand and procure the showing from the first carrier that neither the loss nor injury, *i. e.*, the cause of loss, occurred while the property was in charge of said "first carrier."

Civil Code, § 2202; *Southern Exp. Co. v. Caldwell*, 21 Wall. 265, 22 L. ed. 556.

It is not an implied notice to the second company of any instructions given to the first, that when it receives the goods they are loaded in an appropriately marked car of the particular line over which the shipper ordered them to be forwarded.

Patten v. Union P. R. Co. 29 Fed. Rep. 590; *Knott v. Raleigh & G. R. Co.* 98 N. C. 73.

Defendant is released by the stipulations of the contract sued on.

Lawson, Carr. § 254; *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556.

The stipulation fixing cost of the goods at point of shipment as a limitation of damages is just, reasonable, and binding, and will be enforced against a loss occurring even through negligence, although we do not concede any negligence is shown in this case against this defendant.

Hart v. Pennsylvania R. Co. 113 U. S. 831, 28 L. ed. 717.

The proximate cause of the loss was by the "act of God," to wit, by the freezing of the trees; the sole injury complained of in the complaint against this defendant in shipping the cars on "other lines northward" was not the proximate cause of the detriment.

Cal. Civ. Code, § 3300.

Frost is an act of God.

The Alesia, 35 Fed. Rep. 581.

The maxim *Causa proxima non remota spec-*

tatur applies to such cases as to other contracts and transactions. Ordinary diligence is all that is required of the carrier to avoid or remedy the effects of the overpowering cause.

Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909.

Messrs. John S. Chapman and Curtis, Oster, & Curtis, for respondent:

Independently of a contract to carry *via* the Southern Pacific, an intermediate carrier in this country is responsible for the loss occurring through his negligence, and in such case no privity of contract would be absolutely essential to entitle the plaintiff to recover.

Hutchinson, Carr. 2d ed. § 150.

Whether the action is in tort or assumpsit, the contract, if it be express, should be proved.

Hutchinson, Carr. § 762.

It would have made no difference if, after deviating from the course and taking these goods *via* Ogden, the carload of trees had been destroyed by lightning, for in that case the loss did not accrue by the act of God alone, but the negligence of the defendant in exposing the property to that force.

Hutchinson, Carr. § 190.

The washout of which the defendant speaks did not require the goods to be sent to Ogden, and, more than that, it was not the custom of the company to deviate from the route without instructions.

Hutchinson, Carr. § 179; *Armentrout v. St. Louis, K. C. & N. R. Co.* 1 Mo. App. 158; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415.

If the defendant ever had any right to claim the benefit of the clause in the bills of lading, as to the invoice cost at point of shipping, that right ceased to exist when it deviated from the route over which it agreed to carry the trees.

Thomp. Trials, § 1864; *Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 514, 6 Am. Rep. 124; *Paxitt v. Lehigh Valley R. Co.* 153 Pa. 302.

The detriment caused by the breach of a carrier's obligation to deliver freight is deemed to be the value thereof at the place and on the day at which it should have been delivered, deducting the freightage to which he would have been entitled, if he had completed the delivery.

Civil Code, § 3816.

Freight is not to be deducted because it has been paid.

Hutchinson, Carr. § 769; *Sturges v. Bisell*, 46 N. Y. 462; 3 Sutherland, Damages, 217; 2 Am. & Eng. Enc. Law, p. 905.

On rehearing.

A stipulation in a bill of lading that is intended to protect a common carrier from the violation of his contract, and in disregard of the settled rules of public policy, will not be sustained, and it is contrary to public policy to allow a common carrier to stipulate for immunity for the consequences of his own negligence and fraud, or that of its own employees.

Willock v. Pennsylvania R. Co. 166 Pa. 134, 27 L. R. A. 228; *Georgia R. & Bkg. Co. v. Keener*, 98 Ga. 808; *Ruppell v. Allegheny Valley R. Co.* 167 Pa. 166.

Greater latitude is allowed to contracts for 40 L. R. A.

carrying live stock than is permitted with reference to freight generally.

Abrams v. Milwaukee, L. S. & W. R. Co. 87 Wis. 485; *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372; *Clarke v. Rochester & S. R. Co.* 14 N. Y. 570, 67 Am. Dec. 208.

Searls, C., filed the following opinion:

Appeal by defendant, the Southern Pacific Company, a corporation, from a judgment in favor of plaintiff for \$8,965, interest and costs, and from an order denying its motion for a new trial. In February, 1891, the plaintiff, R. W. Pierce, shipped from Apopka, county of Orange, Florida, by the Florida Midland Railway, two carloads of orange trees, consigned to Gulick Bros., Riverside, California. The first carload of trees was shipped February 19, 1891, and was received at New Orleans by the Southern Pacific Company February 25, 1891. The other carload was shipped February 24, 1891, and was received by the Southern Pacific Company at New Orleans, March 1, 1891. Each carload was shipped under a bill of lading signed by plaintiff, R. W. Pierce, and by the agent of the Florida Midland Railway. A copy of the bills of lading was given to plaintiff. They were upon printed forms, with blanks, filled in with the names of the consignors, etc., in substance as follows: "Marked and consigned to Gulick Bros., Riverside, California, one carload of orange trees, *via* Southern Pacific, 20,000 weight, car initialed, N. & L. No. —," etc. In the printed form it was provided that "the articles and packages" (contents unknown) were in "their nature perishable, fragile, or otherwise susceptible to damage," were shipped at a rate "lower than the regular tariff charges of said railway company and connections," and it was agreed that the shippers should "insure said Florida Midland Railway Company and all lines over which said shipment may pass, between points of shipment and destination, against claims by loss or damage incurred by reason of delay in transportation, or any other cause arising out of responsibility as master over its agents or servants (gross negligence excepted), incident to the shipment, and that the actual invoice cost at point of shipment will be taken as measure of damages to govern settlement of any damages for which the carriers may be liable," and that "claims for loss, damage, or overcharge arising out of this shipment shall be presented to agents of delivery lines within one week after arrival of the property at its destination." The rate of freightage on the trees was \$1.97½ per 100 pounds. The Southern Pacific had a direct through line of railroad, owned or operated by it, and by others in connection with it, from New Orleans, across Texas, New Mexico, and Arizona, *via* El Paso and Yuma, to Colton, California. When the freight reached New Orleans this line was broken by severe storms and washouts in Arizona, and was not likely to be available for the transportation of freight for some time. Under these circumstances, by order of its general agent, the trees in question were sent north through Texas to Denver, Colorado, thence to Ogden, Utah, thence over its Central

Pacific road, etc., to Colton, California, where the cars were delivered to the Southern California Railway, and by it hauled to Riverside, a distance of some 6 or 8 miles, arriving at the latter point March 12 and March 16, respectively, 1891. While in transit by the northern route, the trees were entirely destroyed by freezing.

Plaintiff avers in his complaint, among other things, in substance: (1) That there was no invoice of the cost of the trees; that they had been grown by him in Florida, and were shipped to California for sale. (2) That they were delivered to defendant at New Orleans, to be shipped to Riverside by its direct and usual route. (3) That the defendant violated the contract by shipping through a northern climate, where, at that season of the year, intensely cold weather was common, and hence that defendant was guilty of gross negligence, etc., whereby the trees were frozen and destroyed. These allegations are substantially denied by the answer. Defendant also set up the provisions of subdivision 1 of § 339 of the Code of Civil Procedure (two year) in bar of the action.

1. The contention of appellant is that the evidence showed without contradiction that more than two years elapsed between the negligence complained of and the bringing of the suit, and hence that the finding of the court against defendant's plea of the statute is contrary to the evidence. We think this contention cannot be maintained. Under our Code of Civil Procedure (§ 458) the statute of limitations is sufficiently pleaded by alleging the bar and referring to the section and subdivision thereof (if so divided) relied upon. But the section continues: "If such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." The allegations of the answer are to be deemed controverted. Code Civ. Proc. § 462. It therefore devolved upon the defendant to establish the facts necessary to support the plea. The complaint avers, and the answer admits that defendant "is a corporation organized under the laws of the state of Kentucky, and engaged in the business of operating a railroad as a common carrier of freight and passengers in the state of California and elsewhere, and was so engaged in the said business during all the time hereinafter mentioned." A statute of this state approved April 1, 1872, entitled "An Act in Relation to Foreign Corporations" (Stat. 1871-72, p. 826), requires all corporations created by the laws of any other state to designate some person residing in the county in which its principal place of business in this state is, upon whom process issued by authority of or under any law of this state may be served, and must file such designation in the office of the secretary of state, and a copy of such designation, duly certified, shall be evidence of such appointment. The 2d section of the act provides that a failure to comply with such requirement shall preclude such corporation from "the benefit of the statutes of this state limiting the time for the commencement of civil actions." Section 3 of the act confers the right of corporations organized under the laws of other states which have

complied with the foregoing requirement to avail themselves of the benefits of our statutes of limitation. It being admitted that defendant was a corporation organized under the laws of another state, compliance with the foregoing statute became a necessary fact to be proved as a predicate to its right to avail itself of the benefit of the statute of limitation. This it failed to do, and hence the court did not err in its finding against its defense of the statute of limitations. We may observe that the general rule is that foreign corporations, although having agents and transacting business in a state, come within the provisions of statutes limiting the time for the commencement of actions and making a saving as against absent debtors. It is only by comity that they are permitted to transact business in another state than that of their creation. They are citizens, so to speak, of the state of their creation, and are, in contemplation of law, absent from all other states than the one of their situs. Wood, Limitations of Actions, p. 599. The statute, then, is not a limitation upon the right of foreign corporations to avail themselves of our statutes of limitations, but it confers that right, subject only to the condition prescribed.

2. Appellant contends that its general demurrer to the complaint upon the ground "that said complaint does not state facts sufficient to constitute a cause of action against this defendant" should have been sustained. The complaint, as we think, in giving, as it does, a history of the whole transaction, including the contract made with the Florida Midland Company to ship the orange trees to Riverside, California, via the Southern Pacific Company; the transportation of the trees to New Orleans, and delivery to defendant under the contract; its failure to forward them by its usual route, with a statement of the route by which defendant shipped the goods; the objections to such route, and the result of the deviation, etc., sets out a cause of action, either sufficient to hold defendant as for a breach of the contract, or, failing in that, under its common-law liability as a common carrier. It may well be that a demurrer to the complaint upon the ground of ambiguity or uncertainty would have been good; but no such objection was presented.

3. The contention of defendant that it cannot be held liable for the reasons (a) that the bill of lading described the packages as "contents unknown;" (b) that it was not furnished with the bill of lading, or with an opportunity to inspect the property, so as to inform itself of the character thereof, or its liability to injury,—cannot be maintained. It is true, the printed portion of the bills of lading uses the following expression: "The following articles and packages (contents unknown), marked and consigned as below, to wit [then follows the description in each bill of lading in writing, which is in part as follows]: 1 car orange trees." Again, the evidence shows without contradiction that the cars were marked on the outside with the names and residence of the consignees, and "orange trees," marked in big plain letters. In addition to this, the cars had open ventilators at each end, affording an opportunity to see and examine the contents,

Defendant must, therefore, be held to have known the contents of the car, or, at least, to have had the means of knowledge at hand. "It is the duty of the carrier to transport the goods by the usual direct route; and for any loss which a departure from such route may occasion to them, he is liable." Hutchipson, Carr. § 312. It is said, however, that where there are two or more customary routes, and the carrier is left free to choose between them, he may take his choice without incurring increased liability, if there are no special reasons which make the route chosen unsafe. *United States Exp. Co. v. Kountze Bros.* 8 Wall. 342, 19 L. ed. 457; *Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 514, 6 Am. Rep. 124. Judging from the testimony it can hardly be said that the route by which defendant shipped the goods in this case was one of its customary routes. With a through route of its own through Texas, New Mexico, and Arizona, it sent the goods many hundred miles to the north, over roads operated by other companies, to meet its Central Pacific road at Ogden, in the state of Utah. Conceding, however, that the route was a usual one, there were special reasons for not sending goods which were liable to destruction by frost over this northern route in winter, where defendant might reasonably have expected the result which followed. When, therefore, defendant's through route via Ft. Yuma was obstructed by stress of weather, it became its duty to hold the goods until that or some other safe avenue was opened, or to notify the consignees or consignors, and take their directions in the premises. The evidence shows that they did this with another car of like orange trees at a date a little earlier, and by direction of the consignees shipped them safely through by the Atlantic & Pacific Railroad. Where goods are marked in such a way as to indicate their character, or as to give notice to the carrier that their safety requires that they must be carried in a particular manner, such marks must not be disregarded. Hutchinson, Carr. § 310. In view of all the surrounding circumstances, we are of opinion that the defendant, by a failure to adopt one or the other of the foregoing courses, erred in judgment, and became liable to plaintiff for the results which followed. The evidence fails to establish a case of gross or wanton negligence; but still does, we think, show a want of that extraordinary care imposed upon common carriers of goods.

4. A carrier is not relieved from responsibility under a contract that he shall not be responsible if he has been guilty of negligence. *Ogdensburg & L. C. R. Co. v. Pratt*, 23 Wall. 123, 23 L. ed. 827. It is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants. Hutchinson, Carr. § 260, and cases there cited; *New York O. R. Co. v. Lockwood*, 17 Wall. 367, 21 L. ed. 627; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788.

5. As to the measure of damages. The court below awarded damages up to the full value of the goods at the point of destination, although the uncontradicted evidence tended to show that the value at the shipping point was about one half of that given. It will be

observed that the contract between the plaintiff and the Florida Midland Railway was for a through shipment of the goods to Riverside. We repeat that portion essential to the matter in hand: "Whereas, said railway company has agreed that the cost of transportation . . . shall not exceed . . . \$1.97½ per 100 lbs., said rates being lower than the regular tariff charges of said railway company and connections. Now, therefore, said shippers, for themselves and consignees, do hereby insure said Florida Midland Railway Company and all lines over which said shipments may pass between points of shipment and destination. . . . It is further agreed that the actual invoice cost at point of shipment will be taken as measure of damages to govern settlement of any damages for which the carriers may be liable." There is a wide distinction between a contract for exemption from liability in case of negligence which is usually held in derogation of public policy because tending to encourage negligence, and a contract fairly made, whereby, in consideration of a lower freightage, the parties agree upon a fixed or determinate value to be placed upon the article to be shipped in case of its loss. Hutchinson, at § 250, after discussing the question of total exemption in case of negligence, adds: "To be distinguished from these cases, however,—though the distinction is not always observed,—are those cases, obviously different, in which, for the purpose of determining the shipper's liability for freight and the carrier's responsibility for damages, the value of the property is agreed upon. When such is the case, the Supreme Court of the United States and many of the state courts hold, to use the language of Mr. Justice Blatchford in *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 23 L. ed. 717: 'That where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation.'" In the same case the learned justice further said: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. . . . There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit

of the contract if there is no loss, and to repudiate it in case of loss." We understand full well that there are many cases holding a contrary doctrine to that enunciated in *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, but we think that case, which is cited as a leading one, is founded upon reason and justice, and that the trend of judicial opinion is to the doctrine there enunciated. See cases cited in *Hart v. Pennsylvania R. Co.* 112 U. S. at page 342, 28 L. ed. 721. Respondent objects, and urges that, as the trees in question were cultivated by the plaintiff, there was not and could not be any "invoice price." The evident answer is that by the term "invoice price" was meant the cost or value of the property at the shipping point. That it had a fixed value at that point was attested by the evidence. One of the definitions of an invoice is: "A writing made on behalf of an importer, specifying the merchandise imported, and its cost or value." Black, Law Dict. Plaintiff sued upon his special contract, and averred that defendant received the goods thereunder. Defendant averred in its answer "that it duly performed its duty under the contract set out in the complaint." We think the demand for damages from defendant was in due time, and sufficiently specific, in the absence of any demand by defendant of an invoice, to comply with the contract. We think the court erred in overruling the objection of defendant to proof of the market value of the trees at Riverside, instead of confining the inquiry to the cost or value of the trees at the point of shipment in Florida, as per contract, which, with the freight paid, was the true measure of damages. For this error we recommend that the judgment and order appealed from be reversed, and a new trial ordered.

We concur: **Belcher, C.; Britt, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

Petitions for rehearing in banc having been filed, the following response was handed down on February 23, 1898:

Per Curiam:

The facts of this case are fully stated in the opinion of department 1. When that opinion was filed, both parties petitioned for a rehearing in banc, the appellant insisting that it had proved a valid contract exempting it from all liability, and the respondent contending that the rulings of the lower court with reference to the measure of damages were correct. For the purpose of further considering these two questions a rehearing was granted. Sections 2174 and 2175 of the Civil Code read as follows: "The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract." Section 2174. "A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants." Section 2175. In the absence of proof, we presume that the law of

Florida is the same. The contract in question here, which was executed in Florida, contains the following stipulation: "Now, therefore, said shippers, for themselves and consignees, do hereby insure said Florida Midland Railway Company, and all lines over which said shipments may pass between points of shipment and destination, against claims by loss or damage which may be incurred by reason of delay in transportation, or any other cause arising out of responsibility as master over its agents or servants (gross or wanton negligence excepted) incident to said shipments." The appellant contends that it was empowered by § 2175 of the Civil Code to contract for an exemption from all liability except for gross negligence, fraud, or wilful wrong of itself or servants; that such contract, based upon a valid consideration, was entered into in its behalf with the respondent; and that it was clearly shown and conceded by the court that it was not guilty of gross negligence. When § 2175 of the Civil Code was enacted, § 17 of the same Code read as follows: "There are three degrees of negligence: (1) Slight, which consists in the want of great care and diligence; (2) ordinary, which consists in the want of ordinary care and diligence; (3) gross, which consists in the want of slight care and diligence." In 1874 this section was repealed outright, and the effect of this repeal upon the construction and operation of § 2175 is one of the questions which has been argued on the rehearing. It is not necessary, however, to decide this question; for, conceding that the distinction between gross and ordinary negligence still obtains, so far as stipulations for exemption in contracts of common carriers are concerned, we do not consider this a case for the application of the doctrine. The loss and damage for which plaintiff sues was not for delay in transportation, and the exemption from liability claimed by defendant must be based upon the general words "or any other cause arising out of responsibility as master over its agents or servants," etc. This language, which is of very doubtful and ambiguous meaning, must be construed most strongly against the defendant, and even under a less exacting rule could not be held to mean anything more than that the railroad company was not to be liable for the negligence or misconduct of its servants or agents. But in this case it is clearly shown that the loss and damage complained of was solely due to compliance by the agents and servants of the defendant with an order emanating from headquarters; that is to say, an order issued by the corporation itself through its proper organs. This order embraced all freight east of a certain point, including these cars loaded with orange trees, which, as a matter of common knowledge, are easily killed by that degree of cold which, as a matter equally of common knowledge, they would be likely to encounter at the end of February on the route over which they were transported. Our conclusion upon this point is that the stipulation in this contract, allowing it to be valid, does not extend to or embrace the act of the corporation in ordering these trees shipped through Utah and Nevada.

As to the point made by respondent in his petition for a rehearing, we are satisfied that the conclusion reached by the department was correct. The ordinary measure of damages for breach of a carrier's obligation to deliver freight is the value of the goods at the time and place of delivery (Civil Code, § 8316); but this liability may be limited by special contract (Id. § 3174); and here there was a special contract signed by the plaintiff making the invoice price at the point of shipment the measure of damages. It is true, there was no invoice price actually made out and agreed upon at the time the trees were shipped; but this clause cannot for that reason be treated as meaningless and inoperative. It should receive a reasonable construction, and the most reasonable construction of which it is susceptible is that by invoice price was meant the actual value of the trees at the point of shipment when loaded and ready for transportation. To this, of course, is to be added, in fixing the damages, the freight actually paid, and interest on the whole amount.

Judgment and order reversed, and cause remanded.

I. W. LEES, *Resp't.*,

v.

E. P. COLGAN, State Controller, *App'l.*

(.....Cal.....)

1. The offer of a reward for the arrest of a murderer by Penal Code, § 1547, does not extend to an arrest by an officer whose duty it is to make it.
2. It is against sound public policy to allow an officer to receive a reward for the performance of his duty.
3. The arrest by a police officer of San Francisco, without a warrant, of a murderer for a crime committed in another county of the state, is made in the exercise of his duty so as to preclude his recovery of a reward for making it.

(McFarland, J., *dissents.*)

(March 11, 1898.)

APPEAL by defendant from an order of the Superior Court for the City and County of San Francisco directing the issuance of a writ of mandamus requiring him to draw his warrant for the payment to petitioner of a reward for the arrest and conviction of an alleged murderer. *Reversed.*

The facts are stated in the opinion.

Mr. W. F. Fitzgerald, Attorney General, for appellant.

Mr. Davis Louderback for respondent.

Garoutte, J., delivered the opinion of the court:

This is an appeal from an order of the superior court directing the issuance of a writ of mandate to the state controller, requiring him to draw his warrant upon the state treasury in favor of petitioner for the sum of \$1,000. The

NOTE.—On the question of an officer's right to accept a reward, see also *Morris v. Kassling* (Tex.) 11 L. R. A. 306, and *note*.

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application is based upon the following facts: Petitioner was a captain of police of the city and county of San Francisco. The governor of the state offered a reward of \$1,000 for the arrest and conviction of the person or persons who murdered one Webber in the city of Sacramento. Petitioner arrested the murderer of Webber in the city and county of San Francisco, and furnished witnesses and evidence upon which a conviction was subsequently had. By right of these facts he now claims the reward of \$1,000. There are other matters set forth in the petition for the writ, but we do not deem them material to the issue before us.

The governor of the state offered this reward by virtue of the authority found in § 1547 of the Penal Code, and that section declares: "The governor may offer a reward, not exceeding \$1,000, payable out of the general fund, for the apprehension: (1) . . . (2) Of any person who has committed, or is charged with the commission of an offense punishable with death." It will be observed that the power of the governor is limited to offering rewards for the apprehension of certain criminals. For that reason we attach no importance to the allegations of the petition wherein it is declared that petitioner furnished the evidence upon which the murderer was convicted. It follows from what has already been said that the only question here presented is: May a police officer of the city and county of San Francisco who arrests a murderer for a crime committed in another county of the state, and without a warrant, recover a reward offered by the state for the arrest of such murderer? The answer to this question is largely dependent upon the conclusion to be reached from two other propositions of law, namely: Was it the official duty of this captain of police to make the arrest of the criminal? And, if so, is it against sound public policy to allow such an officer to receive a reward for the performance of his duty?

The last legal proposition stated must be declared in the affirmative. The courts, both in this country and England, are practically unanimous in declaring that a public officer working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for a reward for services rendered in the line or scope of his official duty. In the well-considered case *Re Russell*, 51 Conn. 577, 50 Am. Rep. 55, it is said: "And no case can be found—at least, I have not been able to find any—in which the claim of a public officer to recover a reward for services rendered in the performance of his official duties has received the sanction of a court of last resort in this country or in England." A deputy sheriff making an arrest in the line of his duty is not entitled to a reward offered for such arrest. *Stamper v. Temple*, 6 Humph. 113, 44 Am. Dec. 296. In *Morrell v. Quarles* it was held that a police officer making an arrest in the line of his duty was not entitled to a reward. 35 Ala. 548. In *Ex parte Gore*, 57 Miss. 251, it is declared that a constable is not entitled to a reward for making an arrest in the line of duty, and in that case it was further decided: "The reward offered by § 2786 of the Code was designed to induce the arrest

of fleeing homicides by persons not under an official obligation to do it." A police officer in the performance of his duty is not entitled to a reward for the apprehension of a criminal. *Day v. Putnam Ins. Co.* 16 Minn. 408 (Gil. 365). A police officer cannot take a reward for services rendered within the duties of his office, or for which he receives a fixed salary. *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658. The same principle is again declared in *Thornton v. Missouri P. R. Co.* 42 Mo. App. 58. See also *Smith v. Whildin*, 10 Pa. 39, 49 Am. Dec. 572; *Warner v. Grace*, 14 Minn. 487 (Gil. 364). Counsel for petitioner to some extent concedes the soundness of the doctrine laid down in the foregoing cases as to rewards offered by private parties, but claims the doctrine is not to be applied to governmental or state rewards. We fail to see any substantial difference in principle as to rewards offered by private parties and rewards offered by the state. They stand upon common ground. The basis of the sound public policy supporting the text of the many cases cited is thus declared in *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658: "The services rendered were within the duties of his office. All his energies had been devoted to the service of the city. Under such circumstances, to permit an officer to stipulate for extra compensation for services to which the public was entitled would lead to great corruption and oppression in office. It would follow that whenever a crime was committed, instead of speedy efforts for the arrest of the offender, there would be a holding back, in the hope that there would be a reward given for his apprehension. If once a habit of taking a reward is introduced, nothing will be done unless the service is previously purchased by extra pay." This reasoning undoubtedly applies to rewards offered by the state as fully as to rewards offered by private parties. No case has been cited, and we know of none, where an appellate court has declared the existence in principle of any well-defined distinction as to public officers, in cases where rewards have been offered by the state or municipality, and where rewards have been offered by private parties. No case has been cited where a reward offered by the state or municipality has been recovered by a public officer who simply did some act or acts in the performance of his official duty as the basis of his claim. To the contrary, we cite *Pool v. Boston*, 5 Cush. 219; *Ex parte Gore*, 57 Miss. 251; *Pile v. New Orleans*, 19 La. Ann. 274; *Harris v. Beaven*, 11 Bush, 254; *Williams v. Thuesatt*, 12 Rich. L. 478.

It is insisted that when the state, by its legislature, authorized the governor to offer a reward for the apprehension of certain criminals, such reward is offered to all persons, and necessarily includes sheriffs, police officers, etc.; and that, therefore, the state, by such action, has declared its own public policy as to rewards for the apprehension of criminals. The state has a right to declare what is sound public policy upon this question, however variant its views may be with elementary principles declared by the decisions of courts of other states and countries. And, if this state had authorized the governor in terms to offer this reward to sheriffs and other peace officers, the

courts would have been bound to sustain such a law, as far as any question of public policy was concerned. But the statute here goes to no such lengths. If the state, through its governor, possessed the inherent power to offer this reward, we would hold, in line with the many decisions cited, that peace officers could not recover. Yet it would seem that the legislature, by this statute, only attempted to place in the hands of the governor a power which probably did not inherently rest in him, namely, the power of offering rewards, payable out of the state treasury, for the apprehension of criminals. The grant of a mere power to the governor to offer a reward does not necessarily carry with it any implied power to offer the reward to any and all persons. To hold that the legislature intended these rewards to be recovered by peace officers is to hold that such body intended to declare a certain course of action sound public policy in this state which has been declared unsound and vicious public policy in every other jurisdiction. While the state legislature had the power to take this radical and unusual position, we will not hold that it has taken such a step unless such an intent is plainly manifest from the act itself. Here the purpose of the act was directed to placing the power in the hands of the governor to offer rewards for the apprehension of criminals. The particular persons to whom the rewards might or should be paid was a matter not in the legislative mind. In *Ex parte Gore*, 57 Miss. 251, under a very similar statute, the court said: "The reward offered by § 2786 of the Code was designed to induce the arrest of fleeing homicides by persons not under an official obligation to do it." In *Harris v. Beaven*, 11 Bush, 254, the construction of a statute similar in principle to the one at bar was under consideration. The court there declared: "Having thus provided what was deemed suitable compensation, did the legislature intend by enacting § 8, chapter 42, *supra*, to enable commonwealth's attorneys, by entering their own names on indictments as prosecutors, to secure to themselves, in addition to the compensation otherwise provided, the compensation given by that section to prosecutors? We think not. The object had in view, no doubt, was to bring private individuals to aid the prosecution by offering as an inducement a part of the fine. It was the duty of the commonwealth's attorney to do all that he could reasonably and fairly to secure the conviction of Harris, for the salary and perquisites given him as such; and, when he became prosecutor, he came under no new obligation to the state in the prosecution of the case, and could not lawfully render any service therein which he was not bound to render before assuming the relation of prosecutor." It may well be said in the case at bar that this plaintiff, in arresting the murderer, did not render any service to the state which he was not bound to render regardless of the existence of any reward.

Was it the official duty of the petitioner to arrest the murderer? There can be but one answer to this question. Section 817 of the Penal Code of this state declares a police officer of a city to be a peace officer. The arrest in this case was made without a warrant, but

such fact in no degree changes the legal complexion of the merits of the litigation. Section 886 of the Penal Code declares that a peace officer may make an arrest in obedience to a warrant delivered to him, or may without a warrant arrest a person (1) for a public offense committed or attempted in his presence; (2) when a person arrested has committed a felony, although not in his presence; (3) when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. In other words, it is the duty of the peace officer to make arrests under any of the foregoing conditions. It certainly would be his duty to make an arrest where a public offense was committed in his presence. It likewise would surely be his duty to make an arrest where he held a valid warrant ordering the arrest. Yet, under the statute quoted, it is no more his duty to make arrests under such circumstances than it is when a felony has been committed, and he has reasonable cause for believing a certain person to have committed it. Here, of necessity, it must be assumed that petitioner had reasonable cause for making the arrest. It will not be assumed that he made it without good cause, and, if he had good cause for the arrest, it was his duty to make it. It cannot be contended for a moment but that a police officer would be grossly neglectful of his duty if the opportunity presented itself, and he failed to arrest a person, having reasonable cause to believe such person to be a murderer. Again, the consolidation act of the city and county of San Francisco (§ 26) declares: "Police officers in subjection to the orders of the respective captains, and all under the general direction of the chief of police, shall be prompt and vigilant in the detection of crime, the arrest of public offenders, the suppression of all riots, affrays, duels, and disturbance of the peace," etc. Stat. 1856, p. 153. Under this broad declaration of the duties of police officers, it clearly devolved upon petitioner to make this arrest. Here was a public offender; a man who had committed a horrible crime. The petitioner was a police officer, and knew the fact. Under such circumstances, it was, beyond doubt, his duty to be prompt and vigilant in taking such an offender into custody. The aforesaid section of the consolidation act further provides: "Neither the chief of police, captains, or any other officer of police shall . . . receive any present or reward for official services rendered or to be rendered, unless with the knowledge and approbation of a majority of the police commissioners." Whether or not this provision of the act has been repealed by subsequent legislation is not a matter of concern; for, conceding its present existence, it has no bearing upon this case. Whatever rewards police officers may accept from private parties with the consent of the police commission is another and entirely different matter. Here there is no question of agreement or consent upon the part of all parties interested. The state is here standing

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upon its strict legal right, and, through one of its duly authorized officers, objecting to the payment of this money.

For the foregoing reasons, *the judgment is reversed*, and the cause remanded.

We concur: **Temple, J.; Van Fleet, J.; Harrison, J.; Henshaw, J.**

McFarland, J., dissenting:

I dissent. The authorities are not all to the point that an offer of reward, even by a private person to an officer, is void because against public policy. There are authorities the other way, some of which are recited in respondent's brief. Giving full force to the reasons upon which the cases are cited in the prevailing opinion were decided, I am still inclined to think that the better doctrine is stated in *City Bank v. Bangs*, 2 Edw. Ch. 97, where, speaking of an offer of reward, it is said: "The object is to awaken public attention to the subject, excite vigilance, and call forth extraordinary individual efforts for the accomplishment of the end proposed to be gained. All who choose to engage in it are at liberty to do so, and he who succeeds becomes entitled to the reward, upon the ground of his superior vigilance or sagacity, or of his having used greater exertions or encountered dangers which others were disinclined or not in a situation to hazard. When, therefore, we view the object of rewards offered thus publicly, in their true light, a participation in their benefits or in the receipt of them cannot be considered wholly incompatible with the duties of public officers or against the policy of the law." When a policeman or sheriff is informed that a horrible murder had been committed in a remote county, and that the perpetrator is at large, it may be said that the officer is under some general official obligation to see if the offender is lurking in his city or county; but I cannot see how public policy is outraged by an offer which will spur such officers to extraordinary vigilance and exertion in the interest of public justice. However, when the legislature, by statutory law, expressly authorizes a thing to be done, there is no room for judicial inquiry as to the policy of the thing authorized. In such cases the legislature declares the policy, as it has the right to do, and the statute can be attacked only on the ground of its unconstitutionality; and there is no such attack here. The only question left, therefore, is as to the construction of the section of the Code involved; but, in my opinion, there is here no field for the exercise of any principle of construction, because the language of the section is perfectly plain and clear. It makes no exception of any person or persons. It does not provide, as it might have done, that the governor may offer a reward to any person "not being a sheriff, marshal, constable, or policeman;" and I do not think that there is good reason for judicially inserting an exception which the legislature did not make. In my opinion, the judgment should be affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS.

Nina DUMAS, *Appt.*,
v.
NORTHWESTERN NATIONAL INSURANCE COMPANY.

(.....D. C.....)

1. Insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy or statutory provisions.
2. The purchaser of property on the instalment plan, of which the title is reserved in the seller, has not a sole and unconditional ownership of it, within the meaning of an insurance policy.
3. A condition that an insurance policy shall not be valid if the property is mortgaged does not contravene any public policy.
4. An express condition that a policy shall be void if the insured is not the sole and unconditional owner of the property, or if it is mortgaged, will render it void if the conditions are broken, even if the insured made no representations as to the property or any fraudulent concealment of the facts.
5. Failure to read an affidavit which is short, plain, and simple will not relieve the affiant from the effect of false swearing as to the title and lack of encumbrances on the property to avoid insurance thereon, although the affidavit was prepared by the insurance agent.
6. The indivisibility of an insurance policy upon a certain amount of furniture as a whole renders it entirely void, when it is avoided as to part by breach of conditions as to title and encumbrances on the property and false swearing respecting them, under a provision that "this entire policy shall be void" in various contingencies, including those of encumbrances on the property or lack of sole ownership or false swearing by the insured.

(February 9, 1898.)

A PPEAL by plaintiff from a judgment of the Supreme Court for the District of Columbia in favor of defendant in an action brought to enforce payment of the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. James H. Hayden and Robert C. Hayden, for appellant:

There was no breach on the part of the appellant of the contract of insurance.

The agent of the insurance company put no question whatsoever to the appellant with regard to her ownership of or interest in the property to be insured, and, in consequence of this fact and in ignorance of the conditions contained in the policy about to be issued to her, she made no statement as to the manner in which she held the property.

Such being the fact, she certainly had the right to suppose that the appellee's agent had made inquiry as to all matters which the de-

fendant deemed material; and to avoid the policy it must be proved that she concealed some material matter wilfully and fraudulently.

1 Wood, Ins. p. 517; *Lancaster Ins. Co. v. Monroe*, 19 Ky. L. Rep. 204; 2 Duer, Ins. § 81, p. 689.

Unless an encumbrance is intentionally and fraudulently concealed, and where no inquiries are made as to the matter, the policy is valid even though it provides that if the insured be not the sole, absolute, and unconditional owner the policy shall be void.

Fireman's Fund Ins. Co. v. Meschendorf, 14 Ky. L. Rep. 757.

The affidavit was prepared and presented to plaintiff by the adjuster of the insurance company, and he requested her to sign and verify it, and she did not read it before she did sign and verify it.

Appellant did not, simply by this act, forego her right to recovery.

Knob v. National F. Ins. Co. 101 Mich. 359; *Washington F. Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Clay F. & M. Stock Ins. Co. v. Beck*, 43 Md. 358; *Westchester F. Ins. Co. v. Weaver*, 70 Md. 536, 5 L. R. A. 478; *Dupreau v. Libernia Ins. Co.* 76 Mich. 615, 5 L. R. A. 671; *Farmers' Mut. F. Ins. Co. v. Fogelman*, 85 Mich. 481; *Johannes v. Standard Fire Office*, 70 Wis. 196.

If there had been a breach, on the part of the appellant, of the contract of insurance, it would not have wholly avoided the policy, and she would be entitled in any event to recover *pro rata* on such of property as was hers absolutely.

Hobbs v. Memphis Ins. Co. 1 Sneed, 444; *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507, 27 Am. Rep. 582.

The evidence was not such as to admit of but one reasonable view of the rights of the parties, and that view one utterly opposed to the plaintiff's right to recover. Under such circumstances a trial court should not direct a verdict for the defendant.

Baltimore & P. R. Co. v. Carrington, 3 App. D. C. 101; *Olmstead v. Webb*, 5 App. D. C. 38; *Baltimore & P. R. Co. v. Galway*, 6 App. D. C. 143.

Messrs. A. S. Worthington and Charles L. Frailey, for appellee:

The evidence showed that a large part of the property insured at and prior to the taking out of the policy was encumbered by a chattel mortgage or deed of trust to secure the payment of a sum of money to Craig & Harding. This was a direct violation of the condition in the policy.

Imperial F. Ins. Co. v. Coös County, 151 U. S. 462, 38 L. ed. 235.

The condition in the policy is a substantial, material, and important one, and its violation avoided the policy.

Bowman v. Franklin F. Ins. Co. 40 Md. 620.

It is not necessary for the insurer to inquire as to the title of the applicant.

Hebner v. Palatine Ins. Co. 55 Ill. App. 275;

NOTE.—As to the severability of insurance in the same policy, see note to *Wright v. Fire Ins. Asso. (Mont.)* 19 L. R. A. 211; also *Trabue v. Dwell* 40 L. R. A.

ing House Ins. Co. (Mo.) 23 L. R. A. 719; *Bills v. Libernia Ins. Co. (Tex.)* 29 L. R. A. 708; and *Agricultural Ins. Co. v. Hamilton (Md.)* 30 L. R. A. 633.

Guinn v. Phenix Ins. Co. (Tex. Civ. App.) 31 S. W. 566.

In no sense was the appellant the unconditional and sole owner of the articles obtained from the Lansburgh Company.

Geiss v. Franklin Ins. Co. 123 Ind. 172; *Westchester F. Ins. Co. v. Weaver*, 70 Md. 586, 5 L. R. A. 478.

False swearing in regard to a part of the property insured and destroyed by fire, in violation of the condition in the policy that such false swearing would vitiate it, avoided the policy, and no recovery could be had thereon.

Moore v. Virginia F. & M. Ins. Co. 28 Gratt. 508, 26 Am. Rep. 378.

The legal title to property encumbered by a deed of trust is in the trustees.

Pierce v. Jacobs, 7 Mackey, 498; *Williams v. Jackson*, 107 U. S. 478-482, 27 L. ed. 529, 530.

The contract of insurance, having been violated by the appellant as to a part of the property insured, was thereby rendered entirely void.

Geiss v. Franklin Ins. Co. 123 Ind. 172; *Pickel v. Phenix Ins. Co.* 119 Ind. 291; *Havens v. Home Ins. Co.* 111 Ind. 90, 60 Am. Rep. 689; *Western Assur. Co. v. Stoddard*, 88 Ala. 606; *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202; *Richardson v. Maine Ins. Co.* 46 Me. 394, 74 Am. Dec. 459; *Kimbull v. Howard F. Ins. Co.* 8 Gray, 33; *Lee v. Howard F. Ins. Co.* 8 Gray, 583; *McGowan v. People's Mut. F. Ins. Co.* 54 Vt. 211, 41 Am. Rep. 848; *Stevens v. Queen Ins. Co.* 81 Wis. 385; *Fire Asso. of Philadelphia v. Williamson*, 26 Pa. 196; *Moore v. Virginia F. & M. Ins. Co.* 28 Gratt. 508, 26 Am. Rep. 378; *Barnes v. Union Mut. F. Ins. Co.* 51 Me. 110, 81 Am. Dec. 562; *Plath v. Minnesota Farmers' Mut. F. Ins. Asso.* 23 Minn. 479, 23 Am. Rep. 697; *Day v. Charter Oak F. & M. Ins. Co.* 51 Me. 91; *Schumitsch v. American Ins. Co.* 48 Wis. 26; *Gould v. York County Mut. F. Ins. Co.* 47 Me. 408, 74 Am. Dec. 494; *Loejoy v. Augusta Mut. F. Ins. Co.* 45 Me. 472; *Friemuth v. Agawam Mut. F. Ins. Co.* 10 Cush. 587; *Bowman v. Franklin F. Ins. Co.* 40 Md. 620.

Morris, J., delivered the opinion of the court:

This is a suit upon a policy of insurance against fire. At the trial in the court below, upon the conclusion of the testimony on behalf of the plaintiff, the court, upon the motion of the defendant, peremptorily instructed the jury to render a verdict for the defendant, which was done. From the judgment thereupon entered the plaintiff has appealed.

In this condition of the record there is no controversy as to the facts. The statement of the case is to be adduced from the testimony of the plaintiff and her witnesses; and this testimony shows the following condition of things.

On February 21, 1896, the plaintiff, Nina Dumas, was the occupant of a dwelling house, No. 1430 C. street, in the city of Washington, and had in it furniture stated to be of the value of about \$4,000. Of this furniture she was the absolute owner of about one half, which she stated she had purchased in New York. A part of the residue, amounting in value to about \$950, which had been purchased from a

firm of Craig & Harding, in Washington, was encumbered by a deed of trust or chattel mortgage given to secure that firm in the sum of \$671, which was part of the purchase money. Another part of this residue, amounting to about \$800 in value, she had purchased from a firm, a company designated as the Julius Lansburgh Furniture & Carpet Company, upon what is known as the instalment plan, whereby the vendor company remained the owner of the property until full payment was made for it. And still a third part, consisting of a piano of the value of \$275, had merely been rented by the plaintiff and was not owned by her.

Being thus in possession of this furniture, on the day specified she sought the agent of the defendant company at his office for the purpose of effecting an insurance against fire upon it in the sum of \$3,000. She did not find the agent at the time, but subsequently on the same day the agent came to her house, and agreed, in consideration of a premium of \$8, to let her have a policy of insurance for \$2,500. He declined to examine the furniture, but accepted the plaintiff's estimate as to its value. No questions were asked and no representations were made in regard to the ownership of the furniture. Later in the day an employee of the company called at her house, received from her the premium of \$8, and thereupon delivered to her the policy of insurance.

This policy contained the following conditions, which are material to the issues in the present case:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated therein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if . . . the interest of the insured be other than unconditional and sole ownership; . . . or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by the policy by virtue of any mortgage or deed of trust. . . ."

On February 27, 1896, six days after the issue of the policy, the plaintiff went to New York, leaving her house in charge of a servant, who, after closing it at night, left it and went to her own home. On the night of March 1, or the morning of March 2, 1896, during the absence of the plaintiff in New York, fire broke out in the house under some circumstances of suspicion, and the insured furniture was destroyed or greatly injured. The plaintiff thereupon returned to Washington, and employed one David J. Tavenner, who was or had been the salesman of Craig & Harding in making the sale to her of so much of the furniture as she had purchased from them, to appraise the amount of her loss. He

did so; and she verified the appraisalment. To the appraisalment was annexed an affidavit executed by her, but prepared by the adjuster of the defendant company, in which she swore that she was the sole and absolute owner of all the articles enumerated in the schedule of the appraisalment, and that they were not encumbered in any way. This affidavit she states that she executed without reading it.

On March 5, 1896, she signed and verified another paper entitled "proof of loss," presented to her by the adjuster of the company for execution. In this paper she stated that the property described therein, which was the property claimed to have been destroyed, belonged to her, and that no other person had any interest therein.

On the evening of March 6, 1896, after some negotiations with the agents of the defendant company, the plaintiff, together with Tavenner, already mentioned, who seems to have been with her as her friend, was placed under arrest by private detectives, at whose suggestion does not appear, and taken to the station house. There she was kept until the evening of the next day, and was visited in the meantime by the agents of the company, who offered to procure her release, and to give her \$50 if she would surrender her policy, execute a release to the company of all claims against it, and leave the city. To this she agreed. She executed the desired release, and received from the agents of the company the sum of \$44.50 and a ticket to New York, with an intimation that, if she returned to Washington, she would be "pinched," whatever that expression means. She was put on a train to New York, but she did not go there. She returned to Washington, and on July 6, 1896, instituted the present suit.

Her declaration contains a special count and the common counts. In the former the policy of insurance is set forth and a breach of it by the defendant alleged. The defendant pleaded the general issue, the release above mentioned, and other pleas specifically to the effect that the plaintiff was not the absolute and unconditional owner of the property insured, that to portions of it she had no title, and that other portions were covered by chattel mortgage, all in violation of the conditions of the policy of insurance.

At the trial the facts hereinbefore mentioned, with other facts and details not deemed necessary here to be stated, were adduced by the plaintiff and her witnesses, and, as already stated, at the conclusion of the testimony on her behalf, the court directed a verdict for the defendant. The grounds of that direction, as set forth in the motion made for the purpose on behalf of the defendant, were four, namely:

1. Because the plaintiff had avoided her policy of insurance by declaring in her affidavit of March 5, 1896, that she was the absolute owner of all articles enumerated therein, and that the same were not encumbered in any way.

2. Because part of the furniture was encumbered by a chattel mortgage.

3. Because she had no title to any of the goods claimed to have been purchased from the Julius Lansburgh Company.

4. Because the piano did not belong to her.

It will be noticed that among the reasons

assigned, the enforced release executed by the plaintiff is not mentioned. And certainly it was very proper to omit this proceeding from the further consideration of the court. We do not need to give it any consideration here; although it is insisted on in the brief of counsel for the appellee. If the case turned upon that release, our conclusion might be very different from that which we have reached.

There are six assignments of error by the appellant. Four of these raise the same substantial question, that there was no breach of the conditions of the policy of insurance by the plaintiff, either in executing the affidavit before mentioned, or in the fact that part of the property was covered by a chattel mortgage, or that the title to part of the property was not in her. The fifth has reference to the release executed by the plaintiff, while under duress, as is claimed. And the sixth is based upon the theory that the plaintiff had made a case wherein she was entitled in any event to go to the jury.

In view of what we have said, the fifth assignment need not be further considered here; and the sixth will be disposed of by what we have to say of the others. In connection with this last assignment, however, the point is made, that in any event the plaintiff should have been allowed to recover *pro tanto* for the property actually owned by her, even if as to the remainder of the property insured the objections of the defendant should be regarded as well taken. Of this in its order.

1. The burden of the argument on behalf of the appellant is that there was no fraudulent concealment of anything by her; and that if there was any omission of proper information it was the duty of the defendant company and its agents to inform themselves of the true condition of things by proper inquiry before the policy of insurance was issued. And the claim is that, in the absence of fraudulent concealment by the plaintiff, and in the absence of proper inquiry by the agents of the defendant company, the plaintiff is not chargeable with any breach of the conditions of the policy of insurance.

That there was apparent breach of the conditions of the policy is beyond all question. One of those conditions was that the policy should be void if the interest of the insured in the property should be other than that of unconditional and sole ownership. To one fifth of the property, or thereabouts—the piano valued at \$275, and the property purchased from the Lansburgh Company, about \$600—she had no title whatever. Even if it be conceded that she had an insurable interest, both in the piano, which she had only rented, and in the other property, of which the title had been expressly retained by the vendor, it is very clear that the interest was not that of unconditional and sole ownership.

Another of the conditions was that the policy should be void in the event that the property insured should be covered by a chattel mortgage. Nearly one quarter of the property—that purchased from Craig & Harding, and valued at \$950—was encumbered by a chattel mortgage to secure the greater part of the purchase money yet due upon the property to that firm.

Yet another condition was that the policy should be void in case of false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after a loss. After the loss in the case, the plaintiff, in an affidavit presented to the company and constituting part of her proof of loss, swore that she was the sole and absolute owner of all the articles enumerated in her schedule of her loss, and which comprised both the piano and the furniture contracted for with the Lansburgh Company; and in view of what has already been said, that statement was undoubtedly untrue, and therefore necessarily a violation of the condition of the policy.

But it is argued that there was no fraud in all this on the part of the plaintiff, and that, therefore, she ought not to be precluded from recovering. And cases are cited in which it is claimed that recovery has been allowed under somewhat similar circumstances.

We do not so understand the law. It is unnecessary, and it would be a hopeless task to enter upon the dreary wilderness of judicial decision upon the subject of insurance, with the view of deducing a rule from it for our government in the present instance. Courts have sometimes been too astute in their search for reasons to maintain the liability of insurance companies in the face of conditions limiting such liability. And yet a contract of insurance in this regard is no different from other contracts; and the function of courts is to construe them, not to make them. In the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability, and to impose whatever conditions they please upon their obligations not inconsistent with public policy; and the courts have no right to add anything to their contracts, or to take anything from them. If those contracts contain harsh and onerous conditions, which perhaps a court of equity might not enforce; if called on so to do, yet there is no compulsion, either legal or moral, on parties to deal with them upon the basis of such conditions. And certainly it would be a novel contention for parties to seek to enforce liability under such contracts in a court of common law, and at the same time to repudiate the express conditions upon which such liability is made to depend.

We must take it for granted, therefore, that our duty in the premises is to construe the contract of insurance before us according to its true legal intent and meaning, and not in any manner to vary or modify the instrument itself by disregard of any of its provisions. It is true, however, that this construction must be with reference to the well-established rule that, if a policy of insurance is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. *Imperial F. Ins. Co. v. Coös County*, 151 U. S. 452, 38 L. ed. 281.

In the sense of absolute ownership, clear and unencumbered, as commonly understood, the plaintiff had title only to about one half of the property which she sought to insure. With reference, however, to the portion of the property purchased from Craig & Harding, 40 L. R. A.

and which was covered by a chattel mortgage, she may, in view of the authorities on the point, be also regarded as the sole and unconditional owner. *Washington F. Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Howard F. Ins. Co. v. Chase*, 5 Wall. 509, 18 L. ed. 524. But it is not apparent how, in any sense of the words, she can be regarded as the sole and unconditional owner of the residue of the property. The ownership of that residue was purely and simply conditional; and it would be difficult to conceive an ownership more distinctly of the character against which the defendant company sought to guard its liability. If, therefore, we are to give any force whatever to the condition in the policy of insurance that the person insured must be the sole and unconditional owner, we cannot hold that the condition was observed in regard to a considerable part of the property sought to be protected by this instrument. It may well be that the plaintiff had an insurable interest in all of it, possibly even in the piano, which she had only rented, and that the defendant company might have insured that interest, if only that had been presented to them for insurance. But certainly it was not the interest that was actually presented for insurance; it was not sole and unconditional ownership. And it does not follow that, even if the defendant would have insured, it would have done so on the same terms and conditions. On the contrary, in such cases, the terms and conditions are usually different from the case of either absolute or unconditional ownership.

We must conclude that, at least as to part of the property, about one fifth of it in value, the policy of insurance wholly failed, for the reason that the condition of insurance, requiring unconditional ownership in the plaintiff, was never performed by her.

2. It may be that it was in consequence of such decisions of the courts as those to which we have referred, wherein it was held that there was sole and unconditional ownership, in the legal sense of the policy of insurance, notwithstanding the existence of an outstanding mortgage, that insurance companies sought further to limit their liability by imposing conditions against such mortgages. But whatever may have been the suggestion for these conditions, it is very certain that they add limitations to the policy beyond that of sole and unconditional ownership, which we cannot disregard. It was the right of the company in this case to refuse to insure mortgaged property, and to provide that its policy of insurance, however otherwise conditioned, should not cover personal property encumbered by a chattel mortgage. As nearly one quarter of the property in question here was covered by a chattel mortgage, we find it impossible to understand how the policy can reasonably be construed so as to protect it.

3. But it is said that all this is of no consequence, inasmuch as the defendant company made no inquiry as to the true condition of things, and there was no fraudulent concealment on the part of the plaintiff. And there is excellent authority for the doctrine, that "as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must . . . be

supposed to assume them; and if he acts without inquiry anywhere concerning them seems quite as negligent as the insured, who is silent when not requested to speak." *Clark v. Manufacturers' Ins. Co.* 8 How. 235, 12 L. ed. 1061. The agents of insurance companies are usually experienced men, well informed as to the information which they should have in anticipation of the risk which they assume; and the rule is not unreasonable which would require them to make all due inquiry for the procurement of such information. Nor is it unreasonable that the insured should be held harmless from the mere failure to give information, when he is not interrogated, and when perhaps he is not aware of the importance or materiality of the matter to which the information should extend.

But this is not a case of representation or misrepresentation, of failure to give information or failure to elicit it by proper inquiry. The parties have deliberately put it into their contract, and have made it an essential condition of that contract that the contract itself should not be binding, if there was any mortgage on the property or the title was not that of unconditional ownership. There was no inhibition by law against the insertion of such a condition in the contract; and it may well be that its insertion was a matter of precaution, to guard as well against the negligence or failure of agents to elicit proper information, as against the negligence or failure, not fraudulent, of persons seeking insurance to give such information. The condition is not illegal, and does not contravene any rule of public policy; and even if its practical effect should be held to be to throw upon the insured party the burden of giving voluntarily the information which otherwise the insurer would have been required to elicit by proper inquiry, we know of no rule of law that would preclude parties from contracting to that effect, if they so desire.

In the case of *Clark v. Manufacturers' Ins. Co.* 8 How. 235, 12 L. ed. 1061, to which we have referred for the rule imposing the burden of inquiry upon the insurer rather than that of voluntary information upon the insured, the matters there referred to as proper knowledge for the insurer were the circumstances of the use of the property, to which the minds of insurers would naturally be directed, and those of parties insured might not be so called. But it seems to us that a different condition of things arises, when a person solicits insurance on property not his own, and which he knows not to be his own; and when to the proposed insurer the very solicitation of insurance is the equivalent of a representation that the property, for which the policy is sought, is the unconditional and absolute property of the person seeking the insurance. Assuredly it would not be held that, if the person had no title at all of any kind, and the policy therefore was simply a wagering policy, yet he should still be entitled to recover, if the company or its agents had made no inquiry in regard to his ownership. Neither ownership nor the character of ownership is usually a subject of inquiry in such cases.

In support of the contention of the plaintiff, two cases from Kentucky are cited. *Lancaster Ins. Co. v. Monroe*, 19 Ky. L. Rep. 204, and *Fire-*

man's Fund Ins. Co. v. Meschendorf, 14 Ky. L. Rep. 757. But the decisions in those cases are expressly based upon the provisions of the statute law of the state of Kentucky, which are to the effect that "no misrepresentation, unless material or fraudulent, shall prevent a recovery on a policy of insurance." Ky. Acts 1874. Were they the result of the application of general principles of law, it is not apparent how they could be supported in reason or with any regard to the inalienable rights of parties to contract with each other as they may deem proper, so long as their contracts are not prohibited by law. We cannot read the word "fraudulent" into the contract before us, when neither the letter nor the spirit requires it for the purpose of reasonable interpretation. The contract deals with facts and conditions, not with the intention of the parties with reference to those conditions.

4. What we have said in regard to the matter of the title to the property and the conditions of the policy in reference thereto, will serve in great measure to dispose of the matter of the affidavit made by the plaintiff for the purpose of procuring payment to her of the amount of the policy of insurance. That this affidavit had been prepared by the agent of the defendant company, and that the plaintiff did not read it before she executed it, are circumstances that cannot for a moment entitle themselves to consideration. The affidavit was short, plain, and simple. It was not difficult to be understood; and the failure of the plaintiff to read it before execution only aggravates the falsity of its statements. There is no pretense that she was in any manner prevented from reading it, or that there was any fraud on the part of the agents of the defendant in its procurement. It was precisely the thing against which the defendant company sought to guard itself when it provided that the policy of insurance should be void in case of any false swearing about the matter either before or after the loss. Unless, therefore, we are to hold that this condition in the contract in regard to false swearing was meaningless or void—and we are not aware of any rule of law upon which we can so hold—we cannot see how its effect in vitiating the policy of insurance can be avoided.

The case of *Knop v. National F. Ins. Co.* 101 Mich. 359, is cited, in which there was a suit like the present upon a policy of insurance. There, also, there was a provision in the policy that it should be void if the interest of the insured were other than unconditional and sole ownership. Whether there was any provision in regard to false swearing, as in the policy before us, does not appear from the report of the case, and we are not otherwise advised. But after the loss, the insured party made an affidavit to the effect that he was the sole and unconditional owner. The court in its opinion said: "It has been repeatedly held that such a condition will not invalidate the policy in such case. . . . Nor do we think that the statement in the affidavit, made after the loss, that he was the sole and unconditional owner, would prevent a recovery." The reason given for this latter conclusion is that the false affidavit could not have prejudiced the defendant company.

Plainly that case has no application to this now before us. In that case there was, as here, a chattel mortgage upon the insured property, which was not disclosed to the insurer at or before the issue of the policy. But the court held, in accordance with what seems to be the preponderance of authority on that point, that, notwithstanding such mortgage, the plaintiff was in law, and according to the true legal intent and meaning of the policy of insurance, the sole and unconditional owner; and therefore the condition of the policy had not been broken. But there was no condition there, as here, against the existence of mortgages upon the property; and there was no such absence of ownership as here with reference to part of the property.

When in that case the court held that the plaintiff was the sole and unconditional owner of the insured property, notwithstanding a mortgage existing against it, it would have been entirely logical, in reference to the affidavit, to hold that this paper was not false. For if the plaintiff was in truth the sole and unconditional owner of the property, it was no falsehood for him to say so, either in an affidavit or otherwise. In the opinion it would seem to be conceded that the affidavit was false; but the falsehood was sought to be excused on the ground that it did no injury to the defendant. This may also have been a correct statement of the law as applicable to that case. But it does not appear in that case, as it appears here, that false swearing on the part of the insured, whether prior to a loss or subsequent thereto, operated to avoid the contract, by being made an integral and essential condition of the contract. We cannot say that the insertion of such a condition in the contract was either illegal or improper. Harsh perhaps it may have been; but it was competent for the parties to make it, and they made it. We may conjecture even that it was inserted in the policy of insurance, in view of the decision in the case of *Knop v. National F. Ins. Co.* or of some similar decision elsewhere. Whatever may have been the motive, it is not illegal; it is part of the contract, and it cannot be disregarded by us. As part of the contract, it makes a very different case from that of a false affidavit made in the ordinary course of the proof of loss, and which has not entered into the contract itself as a condition of the validity of the policy.

5. From what we have said, it necessarily follows, in our opinion, that as to about one half of the property supposed to have been covered by the policy of insurance, that policy was or became void by its own express limitations, the condition of the plaintiff's interest in the property, and the affidavit executed by the plaintiff. But it is argued on behalf of the appellant that this should not preclude a recovery, *pro tanto*, in respect of so much of the property as actually belonged to the plaintiff and to which she had full right and title. Again, the answer to this is found in the contract itself. It is one single and entire contract; and the conditions which operate to invalidate it expressly provide that it shall be avoided in its entirety. Even in the absence of such express provisions this would be the result in the present case in any event

by operation of law. The contract is plainly indivisible—certainly not divisible upon any such lines as those indicated in this contention. The defendant insured a certain amount of furniture as a whole upon certain terms and conditions. We cannot assume that it would have insured a part only on the same terms and conditions, inasmuch as the risk might be wholly different. So to assume would be to assume to make a contract for the parties; and such assumption we have repudiated as being beyond the province of the courts, and indeed beyond the province of any other authority than the parties themselves.

The patient ingenuity and evidently conscientious and laborious research of counsel for the appellant have failed to find more than two adjudicated cases in apparent support of their contention in this regard; and we are unable to see that those cases have that effect. In one of them from the supreme court of the state of Tennessee, the case of *Hobbs v. Memphis Ins. Co.* 1 Sneed, 444, action was brought on a policy of fire insurance, covering groceries owned by a partnership. One of the conditions of the policy was that it should be void if assigned in whole or in part. One of the partners, Hobbs, sold his interest in the property and assigned his interest in the policy to his copartner. The property was destroyed by fire, and the insurance company claimed a total forfeiture of the policy on the ground that it had been invalidated by the assignment. It was held by the court, however, that Henly, the copartner, was entitled to recover for his *pro rata*. But if there was error in this decision—and we are disposed to think there was, and that the decision cannot be sustained either on reason or on authority—it was that the remaining partner, Henly, was not allowed to recover for the whole property. For, in our opinion, the assignment by one partner to another was not such an assignment as was contemplated by the policy of insurance.

The other case cited is from West Virginia. It is the case of *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507, 27 Am. Rep. 582, in which suit was brought upon a policy of insurance effected on four buildings and the fixtures therein. The policy provided that it should become void upon a sale or transfer of the property; and the contract of insurance was one entire contract. One of the buildings was sold; and subsequently all four of them were damaged by fire. A recovery was allowed for the three buildings retained by the person insured. But we fail to see wherein that is pertinent to the question before us. The claim of forfeiture in that case was wholly unwarranted. By the express terms of the policy itself, there could have been no forfeiture, except by the alienation of all the property. There was no provision in reference to a partial alienation. At the same time as the recovery by the insured could properly have been only in proportion to his loss and the total amount of the insurance, the decision was only just to permit such proportionate recovery. This was only the application of the principle which makes the amount of the policy the limit of recovery, and authorizes recovery only to the actual extent of the dam-

age within that limit. In the case before us, if there were no question of the plaintiff's ownership of the property insured, and subsequently to the issue of the policy of insurance she had sold or disposed of some of the property, there might be room for the application of the doctrine of the case of *Quarrier v. Peabody Ins. Co.*; but as the case actually stands, it presents a very different aspect, and the rule of that case cannot apply.

The proposition that a policy of insurance, such as that shown in the present case, is an entire and indivisible contract, the consideration being entire, is amply supported by authority. *Bowman v. Franklin F. Ins. Co.* 40 Md. 620; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 30 L. R. A. 638; *Gottelman v. Pennsylvania Ins. Co.* 56 Pa. 210, 94 Am. Dec. 55;

Lee v. Howard F. Ins. Co. 3 Gray, 583; *Geiss v. Franklin Ins. Co.* 123 Ind. 172; *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202; *Stevens v. Queen Ins. Co.* 81 Wis. 335; *McGowan v. People's Mut. F. Ins. Co.* 54 Vt. 211, 41 Am. Rep. 848. The forfeiture necessarily operates to invalidate the whole policy.

From what we have said it follows that the plaintiff having shown by her own testimony that the policy of insurance upon which she sued had become void by its own express terms, had no case upon which to go to the jury; and the trial court was fully justified in peremptorily directing a verdict in favor of the defendant.

The judgment appealed from must therefore be affirmed, with costs; and it is so ordered.

GEORGIA SUPREME COURT.

Dovey PARISH, *Plff. in Err.*,

v.

WESTERN & ATLANTIC RAILROAD COMPANY.

(.....Ga.....)

*1. Even if the evidence in the case was sufficient to find that the homicide of plaintiff's daughter was caused by being stricken by some part of a locomotive or car attached to a moving train, it also shows the further facts that the person injured was on the track, and in some other than an erect position, either sitting or lying thereon, and that such injury occurred at night, between 12 o'clock and daylight. These facts being true, it is a conclusion of law that the injured person could at least have avoided the injury by the exercise of ordinary care, and there could be no recovery. The nonsuit was therefore right, and the judgment of the court below is affirmed.

+2. There was evidence from which the jury could have inferred that the person for whose homicide this action was brought was killed by the running of the train of the defendant company, and upon that evidence the presumption of negligence arose against the company. Consequently, the company might have been held liable, and, there being no evidence as to the circumstances attendant upon the commission of the homicide which either rebuts that presumption or shows that the person injured did not exercise ordinary care, the granting of a nonsuit was erroneous.

(May 21, 1897.)

ERROR to the Superior Court for Catoosa County to review a judgment in favor of

*First headnote by SIMMONS, Ch. J.

+Second headnote by LUMPKIN, P. J., and ATKINSON, J.

NOTE.—As to presumption of due care of person killed by alleged negligence of another, see Hendrickson v. Great Northern R. Co. (Minn.) 16 L. R. A. 40 L. R. A.

defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's daughter. Affirmed.

The facts are stated in the opinion.

Messrs. B. Z. Herndon, T. R. Jones, and W. E. Mann for plaintiff in error.

Messrs. R. J. McCamy and Julian McCamy, for defendant in error:

To be on a track at night without explanation, away from a crossing, is gross negligence.

Wilds v. Brunswick & W. R. Co. 82 Ga. 667; *Central R. & Bkg. Co. v. Smith*, 78 Ga. 694; *Central R. Co. v. Brinson*, 70 Ga. 207; *Smith v. Central R. & Bkg. Co.* 82 Ga. 801.

One asleep on a track cannot recover.

Raden v. Georgia R. Co. 78 Ga. 47; *Sims v. Macon & W. R. Co.* 28 Ga. 93; *Toomey v. Southern P. R. Co.* 86 Cal. 374, 10 L. R. A. 189, and note. See further *May v. Central R. & Bkg. Co.* 80 Ga. 368; *White v. Central R. & Bkg. Co.* 83 Ga. 595; *Southwestern R. Co. v. Hankerson*, 61 Ga. 114.

Messrs. Payne & Tye also for defendant in error.

SIMMONS, Ch. J., delivered the opinion of the court:

There was no evidence tending to show that the plaintiff's daughter was killed by the railroad, except the fact that she was found lying dead near the track, her body bearing certain marks of violence, described below. Her body was found at a point not near a public crossing. There was a hole in the left side of her head, behind the ear, where her skull was crushed to such an extent that an egg would lie in the cavity. At about 8 o'clock in the morning on the 12th of December the railroad train passed the point where she, about daylight of the same morning, was found. Taking into consideration the time of the year, the finding of her body must, therefore, have

A. 261, and note; also Bamberger v. Citizens' Street R. Co. (Tenn.) 28 L. R. A. 436; and Suburban Electric Co. v. Nugent (N. J.) 32 L. R. A. 700.

taken place at about 6 o'clock of the morning. One witness said that when he first saw her blood was running from the wound. The physician who examined her after her death testified that blood would cease running ten or fifteen minutes after the death of a person who died from such a wound; that in his opinion a person who had received such a wound might live fifteen minutes or even a half an hour. There was no blood upon the track of the railroad, there was no indication that the deceased had been dragged by the engine or cars, and her clothing was not torn. She was lying at right angles to the track, her feet near the rail. On the left side of her head was the indentation referred to above, and on the right side were a few little gashes. Several witnesses testified as to how the accident might have happened, but it was seen by no one. One witness said that the deceased might have been struck by the steps of the locomotive; another that she might have been struck by the elliptic springs that project from the trucks. These, however, are mere conjectures. To me it seems unreasonable to suppose that if a woman had been struck by the train at 3 o'clock, and her head crushed as the physician testified it was, she could have lived for nearly three hours. She must have lived that length of time after the accident, if she was killed by the train; for one of the witnesses testified that when he found her, at daylight, blood was running from the wound in her head, and, according to the testimony of the doctor to the effect that in such cases blood ceases to flow in ten or fifteen minutes, she must have been alive less than fifteen minutes before the first witness saw her.

Whether this view of the case is correct or not, the majority of the court think immaterial since, in their opinion, the plaintiff will in neither event be entitled to recover. If the deceased was killed by the train, the testimony shows that she could not have been on the track in a standing or walking position; for she would then have been badly mutilated. So, if she had been directly on the track in any position. The nature of the wounds was such that they could have been inflicted by only certain parts of the engine or cars, and these portions were so located as not to strike her head, had she been standing or walking either on or near the track. She must, therefore, have been on the ends of the cross-ties or near the track,—so near that the steps or elliptic springs could have struck her head,—and she must have been sitting or lying down. The watchman testifies that at midnight he passed with a lantern the spot where she was subsequently found, and that at the time he passed she was not there. If she was struck at all by the train, she must have sat or lain near the track after the watchman passed, and was doubtless asleep when the train passed. Standing, she could not have received the wound in her head, and no other wound on any portion of her body, if the wounds were made by a train. If this theory be correct, she was guilty of the grossest negligence in sitting near the track of a railroad and going to sleep in the night-time. The evidence shows that the train which at 3 o'clock passed the place where she was found was moving at a speed of from 35 to 40 miles 40 L. R. A.

an hour. It would have been impossible for the engineer to have stopped the train in time to avoid striking her in the distance she could be seen by the headlight.

Section 2822 of the Civil Code declares: "No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence." Section 3880 is: "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." For a person to sit or lie down upon or near the track of a railroad at night, and to go to sleep there, is gross negligence. He knows that trains are constantly passing. The railroad track is itself a warning of danger to everyone who goes upon it; and whoever does so, especially in the night-time, takes his life in his own hands.

In the case of *Sims v. Macon & W. R. Co.* 28 Ga. 98, the report of the case shows that Sims' slave, in the daytime, was sitting on the end of a cross-tie, and was struck by the engine, and killed. He could have been seen by the engineer at a distance of several hundred yards. The whistle was not blown until the cars came within about twenty steps of him. He gave no heed to the notice (the presumption is he was asleep), and was struck and killed as above stated. He could have seen the train about 1,000 yards up the road. Sims sued the railroad company for the value of the slave, and on motion a nonsuit was granted. Benning, J., in delivering the opinion of the court, says: "Was the court below right in granting the nonsuit? We think so? The case, on the part of the suffering party, Sims, was a case of the grossest negligence. There is not a single thing to serve as an excuse for his negro's being on the railroad track of the company; and that track was a place of notorious danger. To go asleep in such a place could be nothing short of an act of the grossest negligence."

The case of *Raden v. Georgia R. Co.* 78 Ga. 47, was one where "two boys, seventeen years of age, started from the house of their employer at night to go to the homes of their mothers for the night. Fifteen or twenty minutes after they left, the service train on the railroad went by. They had had plenty of time to have crossed the railroad and reached home. They were struck by a train at a public road crossing; one of them was killed, and the other seriously injured. The witness by whom the plaintiffs sought to establish their right to recover, testified that the boy who died had told him that they had stopped at the crossing, and the witness was satisfied that they were asleep. . . . Held, that a nonsuit was properly granted. To go to sleep on a railroad crossing was such negligence and recklessness as would prevent a recovery, even though the railroad company might have been negligent." Blandford, J., in delivering the opinion of the court, says: "Even if the railroad company had been negligent, yet if the person injured could have avoided the consequences thereof to himself by ordinary care, he cannot recover [citing the Code section above]. So it appears to us that ordinary care would have induced anyone not to go to sleep

on a crossing of a railroad, and the mere going to sleep on the railroad crossing was great negligence and recklessness on the part of these boys. The testimony submitted by the plaintiffs showed that these injuries were caused by their own negligence and the want of ordinary care to avoid the same." This was held, although the boys were, when struck, on a public crossing.

In the case of *Central R. & Bkg. Co. v. Smith*, 78 Ga. 694, it appears that Smith, shortly before the day, while it was yet dark, got on the railroad track at a crossing, turned down the track, using it as a walk, and going only about 65 or 70 yards, when the train, running at high speed, struck him, threw him off the track, crushed his leg, and injured him seriously. Bleckley, Ch. J., in discussing Smith's right to recover, said: "It would be flagrantly unreasonable and improbable to presume that he or anyone else had the shadow of a right to use the track, especially at such an hour, on any other condition. The train was on its regular schedule time. He quietly walked along upon the track as if it belonged to him; the train struck him, knocked him down and broke his leg, those on the engine not seeing him or being aware of his presence. It was at least as much his business to look for the engine as it was the engineer's business to look for him. The engine was a much larger object than he was; it carried a headlight, and could have been seen as far as he could. It was not possible for the engineer to have discovered him on the track sooner than he could have seen the headlight. The presence of the engine was more to be expected by him than his presence was to be expected by the engineer. He had much less reason to be surprised than the engineer had. As a matter of fact, to walk along the middle of a railroad track, between crossings, when it is dark, and without knowing and remembering whether a train is due or not, and without looking out in both directions for trains that may be due, and without listening attentively and anxiously for the roar and rattle of machinery, as well as for the sound of bell or whistle, is gross negligence." In the further discussion of the case (p. 700, 78 Ga.) it is said: "A person, while grossly negligent himself, has no legal right to count on due diligence by others, but is bound to anticipate that others, like he has done, may fail in diligence, and must guard not only against negligence on their part, which he might discover in time to avoid the consequences, but also against the ordinary danger of there being negligence which he might not discover until too late. Smith shows by his own testimony, that he did not discover his danger. If he had been on the crossing, or at any place he was by right entitled to be, he would have been warranted in assuming that the whole world would be diligent in respect to him and his safety, but, as he was engaged in an act of gross negligence himself, he ought to have anticipated that somebody else might fail in diligence, and that the consequences might come down upon him before he discovered the negligence." The trial judge had refused a new trial, and this judgment was reversed, although the injury had occurred in an incorporated town. Subsequently, when

the case was again tried in the superior court, and substantially the same evidence was introduced, the trial judge granted a nonsuit, which was affirmed by this court. *Smith v. Central R. & Bkg. Co.* 82 Ga. 801.

In the case of *Southwestern R. Co. v. Hankerson*, 61 Ga. 114, it was held that, "if one voluntarily becomes drunk, and consequently falls down, or lies down, in a state of insensibility, on a railroad track, so that he is injured by a passing train, he cannot recover for injuries so received, even though there may have been contributory negligence on the part of the employees of the road."

In the case of *Wilds v. Brunswick & W. R. Co.* 82 Ga. 667, it was held that "one knowingly and needlessly walking at night upon a railroad track can, by the use of ordinary diligence, avoid being run over by a train, unless it appears that, owing to some special fact or circumstance, the use of such diligence would prove ineffectual." Bleckley, Ch. J., in discussing the case, said: "The homicide occurred at night, several hundred yards from any public crossing; and the only reason why there was any such unfortunate calamity was that the company and the deceased were both attempting to use the track at the same time. The company had a right to its use; the deceased had none. There is no explanation whatever as to why he did not avoid the consequences of the company's negligence. That he could have done so by exercising the care of a prudent person is manifest. . . . From the facts set out in the official report, it will be seen that this killing cannot be accounted for except upon the theory that the plaintiff's husband was grossly negligent. Had he been in the use of ordinary care, it seems impossible that he could have been in the way of the train at such an hour and in such a place."

We think that the principles announced in the above-cited cases by this court should control the disposition of this case. The facts here are as strong or stronger in favor of the nonsuit than the facts in the cases cited. Here was a young woman wandering about in the dead hours of the night. She seated herself on the ends of the cross-ties, or near the track of the defendant's road. There was no public crossing near where she stopped. Presumably she fell asleep. The defendant's train passed along on its schedule time, and it is claimed that the deceased was killed thereby. The only theories under which the homicide can be charged to the passing train make the deceased woman's conduct necessarily such as to constitute, under the decisions cited *supra*, negligence so gross that her mother cannot recover, even if the railroad was somewhat in fault. It is argued, however, that she may have been taken suddenly ill, and been compelled to stop where she did, and that therefore the railroad ought to be put upon its explanation. If such were the circumstances, how could the servants and agents of the railroad company have known anything about her sudden illness? It was in the night, and they had no reason to believe or suspect that she would be upon the track at that place. Had it been at a public crossing, then the law requires them to look specially to see if any person or thing is on the crossing. Besides, in

the case of *Wilds v. Brunswick & W. R. Co.* 82 Ga. 667, both in the syllabus and in the opinion, it is strongly intimated that this fact of sudden illness must be made to appear by the plaintiff, and not the defendant; and in such a case we think the burden would be upon the plaintiff to show the sudden attack of illness, in order to rebut the presumption of want of ordinary care raised by the circumstances attending the homicide.

It is also contended that the *Cases of Hankerson and Wilds* were so decided because it appeared that they were drunk at the time they were injured. *Wilds' Case* was not put upon that ground at all, nor do we see that it matters in principle whether gross negligence is committed by one who is sober or by one who is drunk. If there could be any extenuation at all, it would seem that it should be in favor of the drunken man. The sober man who is guilty of gross negligence in walking upon the track in the night-time, or in sitting upon the track, or lying upon it asleep, does so while in possession of all his faculties. With the drunken man it is different, and his negligence arises, not so much from what he does while intoxicated, as from his act in placing himself in that condition.

It is also contended that, under our Code, when it is shown that a person is killed or injured by a railroad train, the law presumes that the company was negligent. This is true, and ordinarily it is incumbent upon the railroad company to show that it exercised all reasonable care at the time of the accident; but where the plaintiff's own evidence shows that he was guilty of gross negligence, the presumption against the company is rebutted or overcome, and the plaintiff cannot recover, even though the company may have been at fault. We think, for these reasons, and under the principles of the cases above cited, that the court did not err in granting a nonsuit in this case.

Judgment affirmed.

Lumpkin, P. J., and Atkinson, J., dissenting:

Our objection to the disposition which the trial judge, with the approval of a majority of this court, has made of this case, is that we believe it amounts to a usurpation of a function which properly belongs to a jury. The evidence does not affirmatively show in what manner the death of the plaintiff's daughter was occasioned. It is a thing which has to be reasoned out from the established facts; and this, under our system, is peculiarly an appropriate task for a jury. The testimony would support a number of different theories. That adopted by the court and discussed in the foregoing opinion is certainly a plausible one; but we cannot undertake to say that, as matter of law, it is correct. The argument in support of it is strongly put by the Chief Justice. Such an argument, if addressed to a jury, ought to have great, if not convincing, weight. At the same time, they would not be obliged to accept and follow it. A very strong argument could be made upon the evidence in this record in support of a contention that the deceased was not killed by a train of the defendant. It is not, however, insisted

that a finding that she was so killed would have been unwarranted. The truth is, none of us know, or can ever know, exactly how she came to her death. We do not wish to be understood as entertaining the view that the plaintiff ought necessarily to have had a verdict. Our position simply is that whether she was entitled to recover was a question for a jury. Upon the assumption that the deceased was killed by a passing train of the defendant, the plaintiff had in her favor a legal presumption that the company was negligent and therefore liable. This presumption was not, in our opinion, rebutted; nor are we able to agree with our brethren in saying that the evidence conclusively shows the deceased to have been wanting in ordinary care. None of the cases cited are authoritative or controlling in the case at bar. Each depends upon its own peculiar facts, and no one of them is precisely like the case in hand. It is not our purpose to discuss the evidence. We simply desire to present in this brief form our reasons for being unable to concur in the judgment of this court affirming that of the trial court in granting a nonsuit.

CHICAGO PACKING & PROVISION
COMPANY, *Plff. in Err.*,

v.

SAVANNAH, FLORIDA, & WESTERN
RAILWAY COMPANY.

(.....Ga.....)

***1. When goods are shipped under a bill of lading** stipulating for their delivery to the order of the consignor, an indorsement by him upon the bill of lading directing delivery to a third person, or to his order for collection, in effect makes such person the consignee; and, although such bill of lading may further stipulate that its surrender shall be required before the delivery of the goods at destination, delivery by the carrier without requiring such surrender, if made to such consignee, or upon his order or by his authority, involves no breach of duty to the consignor.

2. Where in such case the bill of lading was indorsed to a partnership, the carrier was authorized to deliver upon a written order signed by one of the partners, though he may have privately intended the signing of the order to be his individual act only; the carrier's agent having no information to this effect, and the circumstances being such as to warrant him in treating the giving of the order as the act of the partnership.

3. The evidence in the present case demanded a verdict for the defendant.

(November 29, 1897.)

ERROR to the Superior Court for Dougherty County to review a judgment in favor of defendant in an action brought to recover damages for the wrongful delivery of

*Headnotes by LUMPKIN, P. J.

NOTE.—On the question to whom goods may be delivered under a bill of lading, see note to *Nebraska Meal Mills v. St. Louis S. W. R. Co.* (Ark.) 38 L. R. A. 368.

property which had been placed in defendant's possession, for transportation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Wooten & Wooten for plaintiff in error.

Messrs. Erwin Du Bignon and Chisholm W. L. Clay for defendant in error.

Lumpkin, P. J., delivered the opinion of the court:

This was an action by the Chicago Packing & Provision Company against the Savannah, Florida, & Western Railway Company for damages alleged to have been occasioned to the plaintiff because of a wrongful delivery by the defendant of certain meat to N. L. Ragan. The court directed a verdict for the defendant, and the plaintiff excepted.

It appeared at the trial that the plaintiff had shipped the meat in question to Albany, Georgia, consigned to its own order, under bills of lading each of which contained a direction to notify Ragan, and each stipulating that its surrender should be required by the carrier before delivery of the goods at destination. Upon each of these bills of lading was an entry in the following words, signed by the plaintiff: "Deliver to Hobbs & Tucker, or order, for collection." Clark, the agent of the railway company at Albany, without requiring a surrender of the bills of lading, delivered the meat to Ragan upon written orders which were as follows:

E. N. Clark, Agent:

Let N. L. Ragan have car meat on dry track, and I will be responsible for B/L.

May 18th, 1898. A. W. Tucker.

Ed. N. Clark, Agent:

Please let Nevil [meaning Ragan] have one car meat, and I will stand for B/L.

Yours, truly, A. W. Tucker.

Tucker testified, in substance, that in giving the above orders to Ragan, it was his private intention that so doing should be regarded as his individual acts; but he did not so inform Clarke, the agent. The circumstances, as disclosed by the evidence, were such as to warrant the latter in treating the giving of these orders as acts of Hobbs & Tucker; that firm being at the time in possession of the bills of lading. It further appeared that, at the time the meat was delivered to Ragan, he had not paid to Hobbs & Tucker drafts drawn on him by the plaintiff for the price of the meat, which drafts had been forwarded to Hobbs & Tucker along with the bills of lading. Upon substantially the same state of facts as above recited, this same plaintiff had previously brought an action of bail trover against Hobbs & Tucker, and obtained a judgment thereon, which was affirmed by this court. See 98 Ga. 576. The question now is, Was the railway company also liable to the plaintiff? If a natural person consigned goods to his own order under a bill of lading of the character above indicated, and called in person upon the carrier's agent at the point of destination, demanded a delivery of the goods, and thereupon received the same, it certainly could not be questioned that, as between the consignor

and the carrier, such delivery would be good, and would free the carrier from further liability to the consignor, although the bill of lading may have not been produced and surrendered in accordance with the stipulation therein contained. While in such a case the carrier might not, as against one who had in good faith and in due course of business obtained the bill of lading properly indorsed, be protected by a delivery to the original consignor, surely the latter would have no cause of complaint against the carrier. If such consignor could thus obtain a delivery of the goods to himself in person, what difference in principle would it make if, instead of doing this, he by a written order directed delivery to another, who obtained the goods upon such order without producing and surrendering the bill of lading? In either case, looking at the transaction with reference only to the consignor and the carrier, the latter would have done all that the former had any right to require of it. In other words, the stipulation in such a bill of lading, requiring its surrender upon delivery of the goods, is for the benefit of the carrier, and not that of the consignor. The plaintiff in the present action was not a natural person, but it made Hobbs & Tucker its agents, and directed delivery to them, or to their order. Treating the papers signed by A. W. Tucker as orders of the firm, the carrier complied with its contract with the Chicago Packing & Provision Company when it delivered the meat upon these orders. The effect of the indorsement entered upon the bills of lading was, as between the consignor and the railway company, to make Hobbs & Tucker the real consignees. In the case of *Boatmen's Sav. Bank v. Western & A. R. Co.* 81 Ga. 231, this court held that where goods were shipped to the consignor's order, the bill of lading being indorsed in blank and negotiated for value as security for a draft drawn by the consignor on a third person, he being the party to be notified of the shipment, the carrier had no right, as against an innocent holder of the bill of lading, who had acquired the same in due course of trade, to make delivery to such third person without his producing the bill of lading, "or authority from the holder thereof." Here was a clear recognition of the protection which the law gives to the innocent holder of a bill of lading thus acquired, and also a strong intimation that authority for a delivery from a legal holder or owner of the bill of lading would be sufficient to authorize delivery without a production of the bill of lading itself. It was, however, insisted here that, even assuming the above reasoning to be perfectly sound and correct, it was not strictly applicable to the present case, because the indorsement directing delivery to Hobbs & Tucker, or order, was not general in its terms, but qualified by the use of the words "for collection." In this connection, the position was taken that the order for delivery to Hobbs & Tucker was not absolute, but to a certain extent conditional, and therefore the railway company could not safely and lawfully make delivery upon the order of this firm, unaccompanied by the bills of lading, without first ascertaining that Hobbs & Tucker had actually collected from Ragan the price of the

meat. The contention was that Hobbs & Tucker were special agents of the Chicago Company, and that in dealing with them as such the railway company was bound to inquire into the extent of their authority. We do not think this is a case where the rule thus sought to be invoked is applicable. Hobbs & Tucker, under the facts recited, were the agents of the plaintiff through whom it sought and obtained delivery to itself under the terms of its contract with the carrier. The railway company did exactly what it agreed to do when it delivered the goods to the order of Hobbs & Tucker, and it had no concern with the plaintiff's reasons for giving this order or its purpose in so doing. The important right reserved by the plaintiff in its contract with the carrier was to name the person to whom delivery should be made in its behalf at the point of destination; and accordingly the plaintiff had no right to impose any obligation upon the carrier with reference to delivery upon its order, further than that which the law imposed upon the carrier, of exercising due diligence in ascertaining the identity of the person to whom delivery was directed to be made. Nor would it seem that the plaintiff ever contemplated that the defendant should do more than it was, under its contract, bound to do. The words "for collection" were vital as between Hobbs & Tucker and the plaintiff, as restrictive of the firm's authority to dispose of the goods after receiving them from the carrier, but were not even intended as qualifying the right of the firm to demand of the carrier a full and complete possession of the goods. In other words, the collection which Hobbs & Tucker were to make from Ragan was a matter to be attended to by them, as the agents of the plaintiff, after they had obtained possession of the meat. It was their duty to get the meat and hold it till Ragan paid for it, but this was a matter of no concern to the railway company. It certainly was not the consignor's resident collecting agent at the point of destination. The drafts were not sent to it, the bills of lading were not intrusted to it, and its relation to the transaction was that of carrier only. In a word, the company was not the plaintiff's agent for any purpose whatsoever, and it never in any manner undertook to vouch for the fidelity of Hobbs & Tucker, who were the trusted agents of the plaintiff, and to whom alone it looked for the collection of its money before its meat went into the possession of Ragan. In any view of the matter, the familiar rule that, where one of two innocent persons must suffer loss, it should fall upon the party who put it in the power of the wrongdoer to occasion the loss, is applicable here. The loss in the present case was not occasioned by the failure of the railway company to require the production and surrender of the bills of lading, but by the faithlessness of Hobbs & Tucker to their principal. Indeed, after the orders for the meat were given to Ragan, Hobbs & Tucker really held the bills of lading for the protection of the carrier, and the only risk it took was the possibility of that firm's indorsing the same to bona fide purchasers for value. In not insisting upon the surrender of the bills of lading as a pre-

40 L. R. A.

requisite to delivery, the carrier simply waived a right which, as against the original consignor, it has reserved to itself under the terms of the contract of shipment. We are aware that in some jurisdictions there are decisions at least intimating, if not directly holding, contrary to some of the views above expressed; but, notwithstanding this, we are confident that we have ascertained and announced the true law of the present case.

As to the fact that Tucker alone signed the orders upon which Clark, the agent of the railway company, delivered the meat to Ragan, it is only necessary to say that, upon the identical state of facts here presented with reference to this matter, this court, in the case first cited *supra*, held that the acts of Tucker in giving the orders in question were properly treated by the agent to whom they were addressed as the acts of the firm itself.

Judgment affirmed.

All the Justices concur.

Abram SMALLS, *Plff. in Err.*,

v.

STATE of Georgia.

(.....Ga.....)

"The verdict of a coroner's jury, in this state, is advisory merely to the officers charged with the execution of the public law in cases of homicide, binds no one as a judgment, has no probative effect as evidence, can prejudice the right of no one, and is therefore not subject to be reviewed, set aside, or quashed in the superior court, either at the instance of the person accused by it or of any other person.

(June 10, 1897.)

ERROR to the Superior Court for Chatham County to review a judgment sustaining a demurrer to a petition for a writ to review and quash the verdict of a coroner's jury. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. N. West, T. P. Ravenel, H. A. Alexander, and King & Spalding for plaintiff in error.

Mr. W. W. Osborne, Solicitor General, for the State.

Simmons, Ch. J., delivered the opinion of the court:

On February 11, 1894, an inquisition was taken in Chatham county, Georgia, before the coroner of that county, upon view of the body of J. C. Neve. The coroner's jury returned a verdict that Neve "came to his death from a gunshot wound inflicted by a weapon in the hands of Abe. Smalls, and we consider it murder." On March 24, 1897, Smalls filed in the superior court a petition praying "that the said inquest and verdict may be quashed, and that an order of *melius inquirendum* shall be

*Headnote by *SIMMONS*, Ch. J.

NOTE.—As to necessity or propriety of coroner's inquest, see *Lancaster Count v Holyoke* (Neb.) 21 L. R. A. 394.

granted by this court to the coroner of the county of Chatham, and that the said inquiry shall be held by the coroner *super visum corporis*." The grounds of this petition were that the inquisition and verdict do not show the time of the injury that caused the death of Neve, nor the time or place of such death, nor that such death occurred within the limits of the county of Chatham. The solicitor general of the circuit was served with this petition, and demurred to the same. The judge upon the hearing, sustained the demurrer, and denied the petition, and to this judgment Smalls sued out a writ of error to this court. The judge, in his order sustaining the demurrer of the solicitor general, says: "The incidents and characteristics of a coroner's inquest, under the old practice at common law, in England, where the verdict could be used for prosecuting the offenders without and instead of an indictment by a grand jury (see Clark, Crim. Proc. pp. 78, 180), and where it also fixed the value of the property forfeited, have disappeared in this state, the inquest and its finding amounting only to the finding of a court of inquiry." This reason we consider sufficient to sustain the judgment of which complaint is here made. At common law the verdict of a coroner's jury was, when it contained the subject-matter of an accusation, equivalent to an

indictment of the accused for the homicide of the deceased. The writ of *melius inquirendum* issued in certain cases, as where the misbehavior of the coroner rendered necessary another inquiry *super visum corporis*. Our laws relating to the subject differ fundamentally from the common law. In this state, under our present system, the verdict of a coroner's jury is merely advisory to the officers charged with the execution of the public law, and may also make it the duty of the coroner to issue a warrant for the arrest of the person suspected of the homicide, but further than this it is without effect. Portions of the evidence given at the inquest may sometimes be admissible at the trial of the accused for the homicide, but the verdict has itself no probative effect as evidence, and is binding upon no one as a judgment. It can prejudice the rights of no one, and is therefore not subject to be reviewed, set aside, or quashed in the superior court, either at the instance of the person accused by it or of any other person. Under our system, the writ of *melius inquirendum* will not lie to such verdict. Penal Code, §§ 1255-1269.

The judgment of the court below, sustaining the demurrer to the petition, was without error, and is therefore *affirmed*.

All the Justices concur.

INDIANA SUPREME COURT.

Rufus MAGEE, *Appt.*,
v.

Ellsworth B. OVERSHINER.

(.....Ind.....)

1. **The uses of streets prevailing at the time of the taking or dedication** of a street are not the limits of the uses to which the public is entitled and which the soil owner is deemed to have contemplated, but such uses are to be enlarged to include all of the additional and improved methods of attaining the same objects and enjoying the same privileges, not, however, to the denial or substantial impairment of the fee owner's use and enjoyment of his abutting property.
2. **The reasonable use of the streets of a city for the equipment of a telephone system**, including poles and wires, is not a new and additional servitude for which the abutting property owner is entitled to compensation.
3. **A telephone system may be owned and conducted by an individual** without legislative assent, unless there has been some legislative restriction upon such right.

(March 29, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Howard County in favor of defendant in an action brought to compel defendant to move a telephone pole

NOTE.—As to additional burden of telephone or telegraph system in highway, see also *People v. Eaton* (Mich.) 24 L. R. A. 721, and *note*.

40 L. R. A.

which had been set in front of plaintiff's property. *Affirmed*.

The facts are stated in the opinion.

Messrs. George W. Funk, D. H. Chase, and Blackledge & Shirley for appellant.

Messrs. McConnell & Jenkins, Bell & Purdens, and Goodykoontz & Ballard, for appellee.

The power of municipalities of Indiana over streets and alleys is very broad and comprehensive.

2 Rev. Stat. 1894, §§ 3616-3623; *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 223; *Milbau v. Sharp*, 17 Barb. 437; *Indianapolis & C. R. Co. v. State, Lawrenceburg*, 37 Ind. 496; *Kistner v. Indianapolis*, 100 Ind. 210; *Terre Haute & L. R. Co. v. Bissell*, 108 Ind. 113; *Indianapolis Cable Street R. Co. v. Citizens' Street R. Co.* 127 Ind. 369, 8 L. R. A. 539.

The nature of the telephone service is such that the owner of it is compelled to furnish facilities to the public and the citizens when required, is affected with a public interest, and the municipal authorities have inherent power to provide for such service, as much as for lighting the streets, independent of any statutory power.

Hockett v. State, 105 Ind. 250, 55 Am. Rep. 201; *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 7; *Craufordville v. Braden*, 180 Ind. 149, 14 L. R. A. 268.

On the 13th of April, 1895, the legislature passed an act in which it specifically recognizes the right of an individual to operate a telephone plant and system on an equal footing with a corporation.

See Acts 1885, p. 227; *Central U. Teleg. Co. v. State, Hopper*, 123 Ind. 113; *Central U. Teleg. Co. v. State, Falley*, 118 Ind. 194; *Central U. Teleg. Co. v. Bradbury*, 106 Ind. 1.

The erection of the telephone pole complained of is not an additional burden to the freehold.

There is a marked distinction between the use of the urban and suburban highways.

Elliott, Roads & Streets, p. 299; *Kincaid v. Indianapolis Natural Gas Co.* 124 Ind. 577, 8 L. R. A. 602.

In *Cater v. Northwestern Teleg. Exchange Co.* 60 Minn. 539, 28 L. R. A. 810, the court held and decided that the construction along a highway of a telephone line consisting of poles planted in the ground and upon which wires were strung, was not an additional servitude.

The public easement in a highway is not limited to travel or transportation of persons or property or movable vehicles.

The setting of telephone poles is not necessarily an additional burden on abutting property and on the easement.

McCormick v. District of Columbia, 4 Mackey, 396, 54 Am. Rep. 284; *Julia Bldg. Assn. v. Bell Teleg. Co.* 88 Mo. 258, 57 Am. Rep. 393; *Pierce v. Drew*, 186 Mass. 75, 49 Am. Rep. 7; *Hershfield v. Rocky Mountain Bell Teleg. Co.* 12 Mont. 103; *Montgomery v. Santa Ana Westminster R. Co.* 104 Cal. 186, 25 L. R. A. 654; *Lockhart v. Craig Street R. Co.* 139 Pa. 419; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Cater v. Northwestern Teleg. Exchange Co.* 60 Minn. 539, 28 L. R. A. 810; *Central U. Teleg. Co. v. State, Falley*, 118 Ind. 194, 10 Am. St. Rep. 114, note 180; *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721; *Loeber v. Butte General Electric Co.* 16 Mont. 1; *Irwin v. Great Southern Teleg. Co.* 37 La. Ann. 63; *Southern Bell Teleg. & Teleg. Co. v. Francis*, 109 Ala. 224, 31 L. R. A. 193; *Eichels v. Evansville Street R. Co.* 78 Ind. 261, 41 Am. Rep. 561.

The plaintiff could not maintain this action, which is a suit in ejectment and for the possession of the real estate occupied by the appellee, and, unless the appellant was entitled to immediate possession at the time he brought his suit, he must fail, and the judgment of the court was right, under the facts found by the jury.

Montgomery v. Santa Ana Westminster R. Co. 104 Cal. 186, 25 L. R. A. 654; *McDonnell v. Cambridge R. Co.* 151 Mass. 159; *Pittsburgh, C. & St. L. R. Co. v. O'Brien*, 142 Ind. 218; *Roots v. Beck*, 109 Ind. 472.

Hackney, J., delivered the opinion of the court:

Rufus Magee, the owner of a business property fronting upon one of the principal business streets of the city of Logansport, and the owner of the fee in the street, brought this suit for a mandatory injunction to cause the removal of a telephone pole placed by the appellee, Overshiner, in the curb line of the sidewalk in front of said property. The appellee, the owner of the telephone system in said city, placed said pole, and strung wires upon the same in the night-time, after protest by the appellant, and without compensation to or consent from him. The principal question in

the case is as to whether such use of the street is a servitude, not within the contemplated uses of a city street, and therefore an additional burden upon the fee of the appellant, for which he should be compensated. The decisions of the courts of this country, so far from establishing a definite rule upon this question, are at such variance as to render hopeless any effort to reconcile them. At the threshold of our inquiries there are certain well-recognized propositions: The owner of the fee in a street which has been dedicated or condemned for a street is entitled to restrict its uses to such as are proper street uses, as stated by most of the decisions; to the uses contemplated at the dedication or condemnation. The public have only an easement for the proper uses of a street. When applied to new uses, the fee owner is entitled to compensation. When a use is by proper public authority, and is not an additional burden upon the fee, no compensation is due the fee owner. In the use of the public easement, there is no right to unreasonably burden the fee, to the special injury and damage of the fee owner. These general propositions, however, are of little service when we revert to the question: Is the telephone equipment an unnecessary or unreasonable obstruction, and a new and additional servitude? Will it suffice to say that because a street was dedicated or condemned fifty years ago, before electric inventions for lighting, communicating oral and telegraphic messages, and propelling street cars, were thought of, it could not therefore have been condemned or dedicated in contemplation of the uses therein of such inventions; or that, because gas had not been used as a method of lighting, the right to lay pipes to conduct the gas could not have been contemplated; or that because water, for protection against fire, had not been forced through pipes in the streets, such use could not have been contemplated; and so on as to the uses of the street for sewerage, for natural gas piping, for telegraph or telephone lines, above or below the surface of the street, or for the possible future uses of pneumatic tubes for the transmission of mails or parcels, and the distribution of steam or electricity for heating, etc.? If what was actually contemplated at the time of the dedication should be found to answer the question in every case, many of the uses common to the streets of every city would be additional servitudes, for which the fee owner would be entitled to compensation.

It must be, however, that the contemplated uses should be deemed to have been, not only in the walking, riding upon horseback and in wagons or other vehicles drawn by animals, in the going and returning upon business, social, religious, or political missions, but also by such methods of travel and communication, in addition or in substitution for those as might come into vogue and be accepted and recognized as proper and important uses of the street in the varying needs and demands of commerce, and the relations of man to man socially and otherwise. If this were not true, the way originally dedicated for a suburban highway, but by the growth of population becoming a city street, or the dedication of a village or town street afterwards

becoming the principal thoroughfare of a great city, would be limited to the uses in vogue at the time and suited to the country road or the village or town street; and the growth of population, the advancement of commerce, and the increase in inventions for the aid of mankind would be required to adjust themselves to the conditions existing at the time of the dedication, and with reference to the uses then actually contemplated. That a dedication or condemnation is deemed to comprehend uses not actually in the minds of the parties at the time is seen from the almost unvarying rule that the electric street-railway systems are not a new use and an additional servitude, but are a new method of enjoying an old and ever existing use? *Biehels v. Evansville Street R. Co.* 78 Ind. 261, 41 Am. Rep. 561; *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* 139 Ind. 297, 26 L. R. A. 387; *Lockhart v. Craig Street R. Co.* 139 Pa. 419; *Detroit City R. Co. v. Mills*, 85 Mich. 634. They carry the people by means of a propulsive force, which is a substitute for the horse or mule which formerly drew the cars. The horse car was accepted as a conveyance added to the numerous kinds of vehicles in use, and varying in the use of stationary tracks or railways. Poles and wires for electric lighting have been admitted as a proper use, on the ground that the streets are lighted, and their general uses thereby made safer and more expeditious. Incidentally, the same use has been employed for supplying light to public, business, and private houses. Sewers have been admitted as not constituting an additional servitude, because they afforded a means of drainage for the streets, although one use was in carrying the waste from buildings of the citizens. Gas mains and poles were admitted in like manner as electric lighting systems, and for like uses. In none of these cases has the inquiry been as to whether the fee owner contemplated such uses, or whether they were in vogue at the time of the dedication. They were always deemed to constitute a beneficial use of the streets, as in some degree aiding in the means or opportunities for conducting the affairs of the inhabitants, and in facilitating the communication indispensable to such affairs. Some of the authorities reaching the same conclusion, treat the uses of a street, arising from a dedication or condemnation, as expansive, not confined to uses already permitted, but, as civilization advances, admitting new uses. *Angell & A. Corp. § 312; Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398; *Cater v. Northwestern Teleph. Exchange Co.* 60 Minn. 539, 28 L. R. A. 310; *Detroit City R. Co. v. Mills*, 85 Mich. 634. In *Cater v. Northwestern Teleph. Exchange Co.* 60 Minn. 539, 28 L. R. A. 310, it is said: "The question, then, is, What is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals,—and, next, a

way for vehicles drawn by animals,—constituting, respectively, the 'iter,' the 'actus,' and the 'via' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use." Judge Elliott, in his work on *Roads and Streets* (p. 529), quotes approvingly from *Cooley's Constitutional Limitations* (p. 556) as follows: "When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run on a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving." Upon this branch of our inquiries, we must conclude, therefore, upon both reason and authority, that the uses of streets prevailing at the time of the taking or dedication of a street are not the limits of the uses to which the public is entitled, and which the soil owner is deemed to have contemplated, but that such uses are to be enlarged to include all of the additional and improved methods of attaining the same objects and enjoying the same privileges, not, however, to the denial or substantial impairment of the fee owner's use and enjoyment of his abutting property.

Is the telephone with its necessary poles and wires to be regarded as a new use, so disconnected from the purposes and objects in actual and legal contemplation when our city streets were dedicated or condemned as to constitute an additional servitude? The telegraph equipment, in its occupancy of the highway or street and its uses, is the nearest parallel we have to that of the telephone system. They are both inventions for communication by electricity. The equipment occupying the streets is the same. Some authorities have attempted to distinguish between the uses contemplated of city streets and of suburban highways. This distinction was recognized by this court in *Kincaid v. Indianapolis Natural Gas Co.* 124 Ind. 579, 8 L. R. A. 602, where this language was employed: "There is an essential distinction between urban and suburban highways, and the rights of abutters are much more limited in the case of urban streets than they are in the case of suburban

ways. We note the distinction between the classes of public ways, and declare that the servitude in the one class is much broader than it is in the other." In *Elliott, Roads & Streets*, p. 299, it is said: "There is an essential difference between urban and suburban servitudes. The owner of the dominant estate in an urban servitude has very much more authority and much greater rights than the owner of the dominant estate in a suburban servitude. The easement of the one is much more comprehensive than that of the other. It is doubtful whether, of all servitudes, there is one so broad and comprehensive as that of a city in its streets." Again, the same author says, on page 307: "The easement in a city is so broad and exclusive as to leave very little, if any, private right of use in the owner of the servient estate."

If this doctrine is accepted,—and we think it must be,—the cases which hold that telegraph and telephone lines upon county highways are an additional servitude cannot be given much weight in determining the question before us. However, those cases which hold that these uses of the suburban ways are not an additional servitude, if their reasoning is tenable, apply to cases of city streets with greater force than to those of country ways. *Cater v. Northwestern Teleph. Exchange Co.* 60 Minn. 589, 28 L. R. A. 810, is such a case. In addition to the pertinent quotation already made from that case, we quote the following: "We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. We are not forgetful of the fact that care should be taken that, in the popular zeal for modern public improvements, the burden of furnishing these improvements should not be shifted from the public, and imposed upon any particular class of individuals. But viewing as we do highways as being designed as public avenues of travel, traffic, and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed, and, within the limitations which we have suggested, does not impose an additional servitude upon the land; in short, that it is merely a newly discovered method of using the old public easement." Another case of the same character is that of *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721. It was there said: "When these lands were taken or granted for public highways, they were not taken or granted for such uses only as might then be expected to be made of them, by the common methods of travel then known, or for the transmission of intelligence by the only methods then in use, but for such methods as the improvement of the country, or the discoveries of future times, might demand. . . . It would be a great calamity to the state if, in the development of the means of rapid travel and the transmission of intelligence by telegraph or telephone communication, parties engaged in such enterprises were compelled to take condemnation proceedings before a single track could be laid or a pole set." This latter 40 L. R. A.

proposition can be the better appreciated by the supposition that in the city of Indianapolis a telephone company should be required to make legal condemnations as to the 20,000 or more properties fronting upon the streets of that city.

The cases of *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *York Teleph. Co. v. Keeseey*, 5 Pa. Dist. R. 366, and *Julia Bldg. Asso. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398, are directly in point in holding that the erection of telephone systems upon city streets is not an additional servitude for which the adjacent fee owner is entitled to damages, but that such use, being an improved method of transmitting intelligence, and a substitute for the messenger upon foot, on horseback, or by vehicle, is within the contemplated uses at the time of the dedication. In the last case cited, it was said: "These streets are required by the public to promote trade and facilitate communications in the daily transactions of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage or other vehicle, in bearing his message. The defendants in this case proposed to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more despatch than any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more despatch, but to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen, or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen, or carriages to effectuate the same purpose. In this view of it, the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman, or carriage." In the case of *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7, a like reasoning is adopted. It is there said: "The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post boy or the mail coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out." In *Hershfield v. Rocky Mountain Bell Teleph. Co.* 2 Mont. 103, it was held that the telephone equipment was not a new and additional burden upon the fee in a city street; quoting with

approval from *Julia Bldg. Asso. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398. It is true that it was further held that the fee in the street was not in the abutting owner, but the proposition is distinctly adopted that it is germane to the proper use of streets to allow the setting of poles and wires for the telephone. In *McCormick v. District of Columbia*, 4 Mackey, 396, 54 Am. Rep. 284, the right of the telephone system to occupy the streets as a proper street use was held. The same right was recognized in *Irwin v. Great Southern Teleph. Co.* 37 La. Ann. 63; but it was placed upon the rule that the abutting owner could not complain, since the fee in the streets was in the public. We observe no means of distinguishing against the telephone equipment, on the ground that its poles are not in motion as are ordinary instruments of travel, since the permanent occupancy by the trolley poles, the gas and water pipes, etc., is maintained. See *People v. Eaton*, 100 Mich. 208 24 L. R. A. 721; *York Teleph. Co. v. Keesey*, 5 Pa. Dist. R. 366.

If the existence of private benefit to the fee owner were the turning point between the admission of those things not instruments of travel or movement, as the first cistern, the illuminating and heating gases, the water pipes, sewers, etc., and the telephone, it would be exceedingly difficult to establish the absence of private benefit to the property owner and business man in the employment of the telephone. Opposed to the view of the question as we have presented it are cited several authorities. *Slowers v. Postal Telegr. Cable Co.* 68 Miss. 559, 12 L. R. A. 864, involved the right to place telegraph poles upon the sidewalk in the city of Vicksburg. The controlling portion of the opinion is as follows: "There is some conflict in the authorities, but the decided weight is to the effect that telegraph companies form no part of the equipment of a public street, but are foreign to its use, and that where the abutting owner is the owner of the fee to the center of the street he is entitled to additional compensation for the additional burden placed upon his land. *Lewis, Em. Dom.* § 181, citing *Board of Trade Telegr. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Dusenbury v. Mutual Union Telegr. Co.* 11 Abb. N. C. 440; *Metropolitan Teleph. & Telegr. Co. v. Colwell Lead Co.* 18 Jones & S. 488; *Broome v. New York & New Jersey Telegr. Co.* 42 N. J. Eq. 141; *contra, Hewett v. Western U. Telegr. Co.* 4 Mackey, 424; *Pierce v. Drew*, 186 Mass. 75, 49 Am. Rep. 7; *Julia Bldg. Asso. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398." All of the cases cited by the court as in conflict with its opinion have been cited by us. Those cited in support of the opinion are by reference to *Lewis on Eminent Domain*, where the text is supported by the four cases first named by the court. Of those cases *Board of Trade Telegr. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453, involved the location of a telegraph pole in a rural highway as did also *Dusenbury v. Mutual Union Telegr. Co.* 11 Abb. N. C. 440. In *Broome v. New York & N. J. Telegr. Co.* 42 N. J. Eq. 141, the statute authorizing the establishment of the system required that the consent in writing of the property owner should be procured for the purpose, and without such consent the 40 L. R. A.

right was denied. The one case cited in the *Slowers Case* giving it any support was *Metropolitan Teleph. & Telegr. Co. v. Colwell Lead Co.* 18 Jones & S. 488. That case broadly asserts that the telegraph service is not a street use. That conclusion is at variance with our conclusion.

Among the other cases cited by counsel for the appellant are *Eels v. American Teleph. & Telegr. Co.* 143 N. Y. 133, 25 L. R. A. 640; *Western U. Telegr. Co. v. Williams*, 86 Va. 696, 18 L. R. A. 429; *Postal Telegr. Cable Co. v. Irvine*, 49 Fed. Rep. 113,—in each of which the question was as to the erection of telegraph poles upon a rural highway; and, if the distinction heretofore maintained is correct, they are not authorities in this case. In *Willis v. Erie Telegr. & Teleph. Co.* 37 Minn. 347, the judgment of the trial court, holding the telephone pole upon the city street an additional servitude, was affirmed upon a division of the court, and for the lack of a majority for either side of the question. It is therefore of little force as an authority. The only other decision thought to be analogous, to which we have been cited, or which our extended researches have discovered, is that of *Chesapeake & P. Teleph. Co. v. Mackenzie*, 74 Md. 36. In that case the complaint was held sufficient upon the general allegation that the pole planted in the footway in front of the plaintiff's warehouse "obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of said premises" without permission and without payment of compensation. It was held to present a cause of action for a direct interference with the use of the warehouse, and the question of the use of a street or a highway as an additional servitude was expressly held not to be involved. It was held, also, that the legislature had not and could not authorize the substantial impairment of such beneficial enjoyment of one's property. We do not therefore regard that case as in point. Nor do we regard the *New York Elevated Steam Railway Cases* as in point. Those cases correctly held, as we think, that the use of the street for such railway was an obstruction of the easements of access, light, and air, if not an unanticipated street use.

Text-writers justly renowned have grouped many of the cases cited by us, and have variously expressed the opinion that the weight of authority forbids the use of an urban way for telephone equipment. We have found, however, no analysis of the cases, and no attempt by such writers to classify the cases applying to urban and suburban ways, and no effort has been made by them to consider the reasons supporting the cases which uphold the use as within the scope of proper street uses. As we have seen, there are but two decisions of authoritative force supporting the contention of the appellant. Those decisions involved the use of the telegraph equipment,—a use, as we have said, more nearly like that of the telephone than any other. The telegraph, however, has never been employed as a means of intraurban communication. It requires skilled persons to receive the messages, and then they are to be carried to the persons for whom they are intended by just such means and uses of the streets as would other written communica-

tions. The telephone is particularly useful in communications between the people within a city, and it can be used for that purpose directly, and by persons without special skill. It is more clearly a substitute for the old methods of the communication of messages between persons within the city than the telegraph.

We conclude that the reasonable use of the streets of a city for the equipment of a telephone system is not a new and additional servitude, for which the abutting property owner is entitled to compensation. Nor do we agree that the ordinary pole and wires are a special injury to the employment of the abutting property. Nor do we agree with the

appellant that a telephone system may not be owned and conducted by an individual because of the grant, by the legislature, of such rights to corporations. An individual may conduct any proper business without legislative assent, unless there has been some legislative restriction upon such right. If, in the present case, the appellant had been entitled to restrain the use because an additional servitude, the appellee could not have taken the use without an agreement with the appellant or some legislative power to condemn. That question is put at rest by the holding that there is no additional servitude in the erection of the pole.

The judgment of the Lower Court is affirmed.

IOWA SUPREME COURT.

James CALLANAN, *Appt.*,

v.

M. VOTRUBA.

(.....Iowa.....)

A judgment is not rendered so as to constitute a lien from the "time of such rendition," within the meaning of Code, § 3801, until it is entered on the record of the court, as required by § 3784, although a form of judgment has been signed by the judge and indorsed "Filed" by the clerk.

(February 8, 1898.)

APPEAL by plaintiff from a judgment in favor of defendant establishing the lien of a judgment upon certain property owned by plaintiff and the title to which he sought to quiet against defendant's judgment. *Reversed.*

The judgments were against J. W. McClure, and were filed in the office of the clerk of the district court September 24, 1895. They were not indexed until September 28 or September 30; in the meantime, on September 26 or 27, Callanan accepted a conveyance from McClure of the property in question.

Further facts appear in the opinion.

Messrs. Davis & Davis, for appellant:

Judgments and liens, in order to bind land as against persons having no actual notice thereof, must appear of record in the manner prescribed by the law; that is, they must be found in the records wherein the statute requires them to be entered.

Etna L. Ins. Co. v. Hesser, 77 Iowa, 385, 4 L. R. A. 122.

When a judgment is not indexed, a purchaser without actual notice is not bound thereby, for the reason that the record required by the statute to impart constructive notice, i. e., the indexed judgment, does not exist.

Thomas v. Desney, 57 Iowa, 58; *Sterling Mfg. Co. v. Early*, 69 Iowa, 94; *Cummings v. Long*, 16 Iowa, 41, 85 Am. Dec. 502; *Howe v. Thayer*, 49 Iowa, 154.

In many of the states there is a statutory re-

quirement, designed for convenience and expedition in making searches, that the judgment be duly indexed. This is usually done in a separate book or series of books kept for that purpose, and under the judgment-debtor's surname in its alphabetical order. The statute may be so framed as to make the index an essential part of the record; and when this is the case, a judgment is no lien upon the debtor's property, until correctly indexed, as against a purchaser who has searched the index with due care. And the judgment, though duly filed and recorded, creates no lien if it is not indexed.

Black, Judgm. § 405; *Sterling Mfg. Co. v. Early*, 69 Iowa, 94; *Thomas v. Desney*, 57 Iowa, 58; *Cummings v. Long*, 16 Iowa, 41, 85 Am. Dec. 502; *Freem. Judgm.* §§ 343, 347; *Nye v. Moody*, 70 Tex. 434; *Metz v. State Bank*, 7 Neb. 165; *Holman v. Miller*, 103 N. C. 118; *Willis v. Smith*, 66 Tex. 31.

It was the duty of Votruba to see that his judgments were correctly entered and indexed in due time.

Woods v. Reynolds, 7 Watts & S. 406.

It is immaterial that the deed was not delivered until the 27th of September, because the delivery is not essential under the terms of the statute, nor is it required by the statute of frauds in other states.

Drury v. Young, 53 Md. 546, 42 Am. Rep. 843 and note; *Williams v. Bacon*, 2 Gray, 887; *Thayer v. Luce*, 22 Ohio St. 62; *Heideman v. Wolfstein*, 12 Mo. App. 366; 8 Am. & Eng. Enc. Law, p. 715.

An unindexed judgment is not a lien upon real estate at all.

Etna L. Ins. Co. v. Hesser, 77 Iowa, 381, 4 L. R. A. 122; *Winter v. Coulthard*, 94 Iowa, 312.

Messrs. Day & Corry, for appellee:

A party who takes a conveyance simply in consideration of a past indebtedness is not to be treated in a court of equity as an innocent purchaser.

Gafford v. Stearns, 51 Ala. 434; *Wells v. Morrow*, 38 Ala. 125; *Story, Sales of Pers. Prop.* § 318; *Willard, Eq. Jur.* 256, 257; *Fash v. Ravesies*, 32 Ala. 451; *Penno v. Sayre*, 8 Ala. 470; *Andrews v. McCoy*, 8 Ala. 920, 43

NOTE.—As to what entry or record is necessary to complete a judgment, see note to *Re Weber* (N. D.) 28 L. R. A. 621.

40 L. R. A.

Am. Dec. 669; *Boyd v. Beck*, 29 Ala. 718; *Dickerson v. Tillinghast*, 4 Paige, 215, 25 Am. Dec. 528; *Padgett v. Lawrence*, 10 Paige, 181, 40 Am. Dec. 232; *Van Heusen v. Radcliff*, 17 N. Y. 580, 72 Am. Dec. 480; *Pancoat v. Dunal*, 26 N. J. Eq. 445; *Phelps v. Fockler*, 61 Iowa, 340.

The rendition of a judgment is entirely distinct and essentially different from the entry and indexing of a judgment.

Black, Judgm. § 106; *Babcock v. Wolf*, 70 Iowa, 676; *Guthrie v. Guthrie*, 71 Iowa, 744.

Ladd, J., delivered the opinion of the court:

In September, 1895, McClure was the owner of a lot in the city of Des Moines, and conveyed it by warranty deed delivered to plaintiff September 27 of the same year, in pursuance of an oral contract so to do made September 3 previous. The agreed consideration was \$800, of which \$416 was credited on an antecedent indebtedness, and \$384 a mortgage on the lot, subject to which Callanan took the deed. Two judgments by default were ordered in favor of plaintiff and against McClure September 24, 1895, and entries therefor were signed by the trial judge and indorsed "Filed" by the clerk on the same day, but were not recorded in the record book or entered until the 28th or 30th of the same month, and after the conveyance to Callanan. Are these judgments liens on the land? Section 3801 of the Code provides that "judgments in the supreme or district courts of this state or in the circuit or district courts of the United States within this state, are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment." What is meant by the "time of such rendition?" Rendering a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy, as ascertained from the pleadings and the evidence; and, technically, the ministerial act of spreading upon the record a statement of the final conclusion reached by the court is not included therein. Black, Judgm. § 106; *Schuster v. Rader*, 18 Colo. 329; *Blatchford v. Newberry*, 100 Ill. 489; *Conwell v. Kuykendall*, 29 Kan. 707; *Hall v. Tuttle* [6 Ill. 38], 40 Am. Dec. 382, and note; *Stephens v. Santee*, 49 N. Y. 39; *Durant v. Comegys*, 2 Idaho, 809; *Re Cook*, 77 Cal. 220, 1 L. R. A. 567. But in construing this statute its relation to others on the same subject, and the sense in which the words are used, as determined by this court, must be considered. Every final adjudication of the rights of the parties in an action is a judgment. Code, § 3769. All judgments and orders must be entered on the record of the court, and must specify clearly the relief granted or order made in the action. Code, § 3784. It will be noticed that the definition of a "judgment" in the Code differs somewhat from that of some of the lexicographers in that it is a final adjudication. *Zeigler v. Vance*, 3 Iowa, 528; *Taylor v. Runyan*, 3 Iowa, 474. See definitions by authorities collected in 12 Am. & Eng. Enc. Law. In *Humphrey v. Havens*, 9 Minn. 318 (Gil. 301), it was held 40 L. R. A.

that, where a writ of error must be issued within a year after the "rendition of judgment," the time begins to run from the entry of judgment or order on the record. The question was first suggested in this court in *Brown v. Scott*, 2 G. Greene, 454; Kinney, J., remarking: "We are at a loss to know how the justice could have rendered a judgment that would have any force or virtue, without rendering that judgment in proper form in the docket, which he is required by law to keep for that purpose. It is true, he might, in his mind, resolve upon entering the judgment, but unless put into shape and form, it would be as though no judgment at all had existed in the mind." In *Case v. Plato*, 54 Iowa, 64, the court, through Day, J., after quoting the statutes, says: "It is apparent from the foregoing provisions that it is essential to the validity of a judgment that it should be entered upon the record book. This is the book in which a statement of the proceedings of the court is kept, and to which appeal must always be made to determine what has been done. The theory of the law is that it is kept under the direction and supervision of the judge, is approved by him, and constitutes the only proof of his acts." In *Balm v. Nunn*, 63 Iowa, 641, the opinion is by Beck, J., who states: "There can be no judgment until it is entered in the proper record of the court. It cannot exist in the memory of the officers of the court, nor in the memoranda entered upon books not intended to preserve the record of judgments. . . . It is not competent to prove a judgment in any other way than by the production of the proper record thereof." *Elna L. Ins. Co. v. Hesser*, 77 Iowa, 381, 4 L. R. A. 122, seems to be decisive. In that case the judgment was erroneously indexed, and the court, in holding it was not a lien superior to a subsequent mortgage, bases its conclusion on three grounds: (1) No constructive notice was imparted, owing to the failure to index; (2) the judgment, before it becomes a lien, must be of record, i. e., entered in the record book required by the statute; (3) a judgment is not rendered, so as to be effective and capable of enforcement, until it is "made up, finished, stated, or delivered" in the form and manner and entered of record as required by the statutes. Appellee insists the last two grounds stated amount to no more than dicta, but these are not stated in the way of argument, but as conclusions of law. In *Winter v. Coulthard*, 94 Iowa, 312, the court had announced its decision; but these had not been entered of record, and the executions were held invalid because no judgments existed. The judge's calendar is not a record of the court, but entries therein announce the judge's conclusions, and are intended for the guidance of the clerk. *Traer v. Whitman*, 56 Iowa, 443; *Miller v. Wolf*, 63 Iowa, 233; *State v. Manley*, 63 Iowa, 344; *Burroughs v. Ellis*, 76 Iowa, 649. While not proof of a decree or judgment, such minutes may tend to show a decree or judgment has been ordered. *Re Edwards*, 58 Iowa, 431. If the record is the only proof of a judgment, as has been repeatedly held by this court, then how can a judgment be said to have been rendered before spread on the records, when its very existence prior to that time cannot be as-

established? If the statute making the judgment a lien "at the time of such rendition" refers to the time of announcement by the judge, rather than when entered on the proper books, it would certainly be capable of enforcement by execution. Section 8954 of the Code. But it was adjudged otherwise in *Winter v. Coulthard*, 94 Iowa, 312. If the court has announced judgment, the clerk may complete the record after the term. Code, § 242. But until the record is prepared no evidence exists of the rendition of the judgment. These records are under the control of the court (§ 248 of the Code), and through them it speaks the final adjudication defined by the statute as a judgment. Until so rendered, there is no judgment. The Code contains no provisions relating to judgment forms signed by the judge, and these amounted to no more than directions for judgments. Until recorded, they were not such, but merely evidence that

the court had ordered judgments, and approved their form. This view finds support in *Babcock v. Wolf*, 70 Iowa, 676, and *Guthrie v. Guthrie*, 71 Iowa, 744. In these cases decisions were, by agreement, to be made in vacation, and were written and signed by the judges before the expiration of their terms of office, though not delivered in the clerk's office until afterwards. In the former it is said: "Now, we think the decision was made when it was deposited in the express office at Afton. Under the agreement of the parties, it was as complete then as if there had been no agreement and the judge had entered a decision in his minutes in open court, because the parties agreed that the decision was not to be made at Clarinda." But it did not have the force of a judgment until spread upon the records as required by law.

Reversed.

MAINE SUPREME JUDICIAL COURT.

Bertha L. WHITMORE, Admr., etc.,
v.
ORONO PULP & PAPER COMPANY.

(91 Me. 297.)

1. The lessor of a pulp mill does not owe to the servants of the lessee the duty of making the requisite examination, or of possessing the requisite technical learning, and communicating the results as to the safe condition of a digester in the mill, before turning the plant over to the lessee.
2. A digester in a pulp mill which is not dangerous unless it is used does not constitute a nuisance which will render the owner liable for injuries resulting to employees of a lessee, by its explosion.

(January 26, 1898.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Penobscot County made during the trial of an action brought to recover damages for death alleged to have been caused by negligence which resulted in a verdict in plaintiff's favor. *Sustained.*

The facts sufficiently appear in the opinion. *Messrs. Charles P. Stetson and C. J. Dunn*, for defendant:

The lessor of a building in the absence of fraud or any agreement to that effect is not liable to the lessee, or others upon the premises by his invitation, for their condition or that they are tenantable and may be safely and conveniently used for the purposes for which they are apparently intended.

Dutton v. Gerrish, 9 Cush. 89, 55 Am. Dec.

NOTE.—As to landlord's liability to third person for defective condition of premises in possession of tenant, see *Lee v. McLaughlin* (Me.) 26 L. R. A. 197, and *note*.

40 L. R. A.

45; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47; *Jaffe v. Harleau*, 56 N. Y. 398, 15 Am. Rep. 438; *Edwards v. New York & H. R. Co.* 98 N. Y. 249, 50 Am. Rep. 659; *Doyle v. Union P. R. Co.* 147 U. S. 414, 37 L. ed. 224; *Cowen v. Sunderland*, 145 Mass. 363; *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 169; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Moynihan v. Allyn*, 162 Mass. 270; *Stevens v. Pierce*, 151 Mass. 207.

If the lessee, instead of exacting from the lessor any warranty of its present or future state of repair, elects to rely upon its own judgment, the law, in the absence of any fraud or concealment on the part of the lessor, leaves the lessee to the operation of the maxim *Caveat emptor* and he takes the premises as he finds them, for better or worse.

McKenzie v. Cheetham, 83 Me. 543; *Cutter v. Hamlen*, 147 Mass. 471, 1 L. R. A. 429.

The same rule applies to the employees of the tenant.

Freeman v. Hunnewell, 163 Mass. 210; *Dalay v. Savage*, 145 Mass. 38; *Bowe v. Hunking*, 135 Mass. 383, 46 Am. Rep. 471; *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 811.

Messrs. P. H. Gillin and C. J. Hutchings for plaintiff.

Emery, J., delivered the opinion of the court:

The defendant company, the Orono Pulp & Paper Company, constructed, and for a few years, up to October 1, 1892, operated a pulp mill in Orono. On that day it leased its mill and plant to another and distinct corporation, the Bangor Pulp & Paper Company, for twenty-five years. This latter company, the lessee, took possession of the leased property on the same day, and for some little time thereafter operated it as a pulp mill on its own account.

By the terms of the lease the Bangor Company, the lessee, was to have the exclusive possession of the property, and was to keep it in substantial repair; the lessor reserving the usual right to enter upon and view the premises at times convenient to the lessee. The lessor made no stipulation as to the condition of the property.

The plaintiff's intestate, Austin J. Whitmore, had entered into the employ of the lessee, the Bangor Company, and was in its employ, upon the premises thus leased and operated by it, on the 11th day of October, 1892. On that day one of the digesters (a large cylinder of deoxidized bronze, and an essential part of the machinery of the mill) exploded while Mr. Whitmore was at work near it in the line of his duty. He was so severely injured by the explosion that he died a few weeks afterwards. The explosion resulted from the inability of the digester to resist the usual pressure of steam injected into it in the course of the business of the mill.

For this injury the plaintiff, as administratrix, first brought an action against the Bangor Company, the lessee operating the mill and plant, and her husband's employer, counting upon the negligence of that company, and recovered judgment upon the ground that that company had not exercised due care in examining into and ascertaining the real condition of the digester, which in fact was too weak to withstand the steam pressure used. By reason of the insolvency of that company the plaintiff has not been able to collect any part of that judgment.

The plaintiff thereupon brought this action against the lessor of the mill and plant, the Orono Pulp & Paper Company, counting upon its neglect of its duty in the matter of the faulty digester. The defendant company did not construct the digester, but purchased it from a reputable manufacturer of digesters. In selecting, purchasing, and setting up this digester, it is not questioned that the defendant company exercised due care. At the first it was sufficiently strong. It was weakened after a time by the peculiar and continued action of the necessary chemicals upon the particular metal of which it was composed. This action was wholly confined to the interior of the closed cylinder, and was invisible from the outside.

Granting that at the time of the execution of the lease, and the change of the possession and control of the premises from the lessor to the lessee, the digester was then in fact too weak for its purpose, it does not appear from the evidence that any officer or agent of the lessor company was actually aware of that condition of the digester, or that knowledge of it could have been obtained, except by actual examination of the interior, or by inference from sufficient technical learning as to the peculiar action of the particular chemicals upon the particular metal. The outward, visible indications all were that the digester was as strong as ever.

The defendant company did not make the necessary examination before or at the time of leasing, and did not possess the requisite technical learning to make the correct inference without examination, but there is no sugges-

tion of fraud or concealment in the matter. It may be that this omission and ignorance were a breach of a duty owed by the defendant company to its own employees or servants, but that proposition alone will not sustain the plaintiff's action. A person may owe a duty to one individual or class which he does not owe to another. The duty may depend wholly upon the relation between the parties. The plaintiff must therefore maintain the proposition that the defendant owed to the servants of its lessee the duty of making the requisite examination, or of possessing the requisite technical learning, and communicating the results before turning the plant over to the lessee. Whether the law of this state supports that proposition is the question presented.

It should be noted at the outset that the defendant company is not a public corporation, engaged in a public business, enjoying public franchises, and owing special duties in consequence thereof. It is a private corporation, transacting a purely private business, and dealing in this instance with another private party. Hence the rules and principles applied to owners of railroads, wharves, elevators, public halls, etc., do not necessarily govern this case. Again, the plaintiff's intestate was not upon his own premises, nor upon any public road or place, at the time of the explosion, but was voluntarily upon the leased premises under a contract with the lessee only. Hence the doctrines of the law of liability for nuisances to strangers or the public are not necessarily applicable. It should be further noted that the lessee engaged to make repairs; that the lessee had as much ability and opportunity as the lessor to ascertain and guard against the actual condition of the digester before accepting and using it, and subjecting the plaintiff's intestate to the consequent danger. Indeed the plaintiff recovered her judgment against the lessee for this same injury upon that very ground,—that the lessee by reasonable effort could have done, and yet did not.

It is not questioned that under such circumstances the lessor owes no more or other duty to the lessee's servants or assigns than he does to the lessee himself. If his duty or freedom from duty to the lessee is made plain, his duty or freedom from duty to the lessee's servant is equally plain. The discussion therefore may be confined to the duty of the lessor to the lessee.

Under such circumstances as have been disclosed and stated in this case, does the owner of property unaffected by any public use owe to his prospective lessee the duty to actively exert ordinary care at the time of the lease, to find out and apprise him of unknown defects which the lessee can equally well find out for himself?

The development of the law has not yet progressed so far in this state. Here the common-law rule of *caveat emptor* is still in force, and is applied to the lease as well as to the sale of property. It was early said in *Hill v. Woodman*, 14 Me. 38, 42, 43, that, in the absence of express stipulations as to the condition of the premises, the lessee took them for better or worse,—at least, when he had sufficient means for ascertaining their condition. In *Libbey v. Tolford*, 48 Me. 316, 77 Am.

Dec. 229, it was explicitly declared to be the law that there is no implied obligation upon the lessor to see that a leased building is safe, well built, or fit for any particular use; that a leased house is reasonably fit for habitation; or that leased land is fit for the purpose for which it is taken. In *Gregor v. Cady*, 82 Me. 181, the owner was held bound to effectually repair where he assumed and began to repair, but it was declared (page 186, 82 Me.), he was under no obligation to repair, and that "the tenant, on the principle of *caveat emptor*, and in the absence of any fraud upon the part of the landlord, takes them [the leased premises] in the actual condition in which he finds them, for better and for worse." In *McKenzie v. Cheetham*, 83 Me. 543, the defendant had leased the second story of a dwelling house, with a defective landing for a stairway, which was the only means of ingress and egress for the second story. The plaintiff had made a social call upon the tenant, and, on leaving, fell through the defective landing. The court held that the defendant owed no duty to the tenant or to his caller, the plaintiff, as to the defective landing upon the premises, even though the landing was essential to the reasonable use of the leased tenement. It was again iterated (pages 548, 549, 83 Me.), that "the law in the absence of any fraud or concealment on the part of the lessor, leaves the lessee to the operation of the maxim *caveat emptor* and he takes the premises as he finds them for better or worse;" and many authorities were cited. The court also necessarily decided that the lessor owed to no one on the premises under the lessee any more duty than he owed to the lessee himself.

So stands the law in this state to-day, well known and hitherto acted upon. Any desired change or extension of it should be asked of the legislature, and not of the court.

The case of *Nugent v. Boston, C. & M. R. Co.* 80 Me. 62, rightly understood, is no departure from the former decisions of this court. The defendant railroad company, the owner of the railroad, had not leased it to the Portland & Ogdensburg Railroad Company, the plaintiff's employer, nor had it in any way turned over the whole plant to the latter company. It had simply permitted the Portland & Ogdensburg Company to run through freight trains over a part of its tracks. It retained the possession and control of its tracks, station houses, platforms, etc. The plaintiff, a brakeman in the employ of the Portland & Ogdensburg Company, was injured, in the line of his duty, through the defective construction of a station awning on the defendant's road. It was conceded that, upon the above facts, the defendant company, having control of the station house, awning, platform, etc., and inviting the plaintiff to pass and repass in the line of his duty as such brakeman, owed him the duty of so constructing and maintaining the awning as not to be dangerous to him. But after this arrangement with the plaintiff's employer, and while it was in force, and before the injury, the defendant company leased its entire road, including stations, to the Boston & Lowell Railroad Company, which latter company completely took over and operated the entire road,

agreeing to assume all liability for injuries, etc.

The plaintiff was injured while the lessee was in possession under that lease. It was contended by the defendant company that such lease and transfer of possession freed it from what otherwise would have been its duty and liability to the plaintiff. The court held that they did not. That was the point of the decision.

The decision in the *Nugent Case*, 80 Me. 62, is really based upon the proposition that the owner of a railroad, or other property affected by a public use, with which the public have business relations, owes a duty to all persons who lawfully come upon the property to make and keep the property safe for all such persons, and cannot avoid that duty by merely leasing the property and retaining rents. That proposition, as before stated, does not include this case of property of a purely private nature, with which the public has no business relations.

It is true, as urged by the plaintiff, that the learned justice writing the opinion in the *Nugent Case* also adduced as an additional support for the judgment the responsibility of a lessor in some cases for the condition of the demised premises; but this was not necessary for the decision, and was not intended to be applied to a case like this. The same justice afterwards wrote the opinion in *McKenzie v. Cheetham*, 83 Me. 543, reaffirming the doctrine of the earlier cases.

The plaintiff, however, advances another and distinct proposition,—that the weak digester was a nuisance, allowed to become and remain so by the owner prior to and at the time of the lease, and hence that the owner must answer as for a nuisance. This proposition cannot be assented to. Some things may be nuisances *per se* under all circumstances, and as to all persons. Other things are nuisances only under certain circumstances, and as to certain persons. A slaughterhouse may be a nuisance as to the owner's neighbors, but none at all as to his employees in the business. What may be a nuisance as to others may not be a nuisance as to one's lessee, and here we are dealing with lessee and lessor.

To constitute any particular thing a legal nuisance *per se* (apart from statute nuisances), as between lessor and lessee and the servants of the lessee, the thing itself must work some unlawful peril to health or safety of person or property,—as defective cesspools, imperfect sewers and drains, walls and chimneys liable to fall, unguarded excavations, etc. A fixed, inert mass of metal, upon a solid foundation upon one's own land, like this digester, was not in itself dangerous to anyone. The employees of the lessee could have worked around and near it without any danger from it, to person or health, so long as it was let alone. The danger arose only when the lessee, the employer, began to make use of the digester without first ascertaining its tensile strength, and gauging the applied force accordingly. Indeed, the plaintiff has once alleged, and recovered judgment upon proof, that the misconduct of the lessee caused the peril and injury complained of. This is inconsistent with

her present contention that the digester was a nuisance *per se* as to her intestate, the lessee's employee.

The question of what is a nuisance upon leased premises was considered at some length, with citation of authorities, in *McCarthy v. York County Sav. Bank*, 74 Me. 315, 43 Am. Rep. 591. It was there held that a discharge pipe insufficient to vent the water flowing into a bowl from a faucet, so that the water overflowed the bowl and caused damage, was not a nuisance as to the tenant. See also *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Burbank v. Bethel Steam Mill Co.* 75 Me. 373, 46 Am. Rep. 400, and *Leavitt v. Bangor & A. R. Co.* 89 Me. 509, 36 L. R. A. 382, though those were not cases between lessor and lessee.

We have hitherto confined our citation of authorities to the decisions in this state, thinking they sufficiently showed our law to be against the plaintiff's contentions. She has, however, cited cases from other states, of which one or two notably support her contentions. *Stenberg v. Wilcox*, 96 Tenn. 163, 34 L. R. A. 615, and *Hines v. Wilcox*, 96 Tenn. 148, 34 L. R. A. 824. As to these cases, the learned editor of the Lawyers' Reports Annotated Series says they are a new departure in the law; that they transfer to the landlord a duty which has heretofore rested upon the tenant,—the duty of taking active care to find out unknown and unsuspected defects. As we have said above, we think it is for the legislature, not the court, to make this transfer of duty, if thought desirable.

On the other hand, many courts, in late de-

cisions, adhere to the long-established rule of *caveat emptor*. In *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438, a boiler defective in construction exploded. In *Edwards v. New York & H. R. Co.* 98 N. Y. 249, 50 Am. Rep. 659, a gallery defective in construction fell. In *Doyle v. Union P. R. Co.* 147 U. S. 414, 37 L. ed. 225, a house was too weak structurally to resist snow slides known to the lessor to be recurrent and dangerous. In *Tuttle v. George II. Gilbert Mfg. Co.* 145 Mass. 169, a floor defective in construction fell. In *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, a stair tread had been sawed. The lessor knew of the sawing, but supposed the tread sufficient. In *Kern v. Myll*, 94 Mich. 477, a well had been used as a cess pool, and thus had become offensive. In *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767, fixtures put up by the lessor were structurally defective, and fell. In *Willson v. Treadwell*, 81 Cal. 58, a stairway was defective. In *Texas & P. R. Co. v. Mangum*, 68 Tex. 842, a defective platform fell. In *Fellows v. Gilhuber*, 82 Wis. 639, 17 L. R. A. 577, an unsafe awning fell upon a guest. In *McConnell v. Lemley*, 43 La. Ann. 1433, 34 L. R. A. 609, a defective gallery fell upon a guest. In *Johnson v. Tacoma Cedar Lumber Co.* 8 Wash. 722, defective machinery in a mill gave way. In all these cases, it appearing that the lessor was unaware of the defects, it was held that he was not liable to the lessee or his servants for the injury occasioned by them.

Motion and exceptions sustained.

MARYLAND COURT OF APPEALS.

Mary LOWNDES, *Appt.*,

v.

J. Wilkins COOCH, *Exr.*, etc., of Nathan H. Clarke, Deceased, *et al.*

(.....Md.....)

1. The law of the testator's domicile governs the lapsing of a legacy of stock in a bank of another state in which the legatee resides, although a statute of the latter state, if applicable, would prevent the lapsing.
2. Shares of stock of a corporation are personal property only, and governed by the law of the owner's domicile.

(April 1, 1898.)

APPEAL by plaintiff from a decree of the Circuit Court, No. 2, of Baltimore City, in favor of defendants in a suit brought to compel defendants to transfer to appellant certain stock which had been bequeathed under the will of Nathan H. Clarke, deceased. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to validity of gift of shares of stock *causa mortis*, see *Leyson v. Davis* (Mont.) 81 L. R. A. 429.

40 L. R. A.

Messrs. Pollard & Bagby for appellant.

Messrs. Barton & Wilmer, for appellee:

Except as to property immovable in its nature, such as land and interests therein, whether real or leasehold, that law shall control which governs the domicile of the owner, and all questions affecting the owner's rights in or disposition of such property, and the succession thereto in the event of his death, shall be resolved in accordance with the laws in force in the place of the owner's domicile.

See *De Sobry v. De Laistre*, 2 Harr. & J. 191, 3 Am. Dec. 535; *Newcomer v. Orem*, 2 Md. 297, 56 Am. Dec. 717; *Wilson v. Carson*, 12 Md. 54; *Hooper v. Baltimore*, 12 Md. 464; *Latrobe v. Baltimore*, 19 Md. 14; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 322, 92 Am. Dec. 688; *Noonan v. Kemp*, 34 Md. 73, 6 Am. Rep. 307; *Keyser v. Rice*, 47 Md. 211, 28 Am. Rep. 448; *Appeal Tax Ct. v. Patterson*, 50 Md. 371; *Moore v. Land Title & Trust Co.* 82 Md. 290; *Baldwin v. Washington County Comrs.* 85 Md. 156; *Kerr v. Urie*, 86 Md. 72, 88 L. R. A. 119.

The property which a stockholder has in his stock is purely personal, and like other personal property controlled as to its disposition by that law which governs the person of its owner.

Newcomer v. Orem, 2 Md. 297 56 Am. Dec.

717; *Donovan v. Firemen's Ins. Co.* 30 Md. 159; *Keyser v. Rice*, 47 Md. 212, 28 Am. Rep. 448; *Appeal Tax Ct. v. Patterson*, 50 Md. 371; *Appeal Tax Ct. v. Gill*, 50 Md. 377; *Bonaparte v. State*, 63 Md. 472; *Baldwin v. Washington County Comrs.* 85 Md. 145; *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119.

Questions which relate merely to the mode of distribution and devolution of property in the case of intestacy, or the legal requisites, interpretation, and legal construction of a will, in cases of testacy, are matters involving merely individual and private rights, and not the interests of the state at large. In all questions of this kind the laws of the owner's domicil are to govern.

Jarman, Wills, 6th ed. § 1, p. 3, note; Whart. Conf. L. § 576; Story, Conf. L. § 468; *Noonan v. Kemp*, 34 Md. 79, 6 Am. Rep. 307; *Keyser v. Rice*, 47 Md. 211, 28 Am. Rep. 448.

Although the courts may exercise their discretion as to whether they will require administration to be made by the local court, or whether they will remit the property for administration to the court of the domicil, in any event the law of the domicil will always be applied in determining the mode of distribution of the estate.

Despard v. Churchill, 53 N. Y. 199; *Wilkins v. Elliott*, 9 Wall. 740, 19 L. ed. 586; *Apple's Estate*, 66 Cal. 435; *Noonan v. Kemp*, 34 Md. 73, 6 Am. Rep. 307.

Roberts, J., delivered the opinion of the court:

This appeal is from a decree of circuit court No. 2 of Baltimore city, sustaining a demurrer to the bill of complaint, and dismissing the same. The facts are that Nathaniel H. Clarke, a resident of the state of Delaware, departed this life on the 18th day of March, 1892, leaving a last will and testament by which he bequeathed to his brother, Moses Clarke, the dividends to accrue upon the stock held by the testator in the Commercial & Farmers' National Bank of Baltimore during his life; and thereafter the said stock was bequeathed to his "friend, Andrew Lowndes, of Baltimore." Mr. Lowndes died on the 16th of March, 1892,—two days prior to the death of the testator, Clarke. The dividends upon said stock were paid to the said Moses Clarke, the life tenant, during his life; he having only recently died. The children of said Andrew J. Lowndes, subsequently to the death of the life tenant, assigned all of their interest in said bequest to their mother, who is the appellant in the record of this appeal. This bill is filed against J. Wilkins Cooch, the executor of said testator, and against the said bank, to compel the transfer to the appellant of the stock bequeathed to said Lowndes. The will of the testator had been admitted to probate in the orphans' court of Baltimore city, and letters testamentary have been granted by said court to said executor. The bank answered the bill, disclaiming any interest in the controversy, and submitting its rights and liabilities to the order and direction of the court below. Cooch, the executor, demurred to the bill, and, while relying on the same, he, by way of answer, set up the defense that there is no statute in the state of Delaware, similar to

that of our own state, to save the lapsing of a legacy given by a testator to one dying before him, which is the meaning and effect of § 313, art. 93, Code Pub. Gen. Laws. The leading inquiry, therefore, which this appeal presents, is, Does the law of Delaware or the law of Maryland control the disposition of the bank stock in controversy here? The facts of this case are few, and easily understood, and the law is well settled, and free of difficulty. It is undoubtedly true that, so far as it can be done consistently with its own interests, one country will respect, and give effect to, the laws of another. This doctrine finds expression in the legal maxim that "*mobilia sequuntur personam*," which is the maxim of our own, as of the Roman, law, while things immovable are governed by the *lex rei sitæ*. The leading case in this state is that of *Noonan v. Kemp*, 34 Md. 79, 6 Am. Rep. 307. The facts are, briefly, that David Kemp, a citizen of this state, bequeathed to his daughter Mrs. Noonan, who then resided with her husband in the state of Kentucky, certain distributive portions of his personal estate. Mrs. Noonan survived her father and died in the state of Kentucky, leaving her husband and two children surviving her. No distribution of her father's estate was made until after her death. Her surviving husband claimed the portion which had been distributed to his wife. It was admitted that by the law of Kentucky the surviving husband was entitled to the personal estate of his deceased wife. Robinson, J., in delivering the opinion of this court in that case, said: "If there be a principle of international law settled beyond dispute, it is that the succession to personalty is governed and regulated by the law of the domicil," etc. And he quoted approvingly the language of Chancellor Kent in 2 Kent. Com. 429, where he says: "It has become a settled principle of international jurisprudence, and one founded in a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to, and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicil at the time of his death, and not by the conflicting laws of the various places where the goods happen to be situate." Judge Story says: "Be the origin of the doctrine what it may, it has so general a sanction among all civilized nations that it may be treated as part of the *jus gentium*." But nowhere is the general doctrine stated with greater force and vigor than by Lord Loughborough in *Sill v. Worwick*, 1 H. Bl. 690, where he says: "It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession, or the act of the party, it follows the law of the person. . . . If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession." The

principle so admirably expressed, which we have just quoted, finds recognition and support in numerous decisions of this court. *De Sobry v. De Laistre*, 2 Harr. & J. 191, 8 Am. Dec. 535; *Newcomer v. Orem*, 2 Md. 297, 56 Am. Dec. 717; *Wilson v. Carson*, 12 Md. 54; *Hooper v. Baltimore*, 12 Md. 464; *Latrobe v. Baltimore*, 19 Md. 14; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 322, 92 Am. Dec. 688. This doctrine, however firmly established, is nevertheless subject to proper limitation, to the effect that if a foreign law directly violates some recognized principle of public policy, or some established standard of morality prevailing in the forum exercising jurisdiction, the rules of comity will not compel such forum to enforce the foreign law, rather than its own, if to do so would be hurtful or detrimental to the interest and welfare of its own citizens. The appellant contends that in the application of any proper test the law of Maryland, and not the law of Delaware, should control the case under consideration, for the reason that the shares of stock, the subject-matter of this controversy, are in their nature things immovable, and incapable of having any situs except that of the corporation of which they are a part, and that in the event the law of Delaware shall be allowed to prevail the result will be, as heretofore stated, the lapsing of the legacy, contrary to the policy recognized in the law of this state. It is not essential to the merits of this case that we should indulge in extended comments upon the subject of the character of the bank stock in question, or as to what may be its situs. It has been variously held by the courts of other states, and text-writers as well, that shares of stock have no situs apart from that of the corporations of which they are a part, as already stated, but that for various purposes shares of stock may be given an arbitrary situs, as in attachment cases, or for purposes of taxation. The law in this state has, however, been settled and determined to the effect that shares of stock of a corporation are personal property only and governed by the law of the owner's domicile. *Donovan v. Firemen's Ins. Co.* 30 Md. 159; *Keyser v. Rice*, 47 Md. 212, 28 Am. Rep. 448; *Appeal Tax Ct. v. Rice*, 50 Md. 317; *Appeal Tax Ct. v. Gill*, 50 Md. 377; *Bonaparte v. State*, 63 Md. 472; *Baldwin v. Washington County Comrs.* 85 Md. 145; *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119.

Other questions have been argued at the hearing of this case which are not necessary to its determination, and we forbear comment upon them. It is only just that we say that the case has been argued with exceptional ability and learning. From what we have said, it follows that the court below has committed no error in its decree, and we affirm the same with costs.

Decree affirmed, with costs.

Martha E. GORE, by Her Next Friend, Louis D. Gore, *Appt.*,

Levi Z. CONDON.

(.....Md.....)

1. **Interference with ownership of land** by advertising and selling it under a fraudulent mortgage and notifying tenants not to pay rent to the owner constitutes an actionable wrong.
2. **A declaration is bad for duplicity** when it states in one count a good cause of action for interference with real property and one for injury to reputation, as to which it is demurrable.
3. **The disgrace and disrepute into which the owner of property is brought** on account of the advertising and sale thereof under a fraudulent mortgage do not constitute a cause of action.
4. **Inducing one of two parties to a contract to break it**, intending thereby to injure the other, or to obtain a benefit for one's self, constitutes an actionable wrong.

(April 1, 1898.)

A PPEAL by plaintiff from a judgment of the Baltimore City Court in favor of defendant in an action brought to recover damages for alleged wrongful interference with plaintiff's property. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. P. Jordan and R. E. Jordan. for appellant:

Even if this were a declaration for a malicious prosecution of civil action, it falls within the exception laid down by this court in all the cases of the kind that have come before it.

Clements v. Odorless Excavating Apparatus Co. 67 Md. 461; *McNames v. Minke*, 49 Md. 183.

In contemplation of law, all acts done, and transactions had, in pursuance of a purpose to defraud, are but one act. The order in which they occur is immaterial, and any person within the range of the fraudulent purpose, and affected adversely by it, is entitled to have all or any part of the acts constituting the fraud annulled and set aside.

Moore v. Blondheim, 19 Md. 176; *McAlee v. Horsey*, 35 Md. 439; *Wilson v. Watts*, 9 Md. 357; *Diggs v. McCullough*, 69 Md. 592; *Gehhart v. Merfeld*, 51 Md. 822; *Lamm v. Port Deposit Homestead Asso.* 49 Md. 233, 33 Am. Rep. 246; *Smith v. Davis*, 49 Md. 470; *Tome v. Parkersburg Branch R. Co.* 39 Md. 44, 17 Am. Rep. 540.

Messrs. Richard B. Tippet & Bro. and W. Sherman Bansemer, for appellee:

The *ex parte* decree in the circuit court under the consent clause in said mortgage was sufficient to protect the mortgagee against inquiry, and was conclusive as to the question of fraud, in obtaining the mortgage. A decree is *res judicata* in respect to all matters of defense existing and which was available to the defendant at the date of passing the decree.

Trayhern v. Colburn, 66 Md. 279; *McDowell*

NOTE.—As to liability to damages for inducing breach of contract with third person, see *Boyeson v. Thorn* (Cal.) 21 L. R. A. 233, and note; also *Raycroft v. Tayntor* (Vt.) 33 L. R. A. 223.

v. *Goldsmith*, 6 Md. 319, 61 Am. Dec. 305; *Beall v. Pearre*, 12 Md. 550.

From the nature of things this case is and can be nothing more than a case for damages for the malicious prosecution of a civil suit.

A judgment rendered by a lower court in favor of the plaintiff, though reversed on appeal, ought to be conclusive as to the question of probable cause, in instituting the suit, "otherwise in every case of reversal an action would lie for the institution of the original suit."

Clements v. Odorless Excavating Apparatus Co. 67 Md. 464; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614.

The absence of any one of the four essential averments in a declaration for malicious prosecution will render such declaration defective.

Cecil v. Clark, 17 Md. 508; *Thelin v. Dorsey*, 59 Md. 589; *Flickinger v. Wagner*, 46 Md. 580; *Owens v. Owens*, 81 Md. 518.

Briscoe, J., delivered the opinion of the court:

This is an appeal from a judgment for the defendant upon a demurrer to the plaintiff's declaration. The cause of action set forth is of an unusual character, and we will state it in the language of the declaration itself, which is as follows: "And the said Martha E. Gore, by her husband and next friend, Lewis D. Gore of Baltimore city, in the state of Maryland, sues Levi Z. Condon, of the city and state aforesaid, for that on or about the 11th day of May, 1889, the said defendant fraudulently obtained from one Daniel Frazier a fraudulent and void mortgage for the sum of \$600 upon the property of the plaintiff, situate in the city of Baltimore, on North Gilmor street, near Pressman street, which said fraudulent and void mortgage contained a consent clause for an *ex parte* decree; the said Condon well knowing at the time of obtaining said fraudulent mortgage that the property upon which it was obtained, and which was described therein, was the property of the said Martha E. Gore, and not the property of the said Daniel Frazier, the mortgagor therein, and that said mortgage was fraudulent, and null and void, as to the said plaintiff and her said property therein described. Yet, notwithstanding the said defendant knew that the said mortgage was fraudulently obtained, and was fraudulent and void as to the said plaintiff, the said Martha E. Gore, and her said property therein described, yet, nevertheless, to further carry out his fraudulent design, the said defendant did, on or about the — day of —, 1894, file his petition and said fraudulent mortgage in the circuit court of Baltimore city, alleging said mortgage to be in default, and under the said consent clause therein obtained an *ex parte* decree from the said circuit court for the sale of the plaintiff's property, Charles W. Nash, Esq., of the Baltimore city bar, being appointed trustee by the said decree to make said sale; and on or about the 13th of June the said defendant actually caused said trustee to advertise said property for sale, and he (the said defendant) notified the said plaintiff's tenants on the property to pay no more rents to the plaintiff. That in

order to save her said property from the sale as aforesaid under said fraudulent mortgage and decree so fraudulently obtained as aforesaid, plaintiff was compelled to file her bill of complaint in said circuit court aforesaid (which she did on or about the 20th day of June, 1894), setting forth the fraudulent character of said mortgage, and praying for an injunction to restrain said sale aforesaid, and that said mortgage be decreed to be fraudulent and null and void as to her and her property therein described. The said writ of injunction did issue, and was served upon the defendant, Condon, and the said trustee, and remained in force until on or about the 8d day of June, 1895, during all which time the said plaintiff received no rents or profits from her said property on account of the said defendant notifying the tenant in said property to pay her no rents; and during all which time the taxes, water rents, and ground rents were accumulating,—when, after hearing said cause, said circuit court dismissed the plaintiff's bill of complaint with costs to the defendant, from which said last decree the said plaintiff, on or about the 5th day of June, 1895, took her appeal to the court of appeals of Maryland; the said defendant, Condon, having full knowledge of said appeal. That, notwithstanding the said defendant, Condon, had actual knowledge of the fraudulent character of said mortgage, and that the property therein described was the property of the said plaintiff, Martha E. Gore, and that there was an appeal pending in said court of appeals from said decree dismissing her bill of complaint, yet, pending said appeal, he seized and sold said property under said *ex parte* decree; whereupon all her tenants moved out without paying her any rent, and leaving said ground rents, taxes, water rents, and other expenses unpaid. That, after arguing said appeal in the court of appeals, the said court reversed the decree of said circuit court of Baltimore city, and decided the said mortgage from said Frazier to said Condon to be fraudulent and void as to the said plaintiff, the said Martha E. Gore, and her said property, and remanded said cause to said circuit court, the said defendant, Levi Z. Condon to pay all costs above and below; all which more fully appears from the opinion of said court of appeals, recorded among the cases of said court designated to be not reported, liber —, folio —, October term, 1895,—a copy of which opinion, taken from the Daily Record of November 25, 1895, is hereto attached as part hereof. And said circuit court of Baltimore city, in pursuance of said opinion and decree of said court of appeals, pass a decree setting aside said sale made pending said appeal aforesaid, making said injunction perpetual, and declaring said mortgage null and fraudulent as to the said plaintiff, Martha E. Gore, and her property. That at the time of advertising the said property, and of the defendant, Condon, notifying her tenants to pay her no more rent, the plaintiff had upon the premises three good, prompt-paying tenants, who had occupied the premises for some time previous to said advertising and notice aforesaid, to wit, a tenant in the dwelling house, paying \$20 per month; a tenant in the two rooms over the stable, paying \$5 per

month; and a tenant on the ground floor of the stable, paying \$2.50 per month rent,—all of whom, upon the sale of said property, moved out, paying the plaintiff no rent, and leaving the property in the hands of the defendant vacant (unless tenants he may have put in), the said defendant not even paying the taxes, ground rents, and other expenses during all the time he was in possession thereof. And the plaintiff claims she has been damaged by the unlawful trespass upon her property, and advertising the same for sale, and sale thereof, and for the disgrace and disrepute into which she was brought on account of said advertising and sale, for the loss of her rents and profits from the time the defendant notified her said tenants to pay her no more rents, and for her large expenditure of money in securing possession of her said property, in paying witnesses' *per diem* and mileage, besides her own loss of time and expense, and for the depreciation in the value of her property from neglect and nonoccupancy while in the hands of the defendant, and other damages to the said plaintiff and her property from and by the unlawful acts and doings of the said defendant in this behalf."

It will be seen that this is not an action for the malicious prosecution of a civil suit without probable cause. Such an action is generally maintainable, as was held by this court in *McNamee v. Minke*, 49 Md. 138, where there has been an alleged malicious arrest of the person, on a groundless and malicious seizure of property, or the false and malicious placing of the plaintiff in bankruptcy, or the like. But such suits are not, however, encouraged, says this court in *Clements v. Odorless Excavating Apparatus Co.* 67 Md. 463, and 605, because the law recognizes the right of everyone to sue for that which he honestly believes to be his own; and the payment of costs incident to the failure to maintain the suit is ordinarily considered a sufficient penalty. In an action for malicious prosecution or the abuse of process the plaintiff must allege and prove that the suit was instituted maliciously, and without probable cause. The declaration before us does not aver malice or the want of probable cause, and does not count upon the malicious prosecution of a civil suit. No suit was, in fact, instituted against the plaintiff. It alleges a wrongful interference by defendant with the property of the plaintiff, and is an action on the case for consequential damages.

The allegations of the declaration which are admitted by the demurrer show that the defendant caused plaintiff's tenants to refuse to pay to her their rents, and caused other injuries to plaintiff, and that the defendant did intermeddle with property of which plaintiff was in possession with the right to possess, and which defendant knew to belong to the plaintiff. The question, then, is whether the conduct of the defendant, under the circumstances stated in this case, constituted such a wrongful act as will give rise to an action of

damages. It would certainly seem just that if a man knows that certain property is not his, but another's, and that he acquired an apparent title to the same by fraud, and that the title is void, then his intermeddling with such property to the damage of the real owner is an unlawful act, for which a remedy should be afforded. To deny a remedy to the aggrieved party in such cases would be a reproach to the law. The mere fact that the interference with another's property was done under a claim of right and title is no defense, especially when, as in the present case, he knows that his title is fraudulent and void. An action has been held to lie in many cases of such interference when the parties have acted in good faith, and under an honest mistake. *Levi v. Booth*, 58 Md. 313, 42 Am. Rep. 332, this court regarded it "as clear law that a person is guilty of a conversion who intermeddles with the property of another and disposes of it, and it is no answer that he acted under authority from some other person, who had himself no authority to dispose of it." No good reason can be given why the same principle is not applicable to such acts of interference with a party's ownership of land as are described in the present case. The right to maintain the action can also be sustained upon the doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the other, or to obtain a benefit for himself, does the other an actionable wrong. *Lucks v. Clothing Cutters & T. Assembly*, No. 7507, K. of L. 77 Md. 398, 19 L. R. A. 408; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 14, 38 L. ed. 63; *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Walker v. Cronin*, 107 Mass. 555.

But it is manifest that the declaration in this case is bad for duplicity. It states two distinct causes of action in one count,—one for damage to the interference with plaintiff's real property, and the other for damage to reputation. As we have seen, the first is a good cause of action; but the second, which seeks to recover for "the disgrace and disrepute into which plaintiff was brought on account of the advertising and sale," etc., is clearly demurrable. It is well settled that no action will lie for words spoken or written in the course of giving evidence, or for words spoken or written in the course of any judicial proceeding. *Bartlett v. Christliff*, 69 Md. 225. We are therefore of opinion that the demurrer to the declaration was properly sustained and the judgment will be affirmed; but, inasmuch as the declaration contains a good cause of action, the cause will be remanded, with leave to the plaintiff to amend; the costs to abide the result of this suit.

Judgment affirmed, and cause remanded, with leave to the plaintiff to amend; the costs to abide the result of this suit.

Rehearing denied May 13, 1898.

MICHIGAN SUPREME COURT.

Hazel KAUMEIER, by Ella Kaumeier, Her
Next Friend,
v.

CITY ELECTRIC RAILWAY COMPANY,
Plff. in Err.

(.....Mich.....)

Leaving a platform car with no machinery about it, or any brake, on a side track of a street railway in such condition that it may be moved by the united strength of several children, is not negligence which will render the company liable for an injury to a child playing with it.

(March 15, 1898.)

ERROR to the Circuit Court for St. Clair County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Phillips & Jenks, for plaintiff in error:

Plaintiff was a trespasser. The car was rightfully on the track, and while the defendant would not have the right to leave a car upon its track in such a way as to impede or prevent the ordinary use of the street, the plaintiff had no cause for complaint for the purposes for which she was using the street.

Battisill v. Humphreys, 64 Mich. 494; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Gay v. Essex Electric Street R. Co.* 159 Mass. 238, 21 L. R. A. 448; *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504, 41 Am. Rep. 177; *Fredericks v. Illinois C. R. Co.* 46 La. Ann. 1180; *Hargreaves v. Deacon*, 25 Mich. 1; *Charlebois v. Gogebic & M. River R. Co.* 91 Mich. 61.

The duty owed to a trespasser is to use reasonable care to avoid injury after becoming aware of the danger to which he is exposed.

Williams v. Kansas City, S. & M. R. Co. 96 Mo. 275; *Louisville & N. R. Co. v. Hunt*, 11 Ky. L. Rep. 825; *Central Branch Union P. R. Co. v. Henigh*, 23 Kan. 847, 83 Am. Rep. 167; *Felton v. Aubrey*, 48 U. S. App. 278, 74 Fed. Rep. 350, 20 C. C. A. 436; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106; *Wright v. Boston & A. R. Co.* 142 Mass. 296; *Western R. Co. v. Mutch*, 97 Ala. 194, 21 L. R. A. 316; *Richards v. Connell*, 45 Neb. 467; *Hargreaves v. Deacon*, 25 Mich. 1; *Charlebois v. Gogebic & M. River R. Co.* 91 Mich. 61; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

In the "turntable cases" the defendants were held liable on the ground that leaving attractive and dangerous machinery in places accessible to and frequented by children was such gross negligence as to make them liable even though the children were trespassers, but

the extent of this doctrine has been considerably modified and in some of the most respected courts it has been expressly denied.

Frost v. Eastern R. Co. 64 N. H. 320; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248; *McEachern v. Boston & M. R. Co.* 150 Mass. 515; *Walsh v. Fitchburg R. Co.* 145 N. Y. 810, 27 L. R. A. 724; *Bates v. Nashville, C. & St. L. R. Co.* 90 Tenn. 36; *St. Louis, V. & T. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269; *Peters v. Bowman*, 115 Cal. 845; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164.

Cars are not dangerous machines and attractive to children within the meaning of the rule adopted in some of the turntable cases.

3 Elliott, Railroads, § 1259; *Acheson, T. & S. F. R. Co. v. Smith*, 28 Kan. 541; *Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 498, 13 L. R. A. 765; *Haesley v. Winona & St. P. R. Co.* 46 Minn. 233; *Curley v. Missouri P. R. Co.* 98 Mo. 18; *Slayton v. Fremont, E. & M. Valley R. Co.* 40 Neb. 840; *Gay v. Essex Electric Street R. Co.* 159 Mass. 238, 21 L. R. A. 448; *Knottnerus v. North Park Street R. Co.* 98 Mich. 348, 17 L. R. A. 726.

Messrs. Avery Bros. & Walsh, with *Messrs. Muir & Smith*, for defendant in error:

The defendant could not invite these children to play upon a small car that could be propelled by two small boys along its track and be shielded from the consequences that might occur in such a place of danger, on the theory that the child was a trespasser.

Baker v. Flint, & P. M. R. Co. 68 Mich. 90; *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 409.

Long, J., delivered the opinion of the court:

This action was commenced to recover damages for injuries sustained by plaintiff by one of defendant's cars, which, it is claimed, was negligently left by it on a side track without being guarded or brakes set, or other means employed to prevent children from moving it. On the trial it appeared that plaintiff was nearly seven years old when the accident upon which this action is founded happened.—September 17, 1895. Defendant operated a street railway in the city of Port Huron. The car which caused the injury was a small flat or platform car, and was about 14 feet long by 6 feet wide, with a box about 12 feet long, having drop sides, and leaving 1 foot of platform at each end projecting beyond the platform, the platform being about 26 inches from the ground. The weight of the car was from 1,500 to 1,800 pounds. It had four iron wheels, and had no brake upon it, or other means to prevent its being moved. On the afternoon of the accident an order was received by the company to go to Huronia Beach, a point about 4 miles north of the center of the city. The employees operating the combination of motor car and flat car decided to leave the platform car at the point of the accident while they proceeded with the motor car alone to Huronia Beach to get some trunks and re-

NOTE.—For negligence in leaving cars where children can play with them, see also *Gay v. Essex Electric Street R. Co.* (Mass.) 21 L. R. A. 448; *Robinson v. Oregon Short Line & U. N. R. Co.* (Utah) 13 L. R. A. 765.

turn, which would occupy from 40 to 45 minutes, and avoid the necessity of drawing the flat car and making switches that would be necessary in order to reverse the position of the cars on the return trip. There is testimony that this car was in that place in the morning and noon, and that there were then no blocks or anything under or beside the wheels to prevent the car's being rolled; and the car was in the same place when witness came from school at night, about the time of the accident. The place of the accident was the only point on the company's line where the platform car could be left without interference with other cars, and had been left in the same way and place a number of times before under similar circumstances. The conductor in charge of the cars on this occasion testified that when the flat car was left at this point on this occasion he blocked the wheels with a stone and a stick, which could be removed, however, by the kick of a small boy, if he hit it hard, and that he always blocked this car every time he left it there. The plaintiff lived about the length of a block from the place where this car was left, and, coming from school in the afternoon of September 17, seeing children playing upon the car, came to the place of the accident. At that time there were eight or ten children playing with it, pushing the car a short distance west, and then returning it east. A part were pushing, the others riding. At this point there is a slight descent to the west, but not enough to start the car of itself, and there was much dust upon the track. At the time the plaintiff arrived, the children playing with the car were just starting, or about to start it, towards the west, and had run it up and down the track a number of times, and there were then no blocks under the wheels. She climbed upon the west end of the platform to ride, and, without having got into the box, either slipped, or was pushed in the play from the car, falling in front of the wheels, one of the wheels running over her leg, and causing the injuries complained of. The plaintiff had been told by her mother "not to go near the cars, that she was liable to be hurt;" but the danger was not explained to her, and she testified she did not think or know it was dangerous. She was not told not to go near the car on this day. This car had been left in the same position before, and children had played upon it, and pushed it, and street-car employees had taken the car from that position when the children were playing upon it, and the children had helped the street-car men shove the flat car up to the motor car for the purpose of connecting it. The plaintiff was injured almost immediately after going to the car. The children had been playing upon the car from three quarters of an hour to an hour. At the conclusion of the proofs, counsel for defendant requested the court to instruct the jury, among other matters, that under the undisputed evidence the defendant was entitled to a verdict. This was refused, and, inasmuch as this is the only question discussed in appellant's brief; we need not state the other requests to charge. The court submitted two questions to the jury: (1) Whether the defendant was guilty of negligence; (2) whether the plaintiff was guilty of contributory negligence.

40 L. R. A.

Upon the first the court instructed the jury as follows: "If this car had been left there by the railway company at other times, and the street-railway company knew of that fact, knew that children were in the habit of going there and playing with the car, and moving it up and down the track, and riding upon it, and with that knowledge left the car there, and left it unfastened and unblocked; and, in your opinion, taking all the surrounding facts and circumstances into consideration, you deem the use of that car in that manner by children dangerous to them, and that careful, cautious, and prudent men would not have left it there in that condition,—you would be justified in finding that the railway company was liable for the injury that this child suffered, provided that she has not been guilty of contributory negligence." Upon the second question the court charged the jury, substantially, that they might take into consideration the age of the child, the means she had of knowing the danger, the judgment, intelligence, and reason of the child, and say whether, under all the circumstances of the case, she was guilty of contributory negligence; and, "If you feel that she was, and that any act of hers contributed to the injury, you should deny her claim; otherwise, if she did contribute to it, and you think that in her tender years, and in her judgment and reasoning powers, she was incapable of knowing any better, you would be justified in passing that over." Plaintiff recovered, and defendant brings error.

Plaintiff contends that, this car track being in a public highway, the child was not a trespasser, either in moving the car or in getting upon it. The plaintiff does not contend that the car was of itself an object dangerous to children, but that, the car being so light that children could move it on the track, it became a dangerous object in being moved along the track, and, being an attractive object, they were likely to move it, and thus be put in danger; that the defendant's employees knew, before leaving the car there on that occasion, that on former occasions children were attracted to it, had moved it along the track, and that such employees had countenanced the children in thus playing with it; that, with this evidence in the case, the court very properly left the question to the jury to determine whether, taking all these matters and the surrounding circumstances into consideration, careful, cautious, and prudent men would have left the car there in that condition. In support of this contention counsel cites the *Turntable Cases* in note to 27 Am. & Eng. Enc. Law, p. 344. It is said in that text: "The general rule of liability, as laid down by the Supreme Court of the United States and adopted by the great majority of the state courts, is, that if a railway company leaves a turntable, or other like machinery upon its own property likely to attract children, so unsecured that children may put it in motion, the company is negligent and, if a child is injured thereby, will be liable in damages." We are not called upon in the present case to express any opinion upon the questions decided by those cases. In Massachusetts and New Hampshire that ruling is not followed, it being held in those states that a railroad company is not liable for injuries.

sustained by a child while playing upon a turntable, either upon the ground of an implied invitation to come there, or of a duty on the part of the company to make the place safe. *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248; *Frost v. Eastern R. Co.* 64 N. H. 220. All the *Turntable Cases* are rested upon *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745. In that case a child of six years was injured by playing upon the defendant's turntable. The turntable was unlocked and unguarded. The court charged the jury upon the question of the defendant's negligence in the management or condition of the turntable as follows: "To maintain the action it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine,—one which, if unguarded or unlocked, would be likely to cause injury to children; that if, in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was as the defendants' property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that, if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence." The court, in passing upon and approving this charge, said: "That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might be fairly inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he [plaintiff] had suffered a serious injury, by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, . . . when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it, and that defendant should have anticipated that such would be the case." It is difficult to see how that case can be likened to the present. In that case a dangerous piece of machinery was left open, exposed, and unguarded, to the knowledge of the defendant. The turntable itself was dangerous. In *Peters v. Bowman*, 115 Cal. 345, the supreme court of California said: "The rule of the *Turntable Cases* is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied." Even in some

of these *Turntable Cases* it is held that railroad cars are not dangerous machines, and attractive to children, within the meaning of those cases. Elliott, *Railroads*, § 1259, says that this is regarded as the true rule. In *Sioux City & P. R. Co. v. Stout*, 17 Wall. 659, 21 L. ed. 745, the court charged the jury that: "If [the turntable in question] in its construction and the manner in which it was left was not dangerous in its nature, the defendants were not liable for negligence." The car in question in the present case was not dangerous in its construction. It was a plain car, with four wheels, with no machinery about it. It had no brake, but was a small platform car. It is true that it stood upon a track where it might be moved by several children applying their united strength. Several children might, in the same way, move a wagon or carriage left beside the highway. We apprehend that no claim of negligence could be sustained against the owner of such a vehicle if one of the children climbing upon it should fall off, and be run over, even if the wheels were left without blocking. In *Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765, it appeared that a hand car had been left beside the track. Some boys had lifted it upon the track, and were running it back and forth, when plaintiff, being attracted by it, went there, and was injured by jumping or falling from it while in motion. The boys had used this car eight or ten times before, with the permission of the "boss," while the men were there at work; but he had never given them such permission while the men were not at work. This car weighed 600 or 700 pounds. It was held that the car was not a thing dangerous in itself, and that the company was not negligent in leaving it unlocked beside the track.

In the present case, assuming that the defendant left the car without sufficient blocking, it must be held that plaintiff could not maintain this action, for the reason that there is nothing in the case showing or tending to show any negligence on the part of the defendant.

It is not necessary to determine whether the plaintiff was guilty of contributory negligence, or whether that question was properly left to the jury. Neither is it necessary to say that the plaintiff was a trespasser in going upon the track there, which was laid along the highway. It is proper, however, to say that she was a trespasser in any attempt to use this car. The defendant had just as much right to leave this car where it did as would a farmer have to leave his wagon or carriage upon his own side of the highway, and no one would have the right to move it, except upon the claim that it impeded public travel. The car being rightfully left where it was upon the track, and not being a thing dangerous in itself, the court should have directed the verdict in favor of defendant.

Judgment below must be reversed. No new trial will be ordered.

The other Justices concur.

MINNESOTA SUPREME COURT.

ST. BARNABAS HOSPITAL, *Respt.*,
v.
MINNEAPOLIS INTERNATIONAL ELEC-
TRIC COMPANY, *Appl.*

(68 Minn. 254.)

"The defendant took one of its employees, who had been seriously injured, to plaintiff hospital, and at its request and upon its promise to pay for his care and treatment the plaintiff accepted and received him as a patient for an indefinite period, no length of time being mentioned. Subsequently, and while the patient was yet incapable of being removed or discharged from the hospital without great danger to his life or health, the defendant gave notice that thereafter it would not be responsible for his care or treatment. Held, that defendant had no right to thus terminate its liability; that, under the circumstances, it was an implied condition of the contract that defendant could only terminate it by removing the patient or when he could be dismissed by the plaintiff without serious danger to his life or health. In order to relieve itself from liability for care and treatment, furnished after the notice, on the ground that the patient had means of his own to pay for it, the burden was on defendant to prove that he had means out of which the plaintiff could and should have collected its pay.

(May 12, 1897.)

A PPEAL by defendant from an order of the Minneapolis Municipal Court denying a motion for a new trial after verdict in favor of plaintiff in an action brought to recover compensation for treatment of one of defendant's employees. *Affirmed.*

The facts are stated in the opinion.

Messrs. Harrison & Noyes, for appellant:

The law imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible.

1 Sutherland, Damages, p. 148; *Worth v. Edmonds*, 52 Barb. 40; *Gillis v. Space*, 63 Barb. 177; *Dillon v. Anderson*, 43 N. Y. 281.

If the plaintiff omits to use his opportunities, and does not reasonably exert himself to lessen the damages which may result from the defendant's act, he is not entitled to compensation for the injury which he might and ought to have prevented, except to the extent of proper compensation for such measures or acts of prevention as the case required and were within his knowledge and power.

1 Sutherland, Damages, p. 288; *Huntington v. Ogdensburgh & L. C. R. Co.* 33 How. Pr. 416; *Worth v. Edmonds*, 52 Barb. 40.

Mr. George S. Grimes for respondent.

Mitchell, J., delivered the opinion of the court:

This was an action to recover for the care

*Headnote by MITCHELL, J.

NOTE.—As to duty of master to furnish medical aid to servant, see *Ohio & M. R. Co. v. Early* (Ind.) 28 L. R. A. 546.

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and treatment of one Soutar, furnished and performed at the instance and request of the defendant. The undisputed evidence is that Soutar, having sustained very severe injuries while in its employment, the defendant brought him to plaintiff's hospital, and that plaintiff received and accepted him as a patient upon the faith of defendant's promise to pay for his care and treatment. The evidence on part of the plaintiff was to the effect that nothing was said as to length of time, while defendant's evidence was to the effect that its promise was to pay for his care until further notice. As we view the case, it is immaterial which is correct. Soutar was taken to the hospital on October 22 and a few days afterwards was, at the request of the defendant, removed from one of the hospital wards to a private room where he was kept and cared for until the 8th of the following April. The usual price for a private room was \$15 a week, while the price for a place in one of the wards was only \$7. These accommodations were, respectively, worth these prices. On November 12 defendant gave notice to the plaintiff that it would not continue responsible for any further treatment or care of Soutar after the next day. The contention of the defendant was that it had the absolute right to terminate its promise *instantly* at any time by giving notice to that effect, and therefore could not, under any circumstances, be held liable for Soutar's care and treatment after November 13. The contention of the plaintiff, and the view of the law on which the court submitted the case to the jury, was that under the circumstances the agreement was not one which the defendant had an absolute right to terminate at any time merely by giving notice; that defendant, having brought a seriously injured man to the hospital, and the plaintiff having taken him in and accepted him as a patient at the request of defendant, on the faith of its promise to pay, it would remain liable, notwithstanding notice to the contrary, until it removed him, or until he sufficiently recovered, so that he could have been dismissed or put out of the hospital without great danger to his health or life, unless it appeared that he had means of his own out of which plaintiff could have collected its pay. This was an implied condition, upon which the contract could be terminated. It is in accord alike with common sense and the dictates of humanity. The plaintiff, having taken in a helpless and severely injured man at the defendant's request, and upon its promise to pay for an indefinite time, it would be monstrous if the defendant could, the very next day, summarily withdraw its promise, leave the sick man on plaintiff's hands, and put it to the alternative of either keeping and caring for him without pay, or else cruelly and inhumanly throwing him into the street. The plaintiff assumed the burden, which doubtless belonged to it, of proving that Soutar could not have been dismissed or removed from the hospital without great danger to his health or life until the date of his dismissal, on the 8th of April. The evidence abundantly established

this fact unless it was as to the last four weeks. The jury evidently took the view that he might have been safely dismissed four weeks sooner than he was, and hence allowed plaintiff nothing for that time. There was no evidence that Soutar had any means to pay for his own treatment. All that it shows is that he was a single man, and presumably had no home of his own. The charge of the court implies that the burden was on the defendant, if it would relieve itself from liability on that ground, to show that Soutar had means to pay for what care he received. We are of opinion that this was right. Plaintiff's contract was with the defendant, and not with Soutar. Defendant having brought the patient to the hospital, and promised to pay for his treatment, if it would relieve itself of liability after notice, notwithstanding its failure to remove him, and the further fact that he was in no condition to be dismissed, it was at least incumbent on it to show that plaintiff could and should have collected its pay from Soutar himself.

The point is made that, after defendant gave notice that it would be no longer liable, the plaintiff should at least have minimized defendant's liability by removing Soutar from the private room to one of the hospital wards, where the cost would have been less than half. It is sufficient answer to this that no such point was made on the trial in the court below, either in the introduction of evidence or by requests to charge the jury. The defendant squarely took the position that it was not liable for anything after November 13, and no question seems to have been made but that it was liable for the full amount charged per week, if it was liable at all.

Several of the assignments of error relate to the admission or exclusion of evidence; but, as the defendant has failed to specify the pages or folios in the paper book where these rulings are to be found we do not feel it to be our duty to read over the whole record to find them. We may add, however, that such of them as we have discovered contain no prejudicial error.

Order affirmed.

Jacob F. JACOBSON, *Respt.*,

WISCONSIN, MINNESOTA, & PACIFIC
RAILROAD COMPANY *et al.*, *Appts.*

(.....Minn.....)

***1. Where the putting in of a connecting switch at the crossing of two railroads to facilitate the transfer of cars from one road to the other will benefit both state and interstate traffic.**—*Held*, there is concurrent jurisdiction in the state and Federal authorities to order the putting in of such connection. *Held*, it sufficiently appears that there is in this case

*Headnotes by CANTY, J.

NOTE.—As to compulsory service by party whose business it is to serve the public, see *note to Rushville v. Rushville Natural Gas Co. (Ind.)* 15 L. R. R. 321.

As to equal rights of connecting carriers to interchange traffic, see also *Kentucky & I. Bridge Co.* 40 L. R. A.

such necessity for the connection in question, arising from the benefit which will accrue to state traffic alone, that the state railroad and warehouse commission were warranted in ordering the connection to be made. But, *Held*, further, on the appeal from the order of the commission, the burden was on the appellant railroad companies to show a want of such necessity, and they failed to maintain that burden.

2. Held, chapter 10, Gen. Laws 1887, as amended by chapter 91, Laws 1895, does not, at least as applied to the present case, contravene either the Federal Constitution or the Constitution of this state in conferring upon the commission power to require the making of such a connection, the transfer and interchange of loaded cars, and the making of joint rates for through shipments when a part of the haul is on one and part on the other of the two connecting railroads.

(April 15, 1898.)

A PPEAL by defendants from a judgment of the District Court for Yellow Medicine County affirming an order of the railroad and warehouse commission requiring defendants to construct a switch track connecting their roads. *Affirmed.*

The facts are stated in the opinion.

Messrs. Albert E. Clarke, W. F. Booth, and M. D. Grover for appellants.

Messrs. H. W. Childs, Attorney General, and *George B. Edgerton*, for respondent:

The evidence will be deemed sufficient to sustain the order of the commission.

The statute expressly provides that the findings of the commission are *prima facie* just and reasonable. This is the policy of the act as to all investigations made by the commission.

Gen. Stat. 1894, §§ 381(c), 392, 393(b); *Steenerson v. Great Northern R. Co. (Minn.)* 72 N. W. 713.

A company organized under a general law is subject to such needful police regulations as the legislature may prescribe. Provisions may be severe, yet they are binding upon the company. It matters not whether the duty was prescribed by the general law at the time the company was organized or by a subsequent enactment.

Stone v. Farmers' Loan & T. Co. 116 U. S. 834, 29 L. ed. 645; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 179, 32 L. ed. 380; *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 455, 33 L. ed. 980, 8 Inters. Com. Rep. 209; *State v. Gladson*, 57 Minn. 390, 24 L. R. A. 502. *Affirmed* 166 U. S. 426, 41 L. ed. 1064.

The right of control or regulation of a common carrier by public authority flows from the fact that from the very nature of such a business, it is affected with a public interest.

Munn v. Illinois, 94 U. S. 126, 130, 24 L. ed. 84, 85; *Com. v. Alger*, 7 Cush. 84; 2 Kent, Com. 240; 2 Spelling, *Priv. Corp.* p. 1228; *Secombe v. Milwaukee & St. P. R. Co.* 23 Wall. 118, 23 L. ed. 69; *Lake Superior & M. R. Co. v. United States*, 93 U. S. 442, 23 L. ed. 987;

v. Louisville & N. R. Co. (C. C. D. Ky.) 2 L. R. A. 239; *Burlington, C. R. & N. R. Co. v. Dey (Iowa)* 12 L. R. A. 436, and cases in *note* thereto; also *Little Rock & M. R. Co. v. St. Louis & S. W. R. Co. (C. C. App. 8th C.)* 26 L. R. A. 192; and *Bald Eagle Valley R. Co. v. Nittany Valley R. Co. (Pa.)* 29 L. R. A. 423.

Express Cases, 117 U. S. 1, 29 L. ed. 791; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 546; *Worcester v. Norwich & W. R. Co.* 109 Mass. 112; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212; *Smith v. Chicago, M. & St. P. R. Co.* 86 Iowa, 202; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584; *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 185, 50 Am. Rep. 605; *State v. Wabash, St. L. & P. R. Co.* 83 Mo. 144; *State, Barton County, v. Kansas City, Ft. S. & G. R. Co.* 32 Fed. Rep. 722; *Worcester Excursion Car Co. v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 793.

The state may, by virtue of reserved power, at least make any reasonable amendments of the charter, and impose any reasonable additional duties and obligations on the corporation.

Pierce, Railroads, p. 457; *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 455, 33 L. ed. 979, 3 Inters. Com. Rep. 209.

The statute has clothed the corporation with the power of eminent domain only in furtherance of the public good. Only because its business is in its nature public can such a delegation of sovereign power be justified. It is because a railroad is a public necessity.

San Francisco, A. & S. R. Co. v. Caldwell, 81 Cal. 367; *Secombe v. Milwaukee & St. P. R. Co.* 28 Wall. 108, 28 L. ed. 67; *Worcester v. Norwich & W. R. Co.* 109 Mass. 112.

The imposition of the duty carries with it the power to acquire the necessary land.

Worcester v. Norwich & W. R. Co. 109 Mass. 112.

Canty, J., delivered the opinion of the court:

The Willmar & Sioux Falls Railroad extends from Willmar, in this state, in a southwesterly direction, to Sioux Falls, in South Dakota, and is crossed nearly at right angles by the Wisconsin, Minnesota, & Pacific Railroad near Hanley Falls, in this state. The former railroad is a part of the Great Northern system of railroads, and the latter is operated in connection with the Minneapolis & St. Louis Railway, and as a part of the same. The crossing near Hanley Falls is a grade crossing, and there has never been any switch connecting the two railroads at that point. Chapter 10, Gen. Laws 1887, as amended by chapter 91, Laws 1895, provides: "Sec. 3. (A) That all common carriers subject to the provisions of this act shall provide, at all points of connection, crossing, or intersection at grade where it is practicable and necessary for the interest of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or track may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers, property, and cars to and from their several lines and those of other common carriers connecting therewith." The act further provides that, on the application of any person interested, the state railroad and warehouse commission shall

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order connections to be made at such crossings and this is conceded by appellants. The commission did so order in this case after notice, and a hearing had in the manner provided by the statute. Both railroad companies appealed to the district court from the order. On a hearing had in the district court, the order was affirmed, and the connection ordered to be made by a curved switch, 778.6 feet long and particularly described, just as the commission had ordered. From the judgment of the district court entered thereon, both railroad companies appeal to this court. The Wisconsin, Minnesota, & Pacific Railroad Company has appealed and filed a brief, but the other appellant has not argued the case or filed any brief.

The connecting switch will, at the middle of the same, extend outside of the right of way of each and either railroad, and it will be necessary to condemn at that place a narrow strip of land, a few hundred feet long, for the use of the switch. One of the lines of the Great Northern system extends from Duluth southwest to Willmar. Another extends from St. Paul and Minneapolis west to Willmar. These two lines pass through large areas of wood land, the timber on which is available for fuel and fence posts. Southwest of Willmar, and for many miles in all directions around Hanley Falls, the country is mostly prairie. Timber is scarce, and great quantities of cordwood and fence posts are brought down on the Willmar & Sioux Falls Railroad from said timbered regions, and distributed along that road. Timber is not as plentiful along the Minneapolis & St. Louis System. For that reason cordwood and fence posts are much dearer at the stations on the Wisconsin, Minnesota, & Pacific Railroad, east and west of Hanley Falls, than such wood is at that station and the stations north and south of it on the Willmar & Sioux Falls Railroad. For this reason it is for the benefit of the people in the territory tributary to the Wisconsin, Minnesota, & Pacific Railroad, but no tributary to Hanley Falls, that this connection should be made so as to enable them to have cars of wood transferred at that point from the Willmar & Sioux Falls Railroad to the Wisconsin, Minnesota, & Pacific Railroad, and distributed at the stations along the latter road. But this will deprive the Wisconsin, Minnesota, & Pacific Railroad Company of the benefit of a much longer haul on dearer wood. The loss of revenue which will result to it by reason thereof is one of the grounds of its complaint here. A large number of cattle are raised in the territory tributary to the Wisconsin, Minnesota, & Pacific Railroad west of Hanley Falls. For such of these cattle as are fat enough for beef, Minneapolis and St. Paul are the best market, but, for the stockers and feeders, Sioux City or Omaha is the best market. But there is no way of reaching Sioux City or Omaha with cars of stock shipped from said territory over said last-named road, except by running the cars first to Hopkins, within 8 miles of Minneapolis, and then transferring them to another railroad with which the Minneapolis & St. Louis Railway Company has traffic arrangements, and running the cars over such other road to Sioux City or Omaha.

The distance from Hanley Falls to Sioux City by this route is 380 miles, while the distance from Hanley Falls to Sioux City over the Willmar & Sioux Falls Railroad is but 181 miles. Making the connection in question will deprive the Wisconsin, Minnesota, & Pacific Railroad Company of the benefit of such longer haul on such stockers and feeders, and the loss of revenue which will result to it by reason thereof is another ground of its complaint.

1. Appellant Wisconsin, Minnesota, & Pacific Railroad Company contends, that as the shipping of stock to Sioux City and Omaha is interstate commerce, the state tribunals have no jurisdiction over it, and must not take into consideration the question of the transferring of cars of such stock when determining the necessity of a connection at this crossing. Conceding, without deciding, that the state tribunals would have no jurisdiction to require the making of this connection for the sole purpose of transferring cars engaged solely in the carrying of interstate commerce, it does not follow that these tribunals may not take into consideration the benefit to such commerce also, when determining the necessity of this connection. The whole traffic to be benefited by the making of the connection may be amply sufficient to justify requiring the same to be made; yet the part of such traffic commencing and ending in the state may not be sufficient when taken alone, and the part which consists of interstate commerce may not be sufficient when taken alone. If appellant's position is correct, neither the state tribunals nor the Federal tribunals would have jurisdiction in such a case. Clearly such is not the law. In such a case jurisdiction is concurrent. If there is some necessity resulting from the benefit which will accrue to exclusively state commerce by reason of the putting in of the connection, this gives the state tribunals jurisdiction (*Munn v. Illinois*, 94 U. S. 126, 24 L. ed. 84); and in disposing of the case, they may take into consideration the whole necessity resulting from the whole benefit which will accrue to all classes of commerce. But, even if this position was not correct, there is, in our opinion, ample evidence in this case of necessity resulting from the benefit which will accrue to exclusively state commerce, when considered alone, to justify the ordering of the connection in question. We will go further. Under the statute, every presumption is in favor of the action of the commission, and the burden was upon appellant to show that such action was contrary to law. See *Steenerson v. Great Northern R. Co.* (Minn.) 72 N. W. 718. Appellant has totally failed to maintain that burden. No evidence was offered by appellant in the district court at all as to the want of necessity for the making of this connection, but it rested its case wholly on the evidence of the witnesses called in behalf of the petitioner. That evidence was not in appellant's favor, and certainly did not show conclusively that there was no necessity for this crossing.

2. Appellant further contends that said act of the legislature is unconstitutional and void, and the judgment entered in this case is erroneous, because they contravene numerous provisions both of the state and Federal Constitu-

tions. Such law and judgment required appellant to exercise the power of eminent domain, construct a railroad track, operate the same, and exchange business with intersecting roads; and it is contended that all of this is outside of and beyond what its charter requires, and that, therefore, the law impairs the obligation of the charter contract between appellant and the state, deprives appellant of the equal protection of the laws, takes its private property without just compensation, deprives it of the right to contract with reference to its own business, etc. All of these constitutional objections may be considered together. These two railroads are public highways, and all of these objections amount simply to this: It is wholly foreign to the purpose of two public highways of the same character to require them to connect where they cross each other, so that public traffic may pass from one to the other. And, where a private corporation has been chartered to construct, maintain, and operate such a public highway, with the right to charge reasonable compensation for its services in so doing, it is a violation of its charter to compel it to connect its highway with another intersecting highway of the same character, unless the right to require the connection is expressly reserved in the charter. We cannot so hold. If appellant's position is correct, it has the constitutional right to completely isolate its railroad at any time by cutting it off from all connection with other railroads, unless the right to compel connections is expressly reserved in its charter. Its road commences at the village of Morton, in this state (an unimportant station at the terminus of a branch of the Minneapolis & St. Louis Railway), and extends westerly to Watertown, in South Dakota; so that it may at any time, and in spite of all public authority, be very completely isolated and cut off from all large commercial centers, if appellant sees fit so to cut it off. The legislature chartered appellant to construct, maintain, and operate a public highway, not a *cul de sac* or something worse, which has no connection with like highways either at its ends or sides. A railroad is an improved highway, on which certain modern appliances are used. It will not, as a general rule, serve fully the purposes for which it was intended, unless the connections between it and other like highways which cross or touch it are improved in like manner, and the same modern appliances are used in passing from one road to another over those connections.

Again, why is not the doctrine advanced by appellant a two-edged sword? If the legislature cannot compel the making of such connections, because there is nothing in the charter expressly authorizing or requiring the making of them, why is it not *ultra vires* under such a charter, and without express legislative authority, to make such connections voluntarily? But who will contend that a railroad company may not, without express authority, and as incidental to its general powers, connect its track with the tracks of other railroads that extend to its road at its ends, or intersect it at its sides. Appellant's property is dedicated to public use, "is affected

with a public interest," and the legislature certainly has the power to regulate that use in a reasonable manner, unless appellant's charter expressly protects it from such regulation. See *Munn v. Illinois*, 94 U.S. 126, 24 L. ed. 84; *State v. Wabash, St. L. & P. R. Co.* 88 Mo. 144; *Allnutt v. Inglis*, 12 East, 527; Lord Hale's Treatise De Jure Maris, 1 Hargraves, Law Tracts, 6. Appellant was chartered to serve the public within the scope of its charter powers and franchises, in the best and most efficient manner possible. It was not, as it seems to contend, chartered to obstruct public traffic or serve the public the least that self-interest might dictate. Appellant cannot be allowed to obstruct the course of public traffic under the claim that, by, putting in this connection and letting such traffic take its course, appellant will lose a large amount of revenue which it would otherwise earn. If, by reason of putting in the connection, its revenues will be so reduced that it will not, on its whole business, receive a reasonable compensation for its services, its remedy is by a readjustment of the whole or such part of its schedule of rates and fares as, under the circumstances, ought to be readjusted, in order to enable it to earn such reasonable compensation.

It is contended that, even if the connections were made, neither railway company could be compelled to deliver its loaded cars to the other, to be carried with their contents to their destination over the road of such other; that to compel appellant to deliver up its cars to be carried away from the line of its road to distant points would be in violation of its charter contract, and unconstitutional; that, for this reason, it is useless to compel the making of the connection in question, and therefore the legislative act fails of its purpose, and is unconstitutional and void. Such interchange of cars between different railroads is a common and almost universal practice; yet, there are few railroad charters which expressly authorize this practice. It would hardly be contended that such an act of interchange is *ultra vires* on the part of a railroad company whose charter is silent as to such authority. As incidental to the operation of its road, a railroad company has the power to interchange cars with other connecting companies, and this is the ordinary and usual way of doing business. We are clearly of the opinion that the legislature has the power to compel a common carrier to do business in the ordinary and usual way, and therefore may 40 L. R. A.

compel such interchange of cars as incidental to the business for which the company was chartered. The supreme court of Iowa reached the same conclusion in *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584. See also *Atchison, T. & S. F. R. Co. v. Denter & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291; *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 185, 50 Am. Rep. 605; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212; *State v. Wabash, St. L. & P. R. Co.* 83 Mo. 144.

The statute provides: "In the event that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, . . . it shall be the duty of the railroad and warehouse commission of this state . . . to establish reasonable joint rates for the shipment of freight and cars over any two or more connecting lines of railroad in this state, and to prescribe the reasonable rules under which any such cars so transferred shall be returned." Laws 1895, p. 214, § 3. (C). Appellant suggests that cases may arise where it would be compelled to deliver its cars to another carrier, who is insolvent, or where the couplings, air brakes, or other appliances of the cars of one of the carriers will not match with those of the other, and where it would be unsafe to haul such other cars. It is only necessary to say that such cases can be disposed of when they arise. There is no suggestion that this is any such a case. Appellant seems to contend that this statute attempts to make the two or more railroad companies partners for the purposes of such a through shipment; that it attempts to compel the making of a joint shipping contract by which each company will be liable for all the defaults of the others in the through shipment; and that, therefore, the statute is unconstitutional and void. The statute merely provides that, in case all the railroad companies concerned in the through shipment fail to fix a reasonable total sum for the total haul, the commission shall do so for them. There is nothing in this which requires any company to assume any liability beyond its own line for the acts of others in making the haul.

There is nothing in the suggestion that the two appellants are competing roads, within the terms of subdivision F of § 3 of said statute, at least as far as regards the traffic for which the connection in question is required.

This disposes of the case, and the judgment appealed from is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

Anderson GRATZ, Trustee, etc., *et al.*, *Appts.*,
v.

LAND & RIVER IMPROVEMENT COM-
PANY *et al.*

(53 U. S. App. 499; 82 Fed. Rep. 381; 27 C. C. A. 305.)

1. **Recorded, but unacknowledged, agreements** regarding land may be considered in an action to quiet title under a statute making them evidence in cases brought after its passage, although a portion of the relief asked is injunction against an ejectment suit begun before the passage of the act.
2. **A strict construction will not be placed upon a power of attorney** to convey an interest in land after the lapse of

many years, the effect of which would be to oppose the clear intent of the parties and divest titles acquired in good faith under it.

3. **A recorded power of attorney** to convey land is not revoked by an unrecorded conveyance of the land by the principal so as to defeat titles subsequently acquired in good faith from the attorney.
4. **Claimants under a deed prior in time but subsequent in record** in order to defeat after a great lapse of time a subsequent deed first recorded, have the burden of showing notice or fraud on the part of the subsequent grantees.
5. **A conveyance of a certain number of undivided acres** out of a tract of land is not void for uncertainty.

NOTE.—Separation of riparian rights from upland.

If a person owns both the banks and bed of the stream or body of water the authorities agree that he may separate them and convey the one without the other. Where he does not own the water, but has only the rights of a riparian owner therein, there is some conflict as to his power to effect the separation.

One man may have the river and another the soil adjacent. *Hale, De Jure Maris*, chap. 1.

One man may own the bed of a stream and another may own its banks. *Rockwell v. Baldwin*, 58 Ill. 22.

The proprietor of adjoining land, who is also the owner of the bed of the stream, may convey the bed of the stream separate from the land which bounds it. *Den, Hartshorn, v. Wright*, Pet. C. C. 64; *Child v. Starr*, 4 Hill, 369.

The submerged land may be reserved and sold separately from the upland. *Axline v. Shaw*, 35 Fla. 305, 28 L. R. A. 991; *State v. Black River Phosphate Co.* 32 Fla. 82, 21 L. R. A. 189.

The owner of the bed of a river and of the upland may separate the ownership of the one from the other. *Smith v. Ford*, 48 Wis. 164; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642; *Elliott v. Baird*, 26 Graet, Ch. (U. C.) 549.

In Massachusetts the owners of upland to which flats adjoin may sell the upland without the flats or the flats without the upland. *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155; *Barker v. Bates*, 13 Pick. 255, 23 Am. Dec. 678; *Mayhew v. Norton*, 17 Pick. 367, 28 Am. Dec. 300; *Valentine v. Piper*, 22 Pick. 85, 33 Am. Dec. 715; *Drake v. Curtis*, 1 Cush. 395; *Knight v. Wilder*, 2 Cush. 199, 48 Am. Dec. 630; *Saltonstall v. Proprietors of Boston Pier*, 7 Cush. 202; *Doane v. Willcutt*, 5 Gray, 323, 66 Am. Dec. 369; *Porter v. Sullivan*, 7 Gray, 441.

And the same is true in Maine. *Deering v. Proprietors of Long Wharf*, 25 Me. 51; *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751; *Stone v. Augusta*, 46 Me. 137; *Hill v. Lord*, 48 Me. 83; *Abbott v. Treat*, 78 Me. 121.

It is competent for the riparian proprietor to sell his upland to the top or edge of the bank of the river, and to reserve the stream or flats below high-water mark, if he does it by clear and specific boundaries. *People, Highway Comrs., v. Madison County Supers.* 125 Ill. 21.

Right of fishing.

The owner of upland has a right of fishery adjacent to his shore, which is capable of alienation. *Fitzgerald v. Faunce*, 46 N. J. L. 536.

The owner of soil beneath water may convey his fishing privileges separate from the upland. *Matthews v. Treat*, 75 Me. 594.

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Right of wharfage.

The right of wharfage may be separated from the upland. *Simons v. French*, 25 Conn. 346; *Ladies' Seamen's Friend Soc. v. Halstead*, 58 Conn. 144.

The owner of improvements which have been made in front of his property has a right to convey them separate from the upland. *Goodsell v. Lawson*, 42 Md. 348.

The owner of land bordering on a river may sell his land and retain his statutory right to build wharves into the river. *Hastings v. Grimsshaw*, 153 Mass. 497, 12 L. R. A. 617.

The owner of land bounded on navigable waters may reserve to himself his right to build wharves when he conveys away the land above high-water mark, or he may grant it to another to enjoy. *Parker v. West Coast Packing Co.* 17 Or. 510, 5 L. R. A. 61. In that case the right was held to be an incorporeal hereditament. Later Oregon cases, however, have denied the existence of any right to wharf out.

In *Hagan v. Gaskill*, 42 N. J. Eq. 215, there was a lease of the right to build a pier, and it was upheld in favor of a mechanic's lien as against the grantor.

But in Iowa it has been held that the right of the owner of land upon the bank of a stream, the bed of which he does not own, to construct piers and landing places, is not a subject of independent sale. *Musser v. Hershey*, 42 Iowa, 356.

Mere riparian rights.

If the owner of upland conveys by metes and bounds a portion of the flats lying in front of the upland, leaving a portion of the flats unconveyed outside beyond the conveyed portion cut off from the upland, the grantee will take the right to reclaim and use the outer flats with the portion definitely conveyed. *New Haven S. B. Co. v. Sargent*, 50 Conn. 199, 47 Am. Rep. 632. This ruling is put upon the ground that the grantor had not the title, but only an incorporeal hereditament, in the shore, and public policy dictates that the right to reclaim land and construct wharves should be in someone in respect to all parts of the shore in a harbor. And if the grantee has not the right no one has. But it is expressly stated that the decision is rested on the particular circumstances of the case.

A mere right of getting seaweed on the beach in front of land is an incorporeal hereditament, and cannot be severed from the estate to which it is annexed. *Phillips v. Rhodes*, 7 Met. 322.

So, it has been held that if the owner of the upland does not own the land under water he cannot upon conveying his upland reserve his right to apply to the state authorities for a grant of such

6. Title to a proportionate share of land under water, depending on title to the upland, will pass by a deed of a certain number of undivided acres out of the tract of upland bordering on the water.

(October 4, 1897.)

A PPEAL by defendants from a decree of the Circuit Court of the United States for the Western District of Wisconsin in favor of complainant in a suit brought to quiet title to certain real estate and restrain the prosecution of an ejectment suit to recover possession thereof. *Affirmed.*

Before *Woods, Jenkins, and Showalter*, Circuit Judges.

Statement by *Jenkins*, Circuit Judge:
Fractional section 16 in township 49 north,

land. *E. G. Blakslee Mfg. Co. v. E. G. Blakslee's Sons Iron Works*, 129 N. Y. 155, *Affirming* 59 Hun, 209.

And the same rule was followed in *People, Blakslee, v. Land Office Comrs.* 39 N. Y. S. R. 642.

In *Steele v. Sanchez*, 72 Iowa, 85, where the question was as to the title to certain stone in the bed of the stream which the owner of the upland had attempted to convey to a third person, the court said the grantor had certain rights between high and low water mark, but those rights were peculiar to himself, and were not the subject of sale or transfer independently of a conveyance of the land to which those rights were appurtenant. In that case the riparian owner had not a title to the bed of the stream.

In Massachusetts it has been held that there is no legal impediment to a grant of land without a water privilege or to a grant of water privilege without the land. *Ashley v. Pease*, 18 Pick. 268.

The owner may sell the land without the privilege of the stream. *Hatch v. Dwight*, 17 Mass. 298, 9 Am. Dec. 145.

In *Dexter Sulphite Pulp & Paper Co. v. Frontenac Paper Co.* 20 Misc. 442, a reservation of water rights was enforced.

There may be a severance of an owner's private right of use and occupation in a public body of water from his adjacent upland. *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 18 L. R. A. 679.

A riparian owner conveying land adjacent to navigable waters may so limit his grant as to reserve to himself, not only his riparian privileges in the waters, but also subsequent accretions to the soil formed by the operation of natural causes. *People, Burnham, v. Jones*, 112 N. Y. 597.

In *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, it was held that riparian rights belong and are incident to the abutting shore, and cannot be severed and transferred apart from the shore.

But the owner of the upland may by a conveyance estop himself from asserting his riparian rights. *Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89.

And the *Lake Superior Land Company Case* was overruled in *Hanford v. St. Paul & D. R. Co.* 43 Minn. 104, 110, 7 L. R. A. 722.

And the new doctrine was followed in *Gilbert v. Eldridge*, 47 Minn. 210, 13 L. R. A. 411; *Gilbert v. Emerson*, 55 Minn. 254; *Bradshaw v. Duluth Imperial Mill Co.* 52 Minn. 59.

Upon the partition of land the riparian rights connected with it may be left to be held in common. *Organ v. Memphis & L. R. R. Co.* 51 Ark. 235.

Cases merely recognizing the doctrine.

Head v. Chesbrough, 13 Ohio C. C. 364, *Affirming* 4 Ohio, N. P. 73, recognizes the right of the riparian owner to separate the water rights from the upland.

of range 14 west, in the county of Douglas and state of Wisconsin, is bounded on the north and west by the St. Louis river and St. Louis bay. The section was surveyed by the government of the United States in the year 1854, and according to that survey and the plat thereof returned to the general land office of the United States, and filed in the office of the surveyor general, the section contained 522.80 acres of land, as follows: The northeast fractional quarter, 180.25; the northwest fractional quarter, 86.50; the southwest fractional quarter, 146.05; the southeast quarter, 160. Under the school-land grant of the enabling act admitting the state of Wisconsin into the Union, approved August 6, 1846 (9 Stat. at L. 56, chap. 89), this section, with others, was granted to the state of Wisconsin for school purposes. On August 4, 1855, Frederick J.

riparian owner to separate the water rights from the upland.

And the same is true of *Day v. Pittsburg, Y. & C. R. Co.* 44 Ohio St. 406.

In *Gouverneur v. National Ice Co.* 184 N. Y. 355, 18 L. R. A. 695, it seems to be assumed that the water might have been severed from the upland by proper calls in the conveyance.

In *Palmer v. Farrell*, 129 Pa. 162, it is assumed that the rights may be separated from the upland.

In *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, there was a contention that a grant of land did not pass title to the land below low-water mark, but the court, without questioning the fact that a separation of the title could be made at low-water mark, held that by the terms of the deed the whole title of the grantor had passed.

In *Jones v. Janney*, 8 Watts & S. 443, 42 Am. Dec. 209, it is said that flats pass by a deed of upland, "if not expressly excluded."

And that case was followed in *Risdon v. Philadelphia*, 18 W. N. C. 73.

Adverse possession.

Title to flats may be acquired by adverse possession. *Boston v. Richardson*, 105 Mass. 353; *Treat v. Chipman*, 35 Me. 84; *Clancey v. Houdlette*, 39 Me. 451.

Partition.

A landowner cannot dedicate the banks of a river to public use, and reserve to himself the interest in the river bed and landing. *Godfrey v. Alton*, 12 Ill. 37, 52 Am. Dec. 476.

Method of separation.

If the water is non-navigable a conveyance by metes and bounds which excludes the water will not pass title to it. *Lembeck v. Nye*, 47 Ohio St. 336, 8 L. R. A. 578.

The owner of city lots bordering on a water-course may sell the lots separate from the water right, but the intention to do so must be plain, and it will not be sufficient merely to plat the property with a line running along the shore. *Watson v. Peters*, 26 Mich. 508.

When the trustee of a town site advertises and sells a lot bounded on a stream, and on the same day, and as part of the same sale, he sells the bed of the stream to another person, an intention is shown to separate the ownership of the bed of the stream from that of the land, and it will overcome the presumption that a deed to a lot on a stream carries the title to the center. *Denver v. Pearce*, 13 Colo. 383.

H. P. F.

Whittaker, William Herbert, Frank Perfect, and Wellington Gregory agreed with M. W. McCracken (for A. S. Mitchell and others) by an instrument in writing under their respective hands and seals, but not acknowledged, and recorded in the register's office of Douglas county on the 9th day of July, 1856, substantially, that the parties first named should proceed to the capital of Wisconsin, and purchase school section 16, and, upon receiving title thereto from the state, should convey to McCracken or Mitchell, or such others as McCracken might request, a full, equal, undivided one half of the section, in fee simple. McCracken therein agreed to convey to one James A. Markland an undivided sixteenth of an undivided one half, to be conveyed to him upon payment within one year from that date by Markland of a one-sixteenth part of the expenses incurred by McCracken. On August 17, 1855, Mitchell agreed with McCracken, by instrument under their respective hands and seals (witnessed by Whittaker, but not acknowledged by the parties thereto, and recorded July 24, 1856), upon payment by McCracken within a year of an amount equal to one half of the sums paid in that time by Mitchell, to convey to McCracken an undivided half of the undivided half of the section. By these arrangements the title to the section was designed to be vested as follows:

A. S. Mitchell, an undivided $\frac{1}{2}$	130.70 acres
M. W. McCracken, an undivided $\frac{1}{2}$	130.70 "
Herbert, an undivided $\frac{1}{4}$	65.35 "
Perfect, an undivided $\frac{1}{4}$	65.35 "
Whittaker, an undivided $\frac{1}{4}$	65.35 "
Gregory, an undivided $\frac{1}{4}$	65.35 "

Total 522.80 acres

The undivided quarters owned by Mitchell and McCracken were subject to the right of Markland to an undivided one thirty-second. December 7, 1855, Herbert and wife executed a power of attorney to Whittaker and Perfect, authorizing them to convey, in whole or in separate parcels, "a certain tract of land, with the appurtenances, whereof we are seised in fee," described as follows: "The undivided one fourth of the school section in township 49, of range fourteen (14) west." On June 2, 1856, the four pre-emptors executed to Joseph G. Wilson a bond conditioned to convey an undivided one-eighth part of the section when the title should become perfected in them. This instrument was executed on the part of Herbert by his attorneys in fact, and recorded on the 2d day of June, 1856. On June 18, 1856, the state of Wisconsin, by its governor and secretary of state, issued patents for the land in question, as follows: To Herbert, for the northeast fractional quarter of section 16, containing 130.35 acres, to Perfect, the northwest fractional quarter of section 16, containing 86.50 acres; to Gregory, the southwest fractional quarter of section 16, containing 146.05 acres; to Whittaker, the southeast quarter of section 16, containing 160 acres. It would appear that these patents were irregular or invalid because not executed by the commissioners of school and university lands. To cure the error, proper patents executed by the latter officers were issued November 26, 1861, 40 L. R. A.

to the same parties, and for the quarter sections as stated. On July 7, 1856, Perfect, Whittaker, Gregory, and Herbert (the deeds of the latter being executed by Whittaker and Perfect, his attorneys in fact) executed to Mitchell, each, two deeds, which conveyed to him the quarter sections by them respectively entered, thus vesting the entire legal title to the section in Mitchell. At the same time, Mitchell conveyed to Perfect, Gregory, Herbert, and Whittaker, jointly, the undivided half of section 16, the deed reciting, "The intention of this deed being to convey to each of said four parties of the second part, Frederick J. Whittaker, Frank Perfect, Wellington Gregory, and William Herbert, the undivided one-fourth part of said undivided half of said section hereby conveyed." By these deeds the title of the section was vested, or supposed to be vested, an undivided one half in Mitchell, and an undivided one eighth in each of the four pre-emptors. On July 8, 1856, Herbert deeded to Mitchell "all of his right, title, and interest in section 16, being the undivided one-fourth part of the undivided one half of said section." This deed was not recorded until July 15, 1856, and was executed by Herbert in person. On July 9, 1856, Herbert, by his attorneys in fact, executed to James A. Markland an undivided one thirty-second part of the section. This deed was recorded the same day. On that day Whittaker, Gregory, Perfect, and Herbert (by his attorneys, Whittaker and Perfect) deeded to Joseph G. Wilson an undivided one-sixteenth of the section. This deed was also recorded on that day. If the two deeds named take precedence of the deed from Herbert to Mitchell, the latter would own the following interests in the section: An undivided one half under deeds from all the pre-emptors, 261.40 acres; under deed from Herbert, 40.84 acres; total, 302.24 acres. Mitchell deeded, July 7, 1856, to Joseph G. Wilson, an undivided one thirty-second; on May 4, 1857, to Edmund H. Taylor, Jr., "an undivided 57 acres" of the section; on February 13, 1858, to M. W. McCracken, "the undivided fourth part of section 16 minus 8 acres, and supposed to contain 122.70 acres, more or less, and situated on the bay of St. Louis, in the county aforesaid." This deed purported to be executed and to be received in abrogation of any other deed of land in that section made by Mitchell to McCracken, and in discharge of all bonds given by Mitchell to convey land in that section. On February 26, 1861, Mitchell conveyed to certain trustees for Mary B. Mitchell, his wife, and her four children, 114.86 acres, undivided, in section 16, and afterwards on February 19, 1874 (his former wife having died, and he having thereafter intermarried with Nellie B. Mitchell, who joined in the deed), conveyed to certain trustees in trust for the children of Mary B. Mitchell "an undivided interest, amounting to 114.86 acres," in the section. Mitchell died on May 1, 1882, and his heirs and the trustees under the trust deed in December, 1882, executed conveyances to John C. Spooner of 106.21 acres, undivided. Upon the assumption that Mitchell acquired from Herbert 40.84 acres, making, with the previous conveyance to him by the pre-emptors, a total of 302.24

acres owned by him, he would seem to have conveyed to his trustees 8.15 acres more than he owned.

The appellee the Land & River Improvement Company acquired the title under these several owners to the 522.80 acres, assuming the validity of the conveyances by Herbert, through his attorneys in fact, to Markland and to Wilson. Anderson Gratz as trustee and the other appellants represent the interest, if any, existing in Mitchell, his children or heirs, remaining undisposed of. This property remained vacant until the year 1884, and is now incorporated within the limits of the city of Superior. From erosion by the waters of the river or bay of St. Louis, the acreage of the upland is now reduced to 424.98 acres. On April 4, 1887, under a statute of the state of Wisconsin, the commissioners of Douglas county established a dock line in front of this property, which was approved by the United States War Department December 5, 1894. The east and south boundary lines of section 16, prolonged to meet this dock line, would include an area of 887.66 acres. It was stipulated as a fact, subject to objection to its materiality, that neither Mitchell nor any of his children supposed that the section in controversy contained more than 522.80 acres, as stated in the government survey, until about the year 1890, when the surviving children were advised by their counsel that the section extended to the thread of the current of the St. Louis river, bounding the section on the northwest. In November, 1890, the present appellants brought ejectment in the circuit court of the state of Wisconsin for the county of Douglas against the present appellees to recover an undivided $\frac{1}{4}$ of the section, which suit was removed to the circuit court of the United States for the western district of Wisconsin. Thereafter, in the year 1892, the appellee the Land & River Improvement Company filed its bill in the latter court to restrain the proceedings in the action at law, and to quiet the title to the section; setting forth at length the history of the devolution of the title, and praying that its title and possession of the premises might be quieted in the complainant by decree of the court, and that the parties defendant to the bill asserting any title or claim to the lands in question may be decreed to release the same to the complainant therein. To this bill the present appellants duly answered, setting forth their claim of title, and they also filed their cross bill, asking that they be decreed to be the owners in common of the undivided $\frac{1}{4}$ of the section; that all instruments of conveyance specifying undivided acres of the section shall be equivalent only to a conveyance of an undivided interest, of which the numerator shall be the specified number of acres in the deed, and the denominator the entire acreage of the section, whether upland or overlaid with water; and that their title be quieted as against the claim of all the defendants to the cross bill. This cross bill was duly answered, and a replication was filed. And at the hearing a decree was rendered in behalf of the original complainant, the Land & River Improvement Company, the appellee here, quieting and confirming its title to the section, enjoining the prosecution of the action in eject-

ment, and decreeing that the appellants have no right, title, or interest in or to any of the land, privileges, appurtenances, or water rights, or any right in the bed of any stream or streams adjoining the section.

Messrs. I. M. Earle and Henry S. Wilcox, for appellants:

A power of attorney to sell specific real estate can confer no original authority to sell real estate not described therein.

Rossiter v. Rossiter, 8 Wend. 494, 24 Am. Dec. 62; *Sandford v. Handy*, 23 Wend. 260; *Gilbert v. Howe*, 45 Minn. 121; *Dodge v. Hopkins*, 14 Wis. 631; *Penfold v. Warner*, 96 Mich. 179.

Parol evidence is not admissible to enlarge the powers conferred.

Mechem, Agency, § 801; 18 Am. & Eng. Enc. Law, p. 871.

The conveyance made to Markland by the attorneys in fact of Herbert and wife was void because Herbert and wife did not own the interest sought to be conveyed at the time of the conveyance, and the deed was not authorized by the power of attorney, and was never subsequently ratified, and the power had already been exhausted by a previous exercise.

Mechem, Agency, § 201.

When the object of the agency is accomplished by other means the agent's authority is terminated.

Mechem, Agency, §§ 202, 223, 225; *Ahern v. Baker*, 34 Minn. 98; 1 Am. & Eng. Enc. Law, p. 444; *Walker v. Denison*, 86 Ill. 142; *Gilbert v. Holmes*, 64 Ill. 548; *Torre v. Thiele*, 25 La. Ann. 418; *Simonton v. First Nat. Bank*, 24 Minn. 216; *Roue v. Rand*, 111 Ind. 206.

No notice is necessary to terminate a special agency.

Ahern v. Baker, 34 Minn. 98; *Mechem, Agency*, § 225; *Strachan v. Muzlow*, 24 Wis. 21; *Fellows v. Hartford & N. Y. S. B. Co.* 38 Conn. 197; *Wharton, Agency*, § 111; *Parsons, Contr.* § 78, 7th ed. 74.

Leaving out the question of agency, to prevail over a prior unrecorded deed, according to the rule in Wisconsin, the burden is on complainant to show Markland a purchaser in good faith.

Lampe v. Kennedy, 56 Wis. 249; *Prickett v. Muck*, 74 Wis. 199; *Boone v. Chiles*, 10 Pet. 211, 9 L. ed. 400; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1068; *Sillyman v. King*, 86 Iowa, 207.

Nor can the payment of a consideration be proved by recitals in the deed except as between the parties thereto.

Hogdon v. Green, 56 Iowa, 733; *Rush v. Mitchell*, 71 Iowa, 333; *Shotwell v. Harrison*, 22 Mich. 410; *Williams v. Shelly*, 37 N. Y. 375.

The undivided acre deeds only convey the number of acres designated therein, and should not be extended to embrace more by construction, and parol evidence is not admissible for that purpose.

United States v. Fosant, 20 How. 413, 15 L. ed. 944; *Union Stock Yards & T. Co. v. Western Land & C. Co.* 18 U. S. App. 483, 59 Fed. Rep. 49, 7 C. C. A. 660; *Howe v. Barker, Johnson*, N. Z. (S. C.) 506; *Locke v. Whiting*, 10

Pick. 279; *Child v. Wells*, 18 Pick. 121; *Butler v. Gale*, 27 Vt. 739; *Pride v. Lunt*, 19 Me. 115; *Snodgrass v. Ward*, 3 Hayw. (Tenn.) 40; *Clarke v. Lancaster*, 36 Md. 196, 11 Am. Rep. 486; *Palmer v. Albee*, 50 Iowa, 429; *Thayer v. Finton*, 108 N. Y. 394; *Coleman v. Manhattan Beach Improv. Co.* 94 N. Y. 229; *Drew v. Swift*, 46 N. Y. 204; *Kirkland v. Way*, 3 Rich. L. 4, 45 Am. Dec. 752; 3 Washb. Real Prop. 5th ed. § 429; Sugden, Vendors, 220; Starkie, Ev. 10th ed. 698; *Clifton v. Walmsley*, 5 T. R. 564; *Elofrson v. Lindsay*, 90 Wis. 203; *Blow v. Vaughan*, 105 N. C. 198; *Cassidy v. Charles-town Five Cents Sav. Bank*, 149 Mass. 325.

Mitchell did not know that he owned land under the St. Louis river at the time he made the conveyances, and if he had conveyed more than he intended to from ignorance he would have been entitled to relief in equity.

15 Am. & Eng. Enc. Law, pp. 639, 640, and cases cited; 2 Pom. Eq. Jur. § 849; *Fly v. Brooks*, 64 Ind. 50; *Irick v. Fulton*, 3 Gratt. 193.

The deeds could not be reformed without showing a material mistake by most clear and satisfactory evidence.

Newton v. Holley, 6 Wis. 592.

The land under water did not pass as appurtenant to that on the shore.

Harris v. Elliott, 10 Pet. 53, 9 L. ed. 344; *Jackson, Yates, v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Webber v. Eastern R. Co.* 2 Met. 151; *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575; *Child v. Starr*, 4 Hill, 369; Angell, Highways, § 814; *Re Popple & B.'s Contract*, 25 Week. Rep. 248; *Shands v. Trip-let*, 5 Rich. Eq. 76.

Each state has the right to deal for itself with the land underlying the waters within its borders.

Weber v. State Harbor Comrs. 85 U. S. 57-65, 21 L. ed. 801, 802; *Hoboken v. Pennsylvania R. Co.* 124 U. S. 659, 31 L. ed. 543; *St. Louis v. Ruta*, 138 U. S. 226, 34 L. ed. 941; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 221.

Under the Wisconsin law the patent to § 16 carried the legal title of the bed of the stream to mid-channel.

Jones v. Pettibone, 2 Wis. 308; *Walker v. Shepardon*, 4 Wis. 486, 65 Am. Dec. 324; *Olsen v. Merrill*, 42 Wis. 212; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642; *Allen v. Weber*, 80 Wis. 531, 14 L. R. A. 861.

The supreme court of Minnesota has adopted the same rule.

Müller v. Mendenhall, 43 Minn. 95, 8 L. R. A. 89; *Gilbert v. Eldridge*, 47 Minn. 210, 13 L. R. A. 411.

The undivided acre deeds are void for uncertainty under the Wisconsin rule.

Johnson v. Ashland Lumber Co. 52 Wis. 458; *Moulton v. Egery*, 75 Me. 487; *Yandell v. Pugh*, 53 Miss. 296; *Plenny v. Ferrill* (Miss.) 11 So. 6.

The grant of a given quantity of land, a parcel of a tract, if valid, makes the grantee a tenant in common in the proportion that that parcel granted sustains to the entire tract.

Schencks v. Envoy, 24 Cal. 110; *Smith v. Crawford*, 81 Ill. 295; *Battel v. Smith*, 14 Gray, 497; *Freeman, Coten*. § 96.

The undivided acre tax deeds are invalid for 40 L. R. A.

uncertainty, and the statute of limitations cannot make them effective.

Pearce v. Perkins, 70 Miss. 276; *Lander v. Bromley*, 79 Wis. 372; *Griffith v. Utley*, 76 Iowa, 292; *Ellsworth v. Nelson*, 81 Iowa, 57; *Smith v. Blackiston*, 82 Iowa, 240; *Wofford v. McKinna*, 23 Tex. 45; *Morgan v. Smith*, 70 Tex. 637; *Tram Lumber Co. v. Hancock*, 70 Tex. 312; *Yandell v. Pugh*, 53 Miss. 296; *Moulton v. Egery*, 75 Me. 487; *Shackelford v. Bailey*, 35 Ill. 387; *Roberts v. Deeds*, 57 Iowa, 323; *Lyon County Comrs. v. Goddard*, 22 Kan. 889; *Head v. James*, 13 Wis. 741; *Johnson v. Ashland Lumber Co.* 52 Wis. 458; *Campbell v. Packard*, 61 Wis. 88; *Marz v. Hanthorn*, 148 U. S. 172, 37 L. ed. 410.

Ordinarily in the granting of injunction to restrain an ejectment proceeding the complainant is required to confess judgment in the ejectment proceedings.

Turner v. American Baptist Missionary Union, 5 McLean, 349; *Mathews v. Douglass*, 1 Cooke (Tenn.) 186; *Trousdale v. Maxwell*, 6 Lea, 161; *Henry v. Tupper*, 27 Vt. 518; 10 Am. & Eng. Enc. Law, p. 891.

A court of equity will not interfere with a suit at law where there is a legal defense.

High, Inj. 96; *Haggood v. Hewitt*, 119 U. S. 226, 30 L. ed. 869; *Ham v. Schuyler*, 2 Johns. Ch. 140; *Carroll v. Sand*, 10 Paige, 298; *Johnson v. McArthur*, 64 N. C. 675.

On rehearing.

Hoyt v. Jones, 31 Wis. 889, when construed in the light of the facts actually before the court and actually decided, does not support the court's views.

Prickett v. Muck, 74 Wis. 199; *Lampe v. Kennedy*, 56 Wis. 249.

Instead of requiring the plaintiff to sustain the allegations of his petition, the opinion requires the defendant to prove that they are not true, a position contrary to the maxims of pleading and the rules of evidence.

Prickett v. Muck, 74 Wis. 199; *Boone v. Chiles*, 10 Pet. 211, 9 L. ed. 400.

In construing a statute a prospective and not retrospective construction is preferred.

Warhung v. Hunt, 47 N. J. L. 256.

A statute will not be given a retroactive effect unless such is the unequivocal or unavoidable implication of its words.

McGeehan v. Burke, 87 La. Ann. 156; *State v. Littlefield*, 93 N. C. 614; *State v. Atwood*, 11 Wis. 423; *United States v. Starr*, Hempst. 469.

Your honors erroneously resorted to extraneous evidence to construe the undivided acre deeds.

United States v. Fossat, 20 How. 413, 15 L. ed. 944; *Hove v. Barker*, *Johnson*, N. Z. (S. C.) 506; *Locke v. Whiting*, 10 Pick. 279; *Child v. Wells*, 18 Pick. 121; *Clarke v. Lancaster*, 36 Md. 196, 11 Am. Rep. 486; *Palmer v. Albee*, 50 Iowa, 429; *Thayer v. Finton*, 108 N. Y. 394; *Drew v. Swift*, 46 N. Y. 204; 3 Washb. Real Prop. 5th ed. p. 429; Sugden, Vendors, p. 220; Starkie, Ev. 10th ed. p. 698.

Land under streams is not a mere easement, it is land bestowing upon the owner all it contains from the center of the earth to the zenith, subject only to the easement in the public. It is never allowed to pass as an appurtenance.

Jackson, Yates, v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; *Webber v. Eastern R. Co.* 2 Met. 151; *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575; *Child v. Starr*, 4 Hill, 369; *Angell, Highways*, § 314; *Re Popple & B.'s Contract*, 25 Week. Rep. 248; *Shands v. Triplet*, 5 Rich. Eq. 76.

Messrs. John C. Spooner and A. L. Sanborn, for appellees:

The owner of land bordering upon a navigable stream owns to the center of the stream by a conclusive presumption of law.

Norcross v. Griffiths, 65 Wis. 599, 56 Am. Rep. 642; *Kenyon v. Knipe*, 46 Fed. Rep. 309; *Illinois C. R. Co. v. Illinois*, 146 U. S. 887, 485, 38 L. ed. 1018, 1035; *Wisconsin River Improv. Co. v. Lyons*, 30 Wis. 61; *St. Paul & P. R. Co. v. Schurmeier*, 7 Wall. 272, 19 L. ed. 74.

When Mitchell conveyed the undivided 57 acres in "section 16" he referred to the section 16 of the government survey, and could only mean to convey 57 acres out of the 522.80 acres laid down as section 16 on the official plat.

Schenk v. Evey, 24 Cal. 110; *Jackson, Garnsey, v. Livingston*, 7 Wend. 136; *Corbin v. Jackson, Garnsey*, 14 Wend. 619, 28 Am. Dec. 550; *Lick v. O'Donnell*, 3 Cal. 68, 58 Am. Dec. 388; *Gibbs v. Swift*, 12 Cush. 393; *Sheafe v. Wait*, 30 Vt. 735; *Freeman, Coten*, § 96, citing cases above referred to; *Smith v. Crawford*, 81 Ill. 296; *Small v. Jenkins*, 16 Gray, 155; *Battel v. Smith*, 14 Gray, 497; *Buck v. Squiers*, 22 Vt. 484.

While the ownership of land in the bed of navigable waters is in the riparian proprietor, in the technical sense, yet this ownership is quite different, legally, from ownership of the land above high-water mark. A man can hardly be said to be the owner of land from which he may, without the slightest compensation, be wholly excluded.

Cohn v. Wausau Boom Co. 47 Wis. 314.

Attorneys in fact have no right to give away their principal's land.

Campbell v. Campbell, 57 Wis. 288; *Meade v. Brothers*, 28 Wis. 689.

The nine deeds of July 7, 1856, from the pre-emptors to Mitchell, and from Mitchell back to them, are all to be read together, as parts of the same transaction, substantially leaving the title to one half of the section in the four pre-emptors, as it had been before the deeds were made.

Cornell v. Todd, 2 Denio, 180; *Norton v. Kearney*, 10 Wis. 444; *White v. Cotzhausen*, 129 U. S. 829, 32 L. ed. 677; *Winnor v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257; *Robbins v. Webb*, 68 Ala. 393; *Eaton v. Troubridge*, 38 Mich. 455; *Lord Cromwell's Case*, 2 Coke, 69; *Harmond v. Richards*, 10 Hare, 81; *Thompson v. Webster*, 4 De G. & J. 604; *Hopgood v. Ernest*, 8 De G. J. & S. 116; *Furrowes v. Farmer*, 2 Rolle, Rep. 245; *Thurman v. Cooper*, 2 Rolle, Rep. 23; *Havergill v. Hare*, Cro. Jac. 510; *Addison v. Otway*, 2 Mod. 283; *Elphinstone, Deeds*, 7; *Holladay v. Land & River Improv. Co.* 18 U. S. App. 308, 57 Fed. Rep. 774, 6 C. C. A. 560.

It is presumed that Markland and Wilson had no notice of the prior deed to Mitchell, and that they are within the protection of the recording act.

Lampe v. Kennedy, 56 Wis. 249; **Hoyt v. 40 L. R. A.**

Jones, 31 Wis. 389; *Cutler v. James*, 64 Wis. 173, 54 Am. Rep. 603; *Boggs v. Varnor*, 6 Watts & S. 474; 2 White & Tudor, Lead. Cas. in Eq. 228, 224.

If it were shown affirmatively that Mitchell searched the record, exercising ordinary care, and had no notice of the agreements or deeds to Markland and Wilson, the form of his deed from Herbert would not prevent him from being a purchaser for value without notice.

Moelle v. Sherwood, 148 U. S. 21, 37 L. ed. 850.

Such a deed, however, purports to convey only such estate as the grantor actually has, as between the parties, and unless the grantee first records it.

Hanrick v. Patrick, 119 U. S. 156, 175, 30 L. ed. 396, 406.

On rehearing.

The purchaser with notice from a grantor without notice is protected by the recording act.

Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; *Wade, Notice*, 2d ed. § 62.

A most important reason why this case is not considered as pending when the act of 1891 took effect is, that under no circumstances could those agreements have been offered in evidence in the ejectment suit.

Johnson v. Christian, 128 U. S. 374, 32 L. ed. 412; *Langdon v. Sherwood*, 124 U. S. 74, 31 L. ed. 344.

Mr. Alfred D. Eddy for Standard Oil Co., appellee.

Jenkins, Circuit Judge, delivered the opinion of the court:

It is urged that the court should not consider the record of the unacknowledged agreements of the parties to this title. It is enacted by chapter 288 of the Laws of Wisconsin of 1891, published April 24, 1891, that all agreements relating to sales and conveyances of land, or of any interest therein, which have not been acknowledged but which shall have been recorded in the proper register's office for twenty years, may be proved and admitted in evidence, by the production of the record of a duly certified copy, with the same effect as if such instrument had been properly acknowledged. The act contains, however, a proviso that its provisions should not affect any pending suit or proceeding. This bill was filed on December 15, 1892—nearly twenty months after the publication of the act. It is true that the action in ejectment was instituted in November, 1890, and prior to the act, but that action and the question of competent evidence upon the trial of that action are not before us. The bill here is one to quiet the title, the restraining of the prosecution of the action at law being merely incidental relief to effectuate the decree in this suit. The act is manifestly applicable here, however ineffectual it might prove to sanction the introduction in evidence of the recorded but unacknowledged agreements upon the trial of the suit in ejectment. We think these instruments are properly before us for consideration, under the provisions of the statute in question.

It is clear that the parties contemplated that the four pre-emptors should obtain the title to section 16 as tenants in common,—each to

own an undivided one-fourth. All the agreements speak thus; but when it came to the entry of the land, either because of the custom of the land office of the state, or through error, the title was taken to each quarter section in severalty. Each pre-emptor then conveyed to Mitchell the quarter section entered by him, and Mitchell at the same time conveyed to the four pre-emptors an undivided one half of the whole, thus placing the title as originally designed. The power of attorney from Herbert to Whittaker and Perfect under date of December 7, 1855, before the legal title was obtained, authorizes a conveyance of a certain tract of land, whereof Herbert was seised in fee, described as the one undivided one-fourth of the section, and was clearly made in view of the agreement of the parties to obtain undivided interests in the section. By the subsequent deeds *inter partes* the title was placed as originally contemplated. We cannot, therefore, doubt that the power of attorney was effectual to authorize a conveyance of the undivided interest of Herbert. Such was the practical construction placed upon the instrument by all the parties, and Herbert, by his subsequent deed, sanctioned such construction of it. We cannot at this late day give to the instrument the strict construction contended for, which runs counter to that placed upon it by those interested, and which would be effectual to oppose the clear intent of the parties, and to divest titles acquired in good faith under it.

We proceed to inquire with respect to the validity of the deeds to Wilson and to Markland under this power of attorney. It is objected to their validity that the execution by Herbert to Mitchell of the deed of July 8, 1856, of all his interest in section 16 accomplished the object of the agency created by the power of attorney, terminated the authority of the agents, and that notice of such termination was not essential. The objection cannot be sustained. The power of attorney was recorded, giving notice to the world of the authority of the agents. The law requires that the termination of that authority, to be effective against purchasers in good faith from the attorney, should be likewise recorded. It may be conceded that the conveyance by Herbert, in a sense, terminated the agency, because the subject-matter upon which the agency operated was disposed of by his deed; but, the deed not having been recorded, the termination of the agency was not effective against those dealing in good faith with the agents, for without notice of revocation the parties were justified in acting upon the presumption of the continuance of the agency. *Hatch v. Coddington*, 95 U. S. 48, 24 L. ed. 339; *Southern L. Ins. Co. v. McCuin*, 96 U. S. 84, 24 L. ed. 653; *Johnson v. Christian*, 128 U. S. 374, 381, 32 L. ed. 412, 414.

It is further objected that the deed from Herbert to Mitchell, being prior in point of time, although subsequent in point of record, was effectual to pass the title of the premises, and was valid against the whole world, except bona fide purchasers for value, without notice, and that the burden of proof with respect to the bona fides of the deeds subsequent in date, but prior of record, is cast upon those claim-

ing under them. This presents a question not altogether without difficulty, and in respect to which the authorities are not wholly at agreement. *Jackson, Rounds, v. M'Cheaney*, 7 Cow. 360, 17 Am. Dec. 521; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Shotwell v. Harrison*, 22 Mich. 410; *Hoyt v. Jones*, 31 Wis. 389, 404; *Lampe v. Kennedy*, 56 Wis. 249; *Cutler v. James*, 64 Wis. 173, 179, 54 Am. Rep. 603; *Prickett v. Muck*, 74 Wis. 199, 206. In the state of New York it is ruled that under the recording act the junior purchaser, whose deed is first recorded, is presumptively a bona fide purchaser for a valuable consideration, without notice, and that the burden of proof to the contrary rests upon the senior purchaser, whose deed has not been recorded. In Michigan it is held that the burden is upon him who claims by virtue of priority of record to show affirmatively the payment of a valuable consideration, but that the burden is upon him claiming under a deed of prior date, but subsequent record, to show that such purchaser under the deed having priority of record had notice of the prior, unrecorded deed. *Shotwell v. Harrison*, 22 Mich. 410. This ruling is founded upon the notion that, the payment of the purchase price being peculiarly within the knowledge of the grantee under the deed having priority of record, the law would not impose the burden of proving the negative fact upon the opposite party. In this case there was a very able and strong dissent by Campbell, Ch. J., to the effect that there is no ground for any such distinction, and that the burden rests upon the party claiming under the unrecorded deed. In *Hoyt v. Jones*, 31 Wis. 389, 404, the supreme court of Wisconsin for the first time considered the subject, and, in an able opinion by Chief Justice Dixon, concurred with the dissenting opinion of Chief Justice Campbell, and with the decisions of the state of New York, and held that the law would not presume fraud or bad faith on the part of the subsequent purchaser, and that the grantee under the unrecorded deed, being a party in the wrong, by omitting to record his deed, must assume the burden of showing a want of consideration or notice in the purchaser under the deed having a priority of record; and this, we think, is the better rule, because, as suggested by Chief Justice Campbell, any other doctrine would render the registry laws of very little value, especially in a case like the present, in which we are dealing with transactions of over forty years ago. The witnesses to the transaction may have died, or may have become inaccessible. If the prior record deed was fraudulent, Mitchell had ample means to protect his title by resorting to the courts at a time when the transaction was fresh, and the witnesses to it were living and could be obtained. His delay is that which at this time renders proof difficult, and it seems but just, under such circumstances, that the burden should be cast upon him and those claiming under him, rather than that the law should indulge the presumption that these deeds executed almost simultaneously with Mitchell's were fraudulent. There is no proof here of the time of the delivery of the deed to Mitchell. It was not recorded for a week after its execution. Mitchell and his heirs rely, as they

probably may, upon the presumption of law that it was delivered at its date. But, to effectuate that presumption, it seems unjust that we should indulge the further presumption that the grantees of the recorded deed were guilty of fraud, which is never to be presumed. The authority of *Hoyt v. Jones* is thought to be weakened by the subsequent decisions in the supreme court of Wisconsin. In *Lampe v. Kennedy*, 56 Wis. 249, it was ruled that between the subsequent purchaser, whose deed is first recorded, and one not claiming under the grantee in the prior conveyance, the burden is upon the latter to show notice of the prior conveyance, and want of valuable consideration. No one will dispute the correctness of the rule, but Mr. Justice Lyon, after rightly deciding the point, enlarges in the following language: "Probably, also, in a contest between two grantees of the same grantor (the last deed being of record and the first unrecorded) the *onus* would be upon the junior grantee to show that he purchased in good faith for a valuable consideration."

This observation is purely *obiter*, was made without any reference to the prior decision of the court in *Hoyt v. Jones*, and is not authority. In *Cutler v. James*, 64 Wis. 173, 179, 54 Am. Rep. 603, the point does not appear to have received much consideration, but the opinion indicates that the burden of proof may be shifted from one party to the other, according to the circumstances of the case. There was no direct evidence on the one side or the other with respect to notice of the prior, unrecorded deed, but certain inferences from the facts indicated want of notice; and the court held that the burden was upon the party claiming under the prior, unrecorded deed. There was no reference to the case of *Hoyt v. Jones*. This case supports, rather than questions, the doctrine of *Hoyt v. Jones*. In *Prickett v. Muck*, 74 Wis. 199, 206, the court ruled that, because the defendant was shown to have actual notice of the existence of the will and the death of the testator at the time that he took a conveyance of the property from the grantee in the deed having priority of record, he could not be entitled to the protection of the statute without showing that his grantor was a purchaser in good faith and for a valuable consideration. No reference is made to the case of *Hoyt v. Jones*, except that it is cited approvingly upon another point. The case seems to have turned largely upon a question of pleading, and there is no indication that the court designed to overrule its former decisions. We are satisfied that the rule in *Hoyt v. Jones* is the better rule to work out substantial justice. If the rule, however, were otherwise, there are here certain facts, and inferences which we may properly indulge from the facts, which we think should avail to shift the burden upon the appellants, if it originally rested upon the opposite party. The deed to Mitchell is dated July 8. It was retained from the record until July 15. On July 9 the two deeds were executed by Herbert, by his attorneys, to Wilson and Markland, respectively, and were recorded on the same day. The four pre-emptors had, on the 2d day of June previous, executed to Wilson a bond conditioned to convey to him an undivided one-eighth part of the section

when the title should become perfected in them. This instrument acknowledges the payment of the consideration of \$900, was executed on the part of Herbert by his attorneys in fact, and was recorded on the 2d day of June, 1856. By this instrument Wilson obtained an equitable interest in the land, of which Mitchell had constructive notice by the record at the time of the execution to him by Herbert of the deed dated July 8, 1856. We cannot doubt, moreover, that Mitchell had also actual notice of the equitable title of Wilson, and agreed to assume, and did assume, in part, the obligation of the pre-emptors to convey; for on the 7th day of July, 1856, the day previous to the conveyance by Herbert to him, Mitchell conveyed to Wilson an undivided one-thirty-second part of the section. This conveyance is by the answer asserted to have been in compliance with the undertaking of Herbert on the bond, but the further allegation that it was in full satisfaction of that obligation is not proved, and cannot be assumed, because it was a conveyance of but one-fourth part of the amount agreed to be conveyed. The two conveyances vested in Wilson an undivided three thirty-seconds of the section, whereas by the bond he was entitled to an undivided one-eighth; and the record does not satisfactorily account for the deficiency, unless it be represented in the deed to Markland made in pursuance of some arrangement between the parties. The consideration stated in the various deeds and in the bond lend some countenance to the view that, as between the pre-emptors and Mitchell, one half of the equitable right of Wilson was by agreement imposed upon the undivided half which was conveyed to Mitchell. In this connection the language of the deed by Herbert to Mitchell is not without significance. There is enough, however, to show that Mitchell had both constructive and actual knowledge of the equitable rights of Wilson, and took the title from Herbert subject to them. We perceive, therefore, no reason upon which the conveyance to Wilson under power of attorney can, upon this record, be successfully impeached; and we think, aside from any general rule, that the circumstances cast the burden of proof upon those claiming under the deed prior in date but subsequent of record.

The equities with respect to the deed to Markland are less clear and strong, but we think there is sufficient to impose the burden of proof upon the claimants under the unrecorded deed. There does not appear, it is true, to have been any written agreement by Herbert to convey to Markland; but before the entry of the land there was an agreement by McCracken to convey to Markland an undivided one-thirty-second part of the section, upon payment of a certain proportion of the expense to be incurred. This appeared in the agreement with the original pre-emptors, and it is under this agreement that Mitchell obtained his title. Wilson did not obtain all the land to which he was entitled, and for which he had paid. An undivided one-thirty-second part was retained, which corresponds with the amount agreed to be sold to Markland upon payment by him of his proportionate part of the expenses incurred. The land was entered

at the price of \$1.25 an acre, and Markland was entitled to receive 16.83 acres. The consideration mentioned in the deed from Herbert to him was \$20. We cannot, of course, say that there was an arrangement between Mitchell, Markland, McCracken, and Herbert by which the obligation to convey to Markland was imposed upon Herbert, but the indications point in that direction. Mitchell, in conveying to McCracken the undivided one-fourth of the section, retained 8 acres,—just one half of the acreage to which Markland was entitled,—which would indicate that McCracken and Mitchell each assumed the obligation to convey to Markland one half of the amount to which he was entitled. At this late day it doubtless would be impossible to ascertain with precision just what was agreed between the parties. It is pertinent to observe that down to the time of his death, in 1892, Mitchell claimed to have no remaining interest in the section, and to have conveyed all his interest in trust for his children. This deed, it is true, upon the assumption of the validity of the deeds to Markland and to Wilson, conveyed 8 acres more than he owned; but, if he had claimed those deeds to be void, there would have remained 16.83 acres unconveyed by the trust deed. It is not surprising that transactions of nearly fifty years ago, and with respect to lands of but nominal value, should be obscure and inexact. We think there is enough to show that Mitchell had recognized this deed to Markland to such an extent that the burden of proving that it was not executed for a valuable consideration is imposed upon those claiming under him, even if we are incorrect in the assumption that the burden of proof in the first instance rests upon those claiming under the unrecorded deed. In this view of the case, Mitchell acquired title to 302 acres and a fraction of the land, the title to all of which, by means conveyances, became vested in the Land & River Improvement Company, one of the appellees.

It is urged by the appellants that the deeds to Mitchell, to Taylor, to McCracken, and to the trustees for the benefit of Mitchell's children, and from the latter to Spooner, conveying undivided acres in the section, are void for uncertainty. The contention cannot be sustained. The grantee in such deed acquires an interest in the whole tract as tenant in common, and in the proportion which the number of acres conveyed bears to the whole number of acres in the tract, and such deed entitles the grantee to all the rights and remedies incident to the tenancy in common, Freeman. Coten. & Part. § 96. Thus, in *Gibbs v. Swift*, 12 Cush. 393, 398, the deed conveyed 211 undivided acres out of a tract of 1,878 acres, and the court ruled: "It gave him a share, as tenant in common, of the whole tract, in the proportion which 211 bears to 1,878."

In *Battel v. Smith*, 14 Gray, 497, there were deeds of "2½ acres, undivided, in lot 17;" "3½ acres, more or less, in number 17;" part of "20 acres and 60 rods, in common pasture, lying in common with other proprietors;" and "2½ acres of land" in the southeast division of common pasture, "in lot number 17, and is undivided." The court observed: "By these deeds we think it clear that the grantors

intended to convey an undivided interest in the whole of lot number 17, in the proportion which the number of acres specified and granted by the deed bears to the whole quantity of land contained in that lot. The use of the word 'undivided' and the phrase 'lying in common' show that the interest conveyed was undivided and in common, and not an estate in severalty; and the quantity of land granted is ascertained and fixed with certainty by the grant of a designated aliquot part of the whole land owned in common."

To this effect is *Jewett v. Foster*, 14 Gray, 495.

In *Small v. Jenkins*, 16 Gray, 155, there was a conveyance of 1,750 acres, undivided, out of an estate of 14,000 acres held in common with other persons, no share in which had been set off in severalty. The court said: "Instead of expressing in the deed in express words or terms the part or proportion of their interest which they intended to convey, this was done indirectly, but just as intelligibly and effectually, by a conveyance of a specified number of acres. They conveyed 1,750 acres, undivided; so that, if the whole tract consisted of 14,000 acres, the conveyance was of 1750-14000 parts of it."

See also *Jackson, Garnsey, v. Livingston*, 7 Wend. 136; *Corbin, Jackson, v. Garnsey*, 14 Wend. 619, 28 Am. Dec. 550; *Schenk v. Eddy*, 24 Cal. 110; *Sheafe v. Wait*, 30 Vt. 735.

It is further urged that these undivided acre deeds conveyed only the number of acres designated, and did not grant an interest in the land under water. It is settled that the extent of the title of a riparian owner to the bed of a river is one of local law (*Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 381), and that in the state of Wisconsin the riparian owner takes title to the bed of the river to the thread of the stream (*Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642). It is thereupon insisted for appellants that the conveyance of an undivided number of acres of upland carries with it no title to the bed of the river, that the language of the deed should not be enlarged to include more than the specified number of acres, and that at the most, if the grantee in an undivided acre deed is to be deemed a tenant in common, his interest is to be computed, not with reference to the acreage in the uplands, but with reference to the combined acreage of the upland and the bed of the stream to midchannel. We concur with the supreme court of Massachusetts (*Battel v. Smith*, 14 Gray, 497, 499) that by such conveyances as those in question "the grantors intended to convey an undivided interest in the whole" of the lot, "in the proportion which the number of acres specified and granted by the deed bears to the whole quantity of land contained in that lot." In other words, we think that Mitchell intended to convey to Taylor ⅙, to McCracken ⅙, and that the heirs of Mitchell intended to convey to Spooner ⅙, which, with the ⅙ conveyed by Mitchell to Wilson, would aggregate ⅙, or 302.24 acres, the total of Mitchell's holding. He therefore was correct in his assertion that he had disposed of his entire interest, unless the

undivided acre deeds take no interest in the bed of the stream. We are of opinion that this latter suggestion must be resolved in favor of the appellees. The nature of the title to the bed of a stream or to a highway is peculiar. It is burdened in the one case with the paramount right of navigation, and in the other with the superior right of traffic, and of those uses to which the public may rightfully put a highway, which are so numerous and burdensome that it has been declared that there is no substantial difference between streets in which the legal title is in the private individual and those in which it is in the public, as to the rights of the public therein. *Barney v. Keokuk*, 94 U. S. 824, 24 L. ed. 224; *La Crosse v. Cameron*, 46 U. S. App. 722, 25 C. C. A. 899, 80 Fed. Rep. 264. So that it has come about, as expressed by Judge Redfield in *Buck v. Squiers*, 22 Vt. 484, 495, that "In ninety-nine cases in every hundred the parties, at the time of the conveyance, do not esteem the land covered by the highway of any importance either way; hence they use words naturally descriptive of the prominent idea in their minds at the time, and in so doing define the land which it is expected the party will occupy and improve."

See also Wallace's American Notes to *Dowson v. Payne*, 2 Smith, Lead. Cas. in Eq. 7th Am. ed. 142. In the state of Wisconsin we therefore naturally find that the rule is established that a grant of land bordering upon the highway, one specified boundary of the premises conveyed being the south line of the street upon which the lot abuts, in the absence of other words of exclusion, carries the fee to the center of the street. *Kneeland v. Van Valkenburgh*, 46 Wis. 484, 32 Am. Rep. 719. And in respect to land bounded upon a navigable stream, a conveyance thereof by metes and bounds, without mention of the stream, but

which included the whole of the bank of the stream along the whole length of the part conveyed, was presumed to have been intended to convey, and was held to have conveyed, all the rights of the grantor to the bed of the stream in front of the described land to the middle of the stream, and that such presumption can be rebutted only by an actual reservation in the deed, or by evidence of such circumstances attending the making of the conveyance as clearly show an intention to limit the ground to the exact boundary fixed by the description. *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642. It is there ruled that the owner of the bank is presumed to be the owner of the stream, and that, while the ownership of the bed of the stream may be separated from the ownership of the bank, such intention to overcome the presumption must explicitly appear by the grant. In the light of these authorities, we have no difficulty in reaching the conclusion that the bed of the stream passed with the conveyance of the upland. We have shown that the undivided acre deeds constitute the grantees tenants in common with the other owners in this section. It is clear that the extent of their ownership was in proportion to the whole number of acres within the meander line. We do not overlook the fact that the meander line is not the boundary of the lot, but it was a line within the contemplation of the parties, by which to designate and ascertain the extent of the interest conveyed. There are no words of reservation which exclude the bed of the stream. The presumption must therefore obtain that it passed with the bank, and the evidence is clear that it was designed so to pass.

The decree is affirmed.

Rehearing denied January 3, 1898.

MISSISSIPPI SUPREME COURT.

John ROWZEE *et al.*, *Appts.*,

v.

E. C. PIERCE *et al.*

(.....Miss.....)

1. **An amendment to a bill for an injunction** against the improper use of land dedicated to the public should be allowed to join some of the original donors as plaintiffs, when the bill was filed by other resident citizens.
2. **The erection of a schoolhouse** upon a lot dedicated "only for public use as an ornamental park" is a wrongful use of the property.
3. **An injunction against devoting property** dedicated for an ornamental park to any other use can be granted in favor of the original donors of the property.

NOTE.—As to conveyance on condition for specified purposes, see *Greene v. O'Connor* (R. I.) 19 L. R. A. 282; also *Kilpatrick v. Baltimore* (Md.) 27 L. R. A. 643.

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(March 14, 1898.)

A PPEAL by complainants from a decree of the Chancery Court for Pontotoc County dismissing a suit brought to enjoin the erection of a schoolhouse upon land which had been dedicated for a public park. *Reversed.*

The facts are stated in the opinion.

Mr. J. D. Fontaine for appellants.

Messrs. Blair & Anderson for appellees.

Whitfield, J., delivered the opinion of the court:

The original bill in this case charged that on the 25th day of May, 1854, a deed was executed by the grantors therein to the president and selectmen of the town of Pontotoc and their successors in office to lots Nos. 20

As to action by landowner to protect park, see *Clarke v. Providence* (R. I.) 1 L. R. A. 725.

As to conveyance for specified purpose as creating determinable fee, see *First Universalist Soc. v. Boland* (Mass.) 15 L. R. A. 281.

and 21 in the S. W. $\frac{1}{4}$ of sec. 33, T. 9, R. 3 E., "only for public use as an ornamental park, subject to such regulations as they may make for the purpose of fencing and ornamenting the same, and keeping the same in good order, and preventing nuisances, or anything tending to subvert the before-declared object of the donors of money to purchase the same;" that said dedication was duly consummated by acceptance on the part of the public authorities; that the board of mayor and aldermen of the town of Pontotoc are the successors in office of the said president and selectmen of the said town of Pontotoc; that the said board of mayor and aldermen of the town of Pontotoc declared the said town to be a separate school district; that the school building—the Pontotoc Male Academy—in which said separate school district school was taught, had been, on or about the 28th day of January, 1897, destroyed by fire; that the said board had contracted with one E. C. Pierce to erect another schoolhouse, and that said Pierce, instead of building said schoolhouse upon the site of the burned school building, or on land belonging to said Pontotoc Male Academy, had begun the construction of said building upon said lot No. 20, and was doing this under the direction and with the consent and approbation of said board of mayor and aldermen; that complainants were lotholders within the corporate limits of the town of Pontotoc, without saying, however, whether their lots adjoined the public square or not; that the erection of said schoolhouse building upon said lot was putting it to a use other than that authorized by the terms of said deed of dedication, and was not consistent with or necessary to the principal use for which said dedication was made,—that of an ornamental park only; that the erection of said schoolhouse building upon said lot was a direct and palpable violation of the use for which said lots of land were dedicated; and prayed an injunction against said Pierce and the said board of mayor and aldermen of the town of Pontotoc to restrain them from erecting said building upon said lot, and using said lot for schoolhouse purposes, and to enforce the proper use of said lot according to the terms of the deed dedicating it. This bill was filed on behalf of complainants and other resident citizens of the town. Subsequently, the complainants asked leave to amend their bill by making J. F. Wray and W. J. Rodgers, two of the original donors of the purchase money of the land, parties complainant. The original bill further alleged that the dedication was made subject to "such regulations as the city authorities might make for the purpose of fencing and ornamenting the same, and keeping the same in good order, and preventing nuisances, or anything tending to subvert the before-declared object of the donors of money to purchase the same." The language of the deed is as follows: "To have and to hold the aforesaid lots to the party of the second part and their successors in office forever, but only for public use as an ornamental park, subject to such regulations as they may make for the purpose of fencing and ornamenting the same, and keeping the same in good order, and preventing nuisances, or anything tending to

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subvert the before-declared object of the donors of money to purchase the same." The defendants demurred to the bill upon the grounds: (1) That the complainants failed to show that they would be injured in any way whatever, either as taxpayers, property owners, or citizens of said town, or otherwise, by the building of said schoolhouse, and that they did not show that the construction of said building would be a public injury; (2) that the bill showed that the building of said schoolhouse would not cause any injury special or peculiar to complainants, or any injury other than such as would be common to all the citizens of said town; (3) that the complainants had no right to institute the suit, but that it should be brought by the proper public official on behalf of all the citizens of said town; (4) that the bill showed that said lots had been abandoned for the purposes for which they were dedicated, and that the said town therefore had acquired the right to use them for any other legitimate purpose. Affidavits were taken by both parties. The chancellor disallowed the amendment, sustained the demurrer, dissolved the injunction, and dismissed the bill.

It may be conceded that the preponderance of the testimony showed that the public school building was being erected on one corner of the square upon a part of the ground considerably cut up by gullies, and which the city authorities or Pierce had filled up to make a foundation for the building. The bill in this case is not filed to abate a nuisance, either public or private. The cases of *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378; and *Whitfield v. Rogers*, 26 Miss. 84, 59 Am. Dec. 244, are both inapplicable here. And the case of *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598, is also inapplicable, not being a bill filed on the line of the bill in the case at bar. Neither is this bill filed to enjoin the collection of taxes, or of local charges. Cases of that character are also *mal appropos*. The amendment should have been allowed; and, treating the bill as so amended, it would be one by the original complainants and two of the original donors of the purchase money of the land dedicated to public use as an ornamental park alone against the city authorities and the contractor, to restrain them from devoting the land dedicated to any other use than that named in the dedicating deed, and to secure to the town the very use to which the owners of the property making the dedication declared it should be devoted. It is well settled that such a bill may be filed by such donors, as well as by the city authorities, and against the city authorities, restraining them from devoting the property to an inhibited use, when they themselves violate the trust by seeking to devote the land to any other than the declared use; and many authorities hold it may be maintained by any lotowner in the city. *Church v. Portland (Or.)* 6 L. R. A. 259, and the exhaustive note thereto (18 Or. 73); *Daniel v. Jacoway*, Freem. Ch. (Miss.) 59. In note, at page 260, in 6 L. R. A. it is said, "If the dedicated property be put to a use foreign to that contemplated by the dedication, any property owner may inhibit such use," citing many cases. And at page 262 the same doc-

trine is declared in the conclusion of the note, citing many other authorities. *Warren v. Lyons City*, 22 Iowa, 351; *Van Wert Bd. of Edu. v. Edson*, 18 Ohio St. 221, 98 Am. Dec. 114; 2 Dill. Mun. Corp. 4th ed. § 658, and the authorities in note 1, and § 915. In this last section Mr. Dillon observes: "If the property or funds of such a corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant . . . be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property owners on whom the loss will eventually fall are without effectual remedy." *Carter v. Portland*, 4 Or. 339; *Price v. Thompson*, 48 Mo. 361; *Com. v. Rush*, 14 Pa. 186. In *Carter's Case* it is said that "any lotholder of the city may proceed in equity to enforce the use according to the original dedication," citing numerous authorities. *Briel v. Natchez*, 48 Miss. 439; *Rutherford v. Taylor*, 38 Mo. 315; *Le Clercq v. Gallipolis*, 7 Ohio, pt. 1, p. 217, 28 Am. Dec. 641; note to *State v. Trask* (Vt.) 27 Am. Dec. 569, under the title, "Changing the Use," where Mr. Freeman says: "Where property dedicated is put to a use other than that authorized by the terms of the dedication, then the dedicator or any lotholder of the city may proceed in equity to enforce the proper use," 5 Am. & Eng. Enc. Law, p. 418, note 1, and the authorities.

It is said that the title is absolute in the city authorities. This is a mistake. It is not absolute in the sense that the city had the whole title, legal and equitable, and the right to dispose of the property as an owner in fee simple might; and cases like *Clarke v. Providence*, 16 R. I. 337, 1 L. R. A. 725, where cities had such complete title, and their disposition of property thereunder has been upheld, are not applicable here. This property, according to the said terms of the dedicating deed, is held in trust "for use only as a public, ornamental park." It is specially provided that it might be fenced, and the sole authority which the city had was to regulate the use marked out; not to change it or alter it so as to put it to a used only inconsistent with the one named by the dedicator. It may be true, as said in note 4, p. 417, 5 Am. & Eng. Enc. Law, that the land "might be put to any use consistent with the object of the dedication, and which would better adapt the premises to the particular use," but it is clearly settled by authority that the erection of a schoolhouse building in a public square is not consistent with the use of the lot as an ornamental public square. It is held in *Rutherford v. Taylor*, 38 Mo. 315, that buildings could not be erected in a public square; and in *Edson's Case*, 18 Ohio St. 221, 98 Am. Dec. 114, it is said: "The dedication in this case, as stated in the petition, was 'for school purposes, and on which to erect school-

houses.' Without determining whether, under this dedication, the lots could properly be used for school purposes, other than the erection of schoolhouses thereon, it is enough to say that the dedication is of the land, and not of its value or proceeds." And in the case of *Church v. Portland*, 18 Or. 73, 6 L. R. A. 259, it is held that ground for a public park could not be used for the purposes of erecting thereon a city hall; the court saying: "Using land to erect a public building thereon is not using it for ornamental purposes, however grand or magnificent the structure erected may be. It devotes the land to a useful purpose, but it certainly is not using it for an ornamental one. . . . The city of Portland was no mendicant, nor was it expected to be. It has always been able to buy necessary and suitable grounds upon which to erect its public buildings; and it should do so, and not attempt to encroach upon its public squares, which were clearly intended to be left open and unoccupied for the health, comfort, and recreation of its inhabitants. The argument of the respondent's counsel, that the dedicators intended that the blocks might be ornamented with public buildings, if the city authorities should so determine, if maintained, would be liable to lead to absurd consequences. One set of the city officials might hold to one policy, and another set to a contrary one, and each act lawfully. The city authorities of to-day might determine that the blocks should be ornamented with public buildings, and proceed to erect them at a great expense; which would be entirely consistent with the intention of the dedicators. The city authorities of next year may conclude that the blocks should be ornamented only with walks, rustic seats, trees, grass, flowers, fountains, statues, and mementoes of heroic deeds, and, in order to carry out the latter mode of ornamentation, proceed to tear down the edifices erected by their predecessors; which would be equally consistent with the intention of the dedicators. I do not think that the court would be justified in adopting any such view. The rule in regard to property dedicated for public use, as laid down in 5 Am. & Eng. Enc. Law, pp. 417, 418, is as follows: 'Property dedicated to the public use may be said to be restricted to the use for which it was fairly intended to be dedicated; although this rule is construed to include such uses as are consistent with, or necessary to the principal use. If dedicated property be put to a use foreign to that contemplated by the intention and purpose of the dedication, then not only the dedicator, but any property owner, will have his remedy in equity to enforce the proper use and inhibit an improper one.' . . . That the blocks were intended to remain open plazas, and be beautified and adorned by the hand of art, I do not think there can be any doubt. Spots of that character, especially in large cities, are highly important. They afford healthful and pleasant resorts in the heated season, and are, in fact, the only places where a large class of the community are able to go and enjoy the blessings and comfort of shade and pure air; and any attempt on the part of public officials to appropriate them as a site for public buildings, in which to conduct the economic affairs of a city, under any pretext

whatever, would, as I view it, be a cruel effort to subvert a humane scheme." So, in *Methodist Episcopal Church v. Hoboken*, 38 N. J. L. 13, 97 Am. Dec. at page 698, it is said: "The word 'square' on this plot of ground, indicated a public use, either for purposes of a free passage, or to be ornamented and improved for grounds of pleasure, amusement, recreation, or health. That is the proper and natural meaning of the term, and its ordinary and usual signification." In *Com. v. Rush*, 14 Pa. 186, the same meaning is given the word "square." So that it is clear that the terms of this grant dedicated the ground to use as a public, ornamental park alone, and that the word "park" *ex vi termini* means a place to be kept open and ornamented for public uses such as above indicated. It is also clear that the right to regulate the park under this specific use furnishes no right to change that use. But it is said again that this ground cannot be dedicated to the use of a park better than by erecting this building; that the construction of such a building is, on the doctrine of *cy prés*, appropriating it to the next best use in the nature of an ornamental public park; but the authorities above cited show that no such construction can be indulged on the facts in this case. See, especially, *Van Wert Bd. of Edu. v. Edison*, 18 Ohio St. 226, 98 Am. Dec. 114; *Church v. Portland*, 18 Or. 73, 6 L. R. A. 259; 2 Perry, Tr. § 727; 2 Pom. Eq. Jur. § 1027. In 2 Perry on Trusts, *supra*, it is said: "From this review of the law it appears that the object of all the rules upon this subject is to ascertain and carry out, as nearly as may be, the true intention of the donor. As thus explained, the doctrine of *cy prés* is only a liberal rule of construction to ascertain intention. The intention of the donor is the point steadily aimed at by all courts." Apply these principles here, and the inquiry would be, What was the intention of the donors at the time the dedication was made in 1854? At that time it may well be supposed that this town was prosperous. War had not ruined the town, and destroyed its revenues, and the intention of the dedicators at the time the grant was made was doubtless to keep open this place as a public, ornamental park for the uses indicated in the authorities cited; and it is not for the court, on account of changed conditions, due to civil convulsion, to substitute what the dedicators might now wish to be done for the intention as it existed when the grant was made. It is said also that

this property had been abandoned, and hence the city authorities might do as they pleased with it. This is not the law. If it had been abandoned, then the fee in the property reverted to the original donors, and not to the city. In *Carter v. Portland*, 4 Or. 389, it is said that "the original owner, though he has the naked fee, has no right whatever to interfere with the premises except where the use becomes absolutely impossible, or where the corporate authorities seek to put the premises to some other use than that to which they were originally dedicated." In *Briel v. Natchez*, 48 Miss., at page 438, it is said: "If the city had lost the easement by abandonment and nonuser, Green, or his heirs, would take the property by the original title discharged of the encumbrance of the servitude." In *Van Wert Bd. of Edu. v. Edison*, 18 Ohio St., it is said at page 226, 98 Am. Dec. 114: "Should the sole uses, to which the property has been dedicated, become impossible of execution, the property would revert to the dedicators, or their representatives," citing authorities. It must thus be clear that none of the objections interposed by the demurrer are available as against a bill of this particular nature. It certainly cannot be impossible for the town of Pontotoc to raise funds, with which to make this property a public, ornamental park, as was originally intended. The town may not be able, and it might not be desirable, to incur any great expense towards this end; but surely the expense would be small which would be required to properly keep it in order, and use it as an open, public, ornamental park, devoted to the amusement, recreation, and health of the citizens. Neither can it be necessary that a public school building should be erected in the park. No reason is shown why it might not as well have been erected on the site of the original building. But, however all this may be, it remains true, on principle and on authority, that the original donors dedicating this ground for a public ornamental park alone are entitled in equity to prohibit the city authorities, or anyone in conjunction with them, from devoting it to any other use than such as is clearly consistent with the purpose of the original grant.

Decree reversed, injunction reinstated, and cause remanded, with directions to allow the amendment, and proceed in accordance with this opinion.

MONTANA SUPREME COURT.

Charles SEARS, *Appt.*,
v.
GALLATIN COUNTY, *Respt.*
(.....Mont.....)

A county is not liable for services rendered by members of a sheriff's posse

NOTE.—As to obligation to give personal services to the public gratuitously, see also *State v. Henley* (Tenn.) 39 L. R. A. 126, and note as to such services by witnesses.

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comitatus, in the absence of statutory provision for their compensation.

(February 14, 1898.)

APPEAL by plaintiff from a judgment of the District Court for Gallatin County in favor of defendant in an action brought to recover for services rendered and money expended by him as a member of the sheriff's posse. *Affirmed*.

Statement by **Pigott, J.:**

Plaintiff brought this action to recover judgment for \$25 on account of services rendered and money expended by him as a member of the sheriff's *posse comitatus*. It appeared that the sheriff of Gallatin county attempted to execute a warrant for the apprehension of one Morgan, charged with the commission of a felony in that county. Being unable to take Morgan, who resisted arrest and fled, the sheriff deemed it necessary, and the admission is made that it was necessary, to command plaintiff and certain other citizens of the county to equip themselves, and accompany that officer, and assist him in pursuing and arresting Morgan. The sheriff, in the discharge of his duty, and by virtue of the power vested in him, did so command plaintiff and others. Plaintiff, believing that it was necessary for him to comply with the demand of the sheriff, and that he would be compensated by the county, procured, at his own expense, arms, ammunition, horse, saddle, and other equipment, and then proceeded to search for Morgan, who escaped. While so engaged, plaintiff expended \$10.50 for food. The reasonable value of such services of man and horse was \$14.50. The board of commissioners of Gallatin county disallowed plaintiff's claim. Upon appeal therefrom the district court adjudged that the claim was not a legal charge against the county, and plaintiff appeals to this court.

Mr. W. L. Holloway, for appellant:

Had the sheriff paid the plaintiff, and he, himself, then had sued the county for the \$25, the case would occupy the same position it does now so far as the questions involved are concerned, and would be an exact parallel with the case of—

Lloyd v. Silver Bow County Comrs. 15 Mont. 438.

Section 4286, Political Code, provides, among other things, that accounts against a county for official services for which no specified fees are fixed by law must contain an itemized account of the time actually and necessarily devoted to such services.

The above provision furnishes ample authority to the board of commissioners of Gallatin county, to allow and pay plaintiff's claim.

Yavapai County v. O'Neil (Ariz.) 29 Pac. 430.

Mr. C. B. Nolan, Attorney General, for respondent:

Members of a sheriff's *posse comitatus* are not deputy sheriffs. The number of compensation receiving deputies allowed the sheriff is limited by §§ 4597 and 4603 of the Political Code.

Compensation to members of a sheriff's posse is nowhere made a county charge, either expressly or by implication.

The services rendered by the members of the posse belong to that class of general services which every man owes to the public, and is bound to render for the general as well as his own individual good.

Chapin v. Ferry, 3 Wash. 386, 15 L. R. A. 116; *Randles v. Waukecha County*, 96 Wis. 629; *Kuehn v. Milwaukee*, 92 Wis. 283, and cases cited; *Morin v. Multnomah County*, 18 Or. 163, 40 L. R. A.

Every citizen capable of bearing arms, of every rank, description, and denomination, is bound to yield prompt obedience to the sheriff's command and repair to meet him at any appointed place of rendezvous within the county. This duty of the citizen is absolute. He has no discretion in the matter, and if he neglect or refuse obedience to the command of the sheriff requiring his aid in the suppression of a dangerous riot or other insurrectionary tumult, he may be fined and imprisoned for such contumacy, at the discretion of the court. His obligation to come to the aid of the sheriff is just as imperative as that imposed on the latter to see the community suffer no harm from lawless licentiousness.

Whart. Crim. Pl. & Pr. note to § 17; *Lloyd v. Silver Bow County Comrs.* 15 Mont. 438; *Yavapai County v. O'Neil* (Ariz.) 29 Pac. 430; *State v. Shaw*, 25 N. C. (3 Ired. L.) 20.

Pigott, J., delivered the opinion of the court:

The single question presented in the court below and in this court is whether or not a county is liable for services rendered by members of a sheriff's *posse comitatus*. Section 4381 of the Political Code provides that the sheriff must "arrest and take before the nearest magistrate, for examination, all persons who attempt to commit or have committed a public offense," and that he must "command the aid of as many male inhabitants of his county as he may think necessary in the execution of these duties." Section 1460 of the Penal Code provides: "When a sheriff or other public officer authorized to execute process, finds, or has reason to apprehend, that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he thinks proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting and confining the persons resisting, their aiders and abettors." Section 279 of the Penal Code is as follows: "Every male person above the age of eighteen years who neglects or refuses to join the *posse comitatus*, or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice, is punishable by a fine of not less than \$50 nor more than \$1,000." Section 4286 of the Political Code provides, among other things, that the board of commissioners shall not allow any account for official services for which no specified fees are fixed by law, unless the time actually and necessarily devoted to such services is stated. Section 4681 of the same Code enumerates the county charges other than salaries of officers and fees of witnesses and jurors, and provides that the contingent expenses necessarily incurred for the use and

benefit of the county shall be county charges. The right of appellant to recover depends upon the existence of express or implied authority of statute allowing compensation to members of the *posse comitatus*. No express provision is made by statute for the compensation of such persons; neither is there implied statutory authority warranting the payment of such compensation. Section 4681, *supra*, which provides that the contingent expenses necessarily incurred for the use and benefit of the county shall be county charges, manifestly restricts the liability of the county to such expenses as may be incurred under statutory authority directly conferred or necessarily implied from the powers granted to the county. Section 4286, *supra*, makes provision touching the contents of verified bills for services of officers for which specified fees are not fixed by law. It does not declare that the county shall be liable for any services, official or otherwise. Its effect, for the purpose of this case, is merely to provide that the board of commissioners shall not allow any account for official services chargeable to the county for which no fees are specified by statute, unless the bill therefor contains an itemized statement of the time actually and necessarily devoted to such service. Moreover, members of the sheriff's posse are not officers, nor do they render official services. Clearly, this section fails to raise an implication of liability to appellant.

Appellant insists, however, that under the terms of § 4681, *supra*, he is entitled to prevail. He argues that the section "furnishes ample authority to the board of county commissioners of Gallatin county to allow and pay plaintiff's claim." We are of the opinion that the county is not liable to plaintiff for his services and expenses incurred as a member of the *posse comitatus*. The statutes have imposed upon counties certain duties and expenses, but have not imposed the expense and compensation of members of the *posse comitatus*. "When the statutes impose upon counties or other municipal bodies certain duties and expenses in that behalf, they are bound to assume them, but whatever is not thus imposed is not thus assumed." *Chapin v. Ferry*, 3 Wash. 386, 15 L. R. A. 116. Appellant cannot recover upon the theory of an implied promise by the county to reimburse and compensate him, for the making of such a contract is beyond the power of a county. Again, there was no consideration moving from appellant which can support a promise, express or implied, by the county to reimburse or compensate him. The legislature imposed on appellant the duty of assisting the sheriff in his efforts to apprehend Morgan, and denounced him as guilty of a crime if he refused, and this created a promise from him to discharge that duty; "so that, being under the obligation, he can claim no pay for doing the duty, and any pay given him is a mere gratuity." Bishop, Contr. § 207, and cases there cited. "One who renders service to the state for which there is no compensation provided by statute cannot, as in the case of services rendered to a private person, raise an implied assumption against the state, and for such services he has no legal claim, that is no claim which can be enforced by process of

law." *State v. Baldwin*, 14 S. C. 185. Even an express promise to reward a man for doing that which was his duty without the promise is void for want of consideration. The statutes of Montana with respect to the *posse comitatus* are, in the main, declaratory of the common law. Our attention has not been called to any case holding that the services of a member of the posse may be compensated by the county. The supreme court of Washington, in *Chapin v. Ferry*, 3 Wash. 386, 15 L. R. A. 116, said: "If they were part of the sheriff's posse, we find no authority for making them compensation out of the county treasury. The service of the citizen as a member of a *posse comitatus* is one which is based purely on patriotism and strict duty, and has never, so far as an investigation shows, been a compensated service." While these remarks of the court may not have been necessary to a decision, we are satisfied that they announce the correct rule of law. The state, in consideration of its protection extended, may impose upon its inhabitants the duty of rendering its services, at least in an emergency requiring the apprehension of a criminal, or one charged with the commission of a public offense; and these services are, as is well expressed by the supreme court of Oregon in a case involving the principle here invoked, of the class of general services which every man is "bound to render for the general as well as his own individual good." *Morin v. Multnomah County*, 18 Or. 163. As illustrating the doctrine we announce, and as supporting the reasons upon which it rests, we make these additional citations: *Whart. Crim. Pl. & Pr. note to § 17*,—being the charge to the grand jury by Judge King on the occasion of the Philadelphia riots in 1844. *Randles v. Waukesha County*, 96 Wis. 629; *Kuehn v. Milwaukee*, 92 Wis. 263; *Johnston v. Lewis & Clarke Co.* 2 Mont. 159; *Washoe County v. Humboldt County*, 14 Nev. 123; *Rove v. Yuba County*, 17 Cal. 62; *Lamont v. Solano County*, 49 Cal. 158; *Presby v. Klickitat County*, 5 Wash. 329; *People, Hadley, v. Albany County Supers.* 28 How. Pr. 22; *Anderson v. Jefferson County Comrs.* 25 Ohio St. 13; *Cincinnati, S. & C. R. Co. v. Lee*, 37 Ohio St. 479.

Appellant urges that, if the doctrine laid down in *Lloyd v. Silver Bow County Comrs.* 15 Mont. 433, be followed, he will be entitled to recover. But in the *Lloyd Case* the men for whose services the sheriff paid were employed by him to keep the jail and prisoners. A contract was made between the sheriff as master and the men as servants. They were appointed, not commanded. No duty was incumbent upon them to serve in their several capacities as jailer and death watch when commanded by the sheriff. The sheriff was not authorized to command their services. The only lawful means which the sheriff could exercise was adopted by him, namely, a hiring, with the necessary ingredient of a promise, express or implied, of compensation. The men so hired were entitled to wages or salary under the contract. The sheriff paid these expenses, and recovered from the county on the ground that he had paid the money for the benefit of the county, and at its implied request.

It is further contended that the case of *Yavapai County v. O'Neil* (Ariz.) 29 Pac. 430, is persuasive authority in appellant's favor. Without expressing any opinion on the course of reasoning or the result reached in that case, we think it sufficient to say that the doctrine announced by the court in the Arizona case is not pertinent to the question raised in the case at bar. There the board of supervisors employed the sheriff of Yavapai county to go to Utah for the purpose of subpoenaing persons there resident who were needed as witnesses in a criminal action pending in Arizona, and ordered that he be allowed mileage

therefor. The point decided by the court was that the sheriff acted, not as sheriff, but as a mere messenger, and, if actually employed in that service, he was entitled to compensation. Appellant is not entitled to recover from the county compensation for services rendered, or reimbursement for expenses incurred as a member of the sheriff's posse.

The judgment appealed from will therefore be affirmed, and it is so ordered.

Pemberton, Ch. J., concurs. Hunt, J., not sitting.

NEBRASKA SUPREME COURT.

PHENIX INSURANCE COMPANY OF
BROOKLYN, *Plff. in Err.*,

v.
Fred A. FULLER.

(.....Neb.....)

(February 17, 1898.)

***1. Where no inquiries are made of an insured** as to the character or condition of his title; where he makes no false representation as to the character and condition of his title, relying upon which the insurer is induced to and does insure the property; where the insured has an insurable interest in the property; the insurer accepts and retains the premium; and a loss occurs,—then the insurer cannot escape liability for such loss because of the fact that the insured at the date of the policy was not invested with an absolute and unencumbered title to the insured property, even though the policy provides that it shall be of no validity unless the title of the insured be an unconditional unencumbered one; as in such cases it will be conclusively presumed against the insurer that it intended to and did insure the interest which the insured had in the property, and waived the provision in the policy providing for its invalidity by reason of the imperfect title of the insured.

2. Where a case is tried to the court without a jury, and a general finding made, upon which judgment is rendered, and in addition thereto the court files a written opinion in the case, such opinion is not an essential part of the record of the case when it is brought here for review.

3. The judgment of the district court must stand or fall upon the statutory record of the case; that is, the pleadings, the findings and judgment, and the bill of exceptions made a part of the record.

4. In reviewing such case, this court will conclusively presume that the trial court considered all the competent evidence before it, and decided all the material and necessary issues presented, though from the language of the written opinion the contrary should be made to appear.

*Headnotes by RAGAN, C.

NOTE.—The present case is an unusually strong one in favor of relieving the insured from the strict terms of a condition in the policy, as the policy in question expressly provided that it should be void in case of an encumbrance, "whether inquired about or not."

As to the effect of failing to state facts in the application, see also Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. (C. C. App. 6th C.) 88 L. R. A. 38.

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Greene & Breckenridge, for plaintiff in error:

Where an insurer stipulates in the contract of insurance that it shall not be liable thereon, or that the insurance contract shall be void if, without its knowledge or consent, the insured shall procure additional insurance upon the insured property, and the assured violates such insurance contract by so procuring additional insurance, then the first insurance contract is voidable at the election of the insurer, and such violation thereof is a defense against the insured in a suit upon such first contract, unless it be shown that such violation of the insurance contract in the procuring of the additional insurance was brought about through fraud or mistake, or has been waived by the first insurer.

Hughes v. Insurance Co. of N. A. 40 Neb. 626; *Phenix Ins. Co. v. Lamar*, 106 Ind. 513, 55 Am. Rep. 764; *Barnard v. National F. Ins. Co.* 27 Mo. App. 34; *Continental Ins. Co. v. Hulman*, 92 Ill. 145, 34 Am. Rep. 122; *Zinck v. Phenix Ins. Co.* 60 Iowa, 286; *Keyser v. Hartford F. Ins. Co.* 66 Mich. 664.

Breaches of the conditions of an insurance policy which by its terms make the policy void, render it voidable only at the election of the company, unless it has waived such breaches.

The company has the right to say to its patrons exactly what it says in its policy. The fact that the insured did not read the policy cuts no figure. No case holds that one may plead ignorance of the terms of his policy.

Hankins v. Rockford Ins. Co. 70 Wis. 1; *Ger-*

plication, see also Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. (C. C. App. 6th C.) 88 L. R. A. 38.

For the opinion of the court as part of the record on appeal, see *note* to Pennsylvania [Co. v. Versten (Ill.) 15 L. R. A. 798.

man Ins. Co. v. Heiduk, 80 Neb. 288; *Sanger v. Dunn*, 47 Wis. 620, 32 Am. Rep. 789; *Wilcox v. Continental Ins. Co.* 85 Wis. 193; *Cleaver v. Traders' Ins. Co.* 65 Mich. 527; *Gould v. Dwelling-House Ins. Co.* 90 Mich. 302. Affirmed upon Rehearing, 90 Mich. 308; *Wierengo v. American F. Ins. Co.* 98 Mich. 621.

There is no allegation nor proof in this case of either fraud or mistake.

Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167; *Patterson v. Murphy*, 41 Neb. 818; *Omaha Consol. Vinegar Co. v. Burns*, 44 Neb. 21.

Mr. George W. Shields for defendant in error.

Ragan, C., filed the following opinion:

Fred A. Fuller sued the Phoenix Insurance Company of Brooklyn, New York, in the district court of Douglas county, to recover the value of certain property of his destroyed by fire, which property the insurance company had insured against loss or damage by fire. Fuller had a verdict, and judgment, and the insurance company has filed here a petition in error to review such judgment.

1. The policy contained this provision: "If the interest of the assured in the property be other than an unconditional exclusive ownership, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, or if there be a mortgage or other encumbrance thereon, whether inquired about or not, it must be so notified to the company, and be so expressed in the written part of this policy, otherwise this policy shall be void." At the time of the issuance of the policy in suit the personal property insured was encumbered by a chattel mortgage. The insurer did not notify the company of the existence of this mortgage, and no memorandum of its existence was written in the policy. The insurance company interposed as a defense to the action in the district court the existence of this chattel mortgage upon the insured property; and the first argument here is that the judgment of the district court is contrary to law, because the undisputed evidence shows that such a mortgage existed upon the insured property at the date of the issuance of the policy, and that the insurance company was not notified of the existence of such mortgage, and no memorandum of its existence was written in the policy. The evidence on behalf of the insured tends to show that the agent of the insurance company solicited this insurance. At the time the agent had no actual knowledge of the existence of the chattel mortgage upon the property, but made no inquiries of the insured as to whether the property was encumbered. In fact the subject of an encumbrance upon the property about to be insured was not mentioned by either party, and, while the insured kept silent upon the subject of the encumbrance, he did not do so with any sinister motive. In other words, the subject of the encumbrance upon the property was not mentioned, because it seems not to have been thought of either by

the insured or the insurer. The premium for the insurance was paid by the insured, and accepted and retained by the insurer. The evidence further shows that the value of the property at the date of its insurance exceeded the encumbrance thereon, and at the date of the destruction of the property by fire the encumbrance had been so reduced that the property destroyed exceeded in value both the insurance and the encumbrance thereon. In *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, it was held that where the insured was not questioned as to encumbrances on his property, and did not intentionally conceal the existence of an encumbrance, and did not keep silent in regard to the encumbrance from any sinister motive, the existence of a mortgage upon the property did not invalidate the policy. And in *German Ins. & Sav. Inst. v. Kline*, 44 Neb. 395, it was held that where the application for insurance is oral, and no inquiry made as to the condition of the title of the property, the insured in fact had an insurable interest in the property, and the premium paid and accepted and retained, the insurance company would be conclusively presumed to have insured the insurable interest which the owner had in the property, and to have waived the provision in the policy providing for its forfeiture by reason of the existence of an encumbrance upon the property. These cases control the case at bar.

2. This case was tried to the court without a jury, and the court found generally in favor of the insured, and against the insurance company, and entered an ordinary money judgment on such finding. But the learned district judge also wrote an opinion in the case, and in this opinion he states that he did not deem it necessary to pass upon the merits of the defense just considered, and reserved the question presented by that defense.

A second argument here is that the judgment must be reversed because the only issue in the case has not been passed upon or decided by the district court. But this argument assumes that the opinion of the district judge is an essential part of the record of the case brought here, but it is not. In reviewing a case brought here either on error or appeal, while this court is always pleased to have the benefit of the written opinion of the trial judge, still the judgment of the district court must stand or fall upon the statutory record of the case,—that is, the pleadings, the findings, and judgment of the district court, and the bill of exceptions made a part of the record; and where general findings are made by a court, and a judgment pronounced thereon, we must conclusively presume that the trial court considered all the competent evidence before it, and decided all the material and necessary issues presented by the pleadings, though from the language of the opinion the contrary should be made to appear.

The judgment of the District Court is affirmed.

Rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

NORTH HUDSON COUNTY RAILWAY
COMPANY, *Plff. in Err.*,

v.

Clarence ANDERSON.

(.....N. J.)

*1. A dollar bill from the upper left-hand corner of which a piece one inch and a half by one inch and a quarter had been torn is not a legal tender for car fare, and the conductor may eject a passenger who refuses to make another payment. He was not bound to accept a bill which was substantially mutilated. If any part was absent which might aid in determining whether it was genuine, he was under no duty to receive it.

2. The rules of the Treasury Department of the United States in regard to the redemption of mutilated notes relate simply to redemption, and do not affect the question of legal tender.

(March 1, 1898.)

ERROR to the Supreme Court at Circuit in Hudson County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged illegal ejectment from defendant's car. *Reversed.*

The facts are stated in the opinion.

Mr. George Holmes, for plaintiff in error:

The United States statute makes certain notes and certificates legal tender (U. S. Rev. Stat. §§ 3598, 3589, 3590, but there is nothing in the statute which makes any part of a note or certificate a legal tender.

There are provisions in the statute, by which the Treasury Department is directed to receive notes and certificates which are mutilated or otherwise injured so as to be unfit for use, and issue others in place thereof (U. S. Rev. Stat. §§ 3580, 5184), and the Treasury Department has adopted certain rules regarding the redemption of such mutilated notes and certificates.

Nothing less than a "bill," *i. e.*, a whole bill, is legal tender. A person is entitled to have the whole bill presented to him, in order that he may judge of its validity, and he is not required to pass on the validity of a part of a bill.

United States v. Lissner, 12 Fed. Rep. 840; *Jersey City & B. R. Co. v. Morgan*, 52 N. J. L. 61.

Mr. Warren Dixon, with *Messrs. Bentley & Gedney*, for defendant in error:

The fact that the bill was torn on the upper left-hand corner an inch and a quarter on one side by an inch and a quarter on the other, at right angles, does not invalidate the note. A United States note has no intrinsic value as has a United States coin.

*Headnotes by VAN SYCKEL, J.

NOTE.—As to the tender of old, worn, or mutilated coin, see *Atlanta Consol. Street R. Co. v. Keeny* (Ga.) 33 L. R. A. 824, and note.

40 L. R. A.

Jersey City & B. R. Co. v. Morgan, 52 N. J. L. 60.

The United States treasury rules, § 10, says: "United States notes when not mutilated so that less than $\frac{3}{4}$ of the original proportion remains, are redeemable in coin." Notes of the United States are lawful money and a legal tender in payment of all debts, both public and private, within the United States, except for duties on imports and interest on the public debt.

U. S. Rev. Stat. p. 712, § 3588.

Van Syckel, J., delivered the opinion of the court:

Anderson, the plaintiff below, tendered the conductor on a car of the company defendant below a mutilated one dollar note for his car fare. The conductor refused to accept the note because it was imperfect, and put Anderson off the car for not paying his fare. Thereupon Anderson brought suit to recover damages for the alleged wrongful act of the conductor. The evidence of Anderson was that a piece one inch and a quarter by one inch and a half had been torn from the upper left-hand corner of the bill, while the evidence on the part of the company was that the piece torn off was two and a half inches by one inch and three-quarters. The trial court was requested by the counsel of the company to charge the jury that the note was not a legal tender for the car fare, which request the court refused to grant. On the contrary, the court did charge that the note was a legal tender. To the refusal to charge as requested, and to the charge as made, the defendant company excepted, and error is thereupon assigned.

The case of *Jersey City & B. R. Co. v. Morgan*, 52 N. J. L. 60, is relied upon to support the ruling of the trial court; but it is not parallel. There a genuine silver coin, worn smooth by use, not appreciably diminished in weight, and distinguishable as a coin duly issued from the mint, was held to be a legal tender. The United States statutes make certain paper money legal tender, but there is no provision that part of such notes shall be impressed with that quality. The rules of the Treasury Department with regard to the redemption of mutilated notes relate simply to redemption, and do not make such notes legal tender. The company was not under any obligation to take upon itself the burden of applying to the Treasury Department at Washington for a perfect note, or to assume the risk of failing to obtain it. The conductor had the right to demand an entire bill, and was not bound to accept one from which a portion had been torn. If any part was absent which might aid in determining whether it was a genuine bill, he was under no duty to receive it. The portion torn off the bill presented in this case constituted a substantial mutilation of it. It was not a legal tender, and the trial court erred in refusing so to charge.

The judgment below should therefore be reversed.

NEW YORK COURT OF APPEALS.

Maryanna HUDA, Admr., etc., of Valentine Huda, Deceased, *Appt.*,

v.

AMERICAN GLUCOSE COMPANY, *Respt.*

(164 N. Y. 474.)

1. **Screwing down the windows of a factory so that there is no access to fire escapes** except by breaking the windows, and forbidding employees to open the windows, in order to preserve a high temperature, which is necessary for the business, does not violate a statute requiring the construction and maintenance of fire escapes on such buildings, where the windows are so light in frame as to offer but the slightest difficulty in breaking through, if there is not time to unscrew them.
2. **It is not negligence for a master to fasten windows leading to fire escapes**, when this does not violate any statute and the windows can be easily broken through to reach the fire escapes if there is not time to unfasten them.
3. **An employee assumes the risk of his employer's methods** which are known to and acquiesced in by him, if they do not violate any statute.

(December 14, 1897.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court for the Fourth Department affirming a judgment of the Erie County Circuit in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Mr. Le Roy Parker, for appellant:

The direct cause of Huda's death was the fire which originated in defendant's dynamo room. A concurring cause was the unlawful screwing down of the windows whereby escape from the building was obstructed.

The evidence given as to the defective and dangerous character of the appliances used by defendant was sufficient to show that it had not maintained its plant in that reasonably safe and proper condition required by law.

Coddington v. Brooklyn Crosstons R. Co. 102 N. Y. 67; *Mayer v. Liebmann*, 16 App. Div. 54.

The record of the fire commissioners of the city of Buffalo respecting the cause of this fire is admissible in evidence as prima facie evidence of the facts therein recorded.

Charter of the City of Buffalo, §§ 249, 498; Laws 1891, chap. 105; *Woolsey v. Ellenille*, 84 Hun, 236; *Buffalo Loan, T. & S. D. Co. v. Knights Templar & Mut. Aid Asso.* 126 N. Y. 450.

Negligence may be presumed from the fact of the happening of an accident which could not, in the ordinary course of events, have occurred without some negligence, or omission in respect to the duty of care which the person

owning buildings or operating machinery owes to the persons injured

Ray, *Negligence of Imposed Duties*, pp. 145, 146; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562; *Scott v. London & St. K. Docks Co.* 3 Hurlst. & C. 596.

When experience has demonstrated that a certain business may be carried on, and certain machinery used without causing damage, if reasonable care is exercised, then the fact of damage may be sufficient, under such circumstances, to show negligence.

Cooley, *Torts*, 703, 794; *Seely v. New York C. & H. R. R. Co.* 102 N. Y. 719; 18 Am. & Eng. Enc. Law, p. 451; *Louisville & N. R. Co. v. Reese*, 85 Ala. 497; *Spaulding v. Chicago & N. W. R. Co.* 30 Wis. 110, 11 Am. Rep. 550; *Cleveland v. Grand Trunk R. Co.* 42 Vt. 449; 8 Am. & Eng. Enc. Law, pp. 10, 11; *Volkmar v. Manhattan R. Co.* 184 N. Y. 420; *Hogan v. Manhattan R. Co.* 149 N. Y. 23; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Cahalin v. Cochran*, 1 N. Y. S. R. 583; *Gall v. Manhattan R. Co.* 24 N. Y. S. R. 24, *Affirmed* 125 N. Y. 714; *Payne v. Troy & B. R. Co.* 83 N. Y. 572; *White v. Boston & A. R. Co.* 144 Mass. 404.

Even if this evidence was sufficient to remove the presumption, the credibility of defendant's witnesses would still be involved and be a question for the jury.

Volkmar v. Manhattan R. Co. 184 N. Y. 420; *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140.

It is for the jury to decide whether the presumption of negligence has been sufficiently negated by the defendant, and not for the court.

Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 Am. Rep. 75; *Bowen v. New York C. & H. R. R. Co.* 18 N. Y. 408, 72 Am. Dec. 529; 2 Thomp. Neg. § 3, p. 1237; Black, *Proof and Pleadings in Accident Cases*, §§ 7-9; *Kraatz v. Brush Electric Light Co.* 82 Mich. 457.

An electric-light company is liable for negligence when injury was occasioned by the insufficiency of fuse catches to break the circuit and cut off the flow of electricity when wires are overloaded.

Yates v. Southwestern Brush Electric Light & P. Co. 40 La. Ann. 467.

The defendant's method of screwing down the windows of the building in which the deceased was employed, so that there was no access to the fire escape except by breaking the windows, and forbidding the employees of the defendant engaged in that building from opening the windows, and requiring them to keep a high temperature in the work rooms, such as was necessary to accomplish the business carried on in these rooms, was a violation of the statute requiring a construction and maintenance of fire escapes in such building.

Gorman v. McArdle, 67 Hun, 487; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 92, 15 L. R. A. 194; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 876; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Schwandner v. Birge*, 33 Hun, 186; *Corcoran v. Holbrook*, 59

NOTE.—For duty as to fire escapes, see note to *Rose v. King* (Ohio) 15 L. R. A. 160; also *Pauley v. Steam Gauge & Lantern Co.* (N. Y.) 15 L. R. A. 194; *Schmalzried v. White* (Tenn.) 32 L. R. A. 782.
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N. Y. 517, 17 Am. Rep. 369; *Stringham v. Stewart*, 100 N. Y. 516; *Stringham v. Hilton*, 111 N. Y. 183, 1 L. R. A. 483; *Eastwood v. Retsof Min. Co.* 86 Hun, 99, Affirmed 152 N. Y. 651.

It was for the jury to say whether Huda did not try to reach a fire escape, and, finding the window leading to it fastened, perished before he could open it.

Willy v. Mulledy, 78 N. Y. 810, 34 Am. Rep. 536.

There can be no presumption, in the absence of evidence, that Huda did anything that he ought not to have done.

The presumption may be made that every man is desirous of preserving his life and keeping his body from harm.

Eastwood v. Retsof Min. Co. 86 Hun, 99, Affirmed 152 N. Y. 651; *Morrison v. New York C. R. Co.* 63 N. Y. 643.

A failure on the part of owners of factories to perform a duty imposed by statute when, as a consequence, an injury results to another, is evidence of negligence, and is actionable.

Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 90, 15 L. R. A. 194; *Willy v. Mulledy*, 78 N. Y. 814, 34 Am. Rep. 536; *McRickard v. Flint*, 114 N. Y. 222; *Burton v. McClellan*, 3 Ill. 436; *Somerville v. Marks*, 58 Ill. 371; *Sangamon Distilling Co. v. Young*, 77 Ill. 197.

The court can only take the case from the jury when not only the facts are undisputed, but when only one set of inferences can be drawn from those facts, and those inferences lead to but one conclusion.

Eastwood v. Retsof Min. Co. 86 Hun, 96, Affirmed 152 N. Y. 651; *Johnson v. Steam Gauge & Lantern Co.* 146 N. Y. 160; *Weeks v. Cornell*, 104 N. Y. 334; *Ohio & M. R. Co. v. Col-larn*, 73 Ind. 264, 33 Am. Rep. 134; *Gardner v. Michigan C. R. Co.* 150 U. S. 349-361, 37 L. ed. 1107-1110; *Vinton v. Schwab*, 32 Vt. 612; *Hart v. Hudson River Bridge Co.* 80 N. Y. 622.

The deceased did what he could to escape death.

Felice v. New York C. & H. R. R. Co. 14 App. Div. 350.

The risks of the service a servant assumes in the employment of a master are those only which occur after the due performance by the employer of those duties which the law enjoins upon him. If the master has failed to perform his duty, the servant does not take the risk of the master's fault.

Knisley v. Pratt, 148 N. Y. 378, 32 L. R. A. 367; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 95, 15 L. R. A. 194; *Benzing v. Steinway*, 101 N. Y. 552; *McGovern v. Central Vermont R. Co.* 123 N. Y. 280; *Booth v. Boston & A. R. Co.* 73 N. Y. 40, 29 Am. Rep. 97; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 376; *Felice v. New York C. & H. R. R. Co.* 14 App. Div. 351; *Southwestern Teleph. Co. v. Woughter*, 56 Ark. 206; *Clairain v. Western U. Teleg. Co.* 40 La. Ann. 178; *Essex County Electric Co. v. Kelly*, 57 N. J. L. 100; *Western U. Teleg. Co. v. McMullen*, 58 N. J. L. 155, 32 L. R. A. 351; *Bailey, Master's Liability for Injuries to Servant*, pp. 152-156.

In the present case it cannot be claimed that the risk was a natural and ordinary one, incident to the work in which Huda was engaged.

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Schwandner v. Birge, 33 Hun, 186; *Gorman v. McArdle*, 67 Hun, 484; *Mayes v. Chicago, R. I. & P. R. Co.* 63 Iowa, 566.

The risk related to the safety of the place of employment, and not to the character of the employment itself.

It was the risk of the master, and not of the servant.

Freeman v. Glens Falls Paper Mill Co. 61 Hun, 182, Affirmed 142 N. Y. 639; *Abrahan v. Manufacturers' Nat. Bank*, 16 N. Y. S. R. 750; *Gaul v. Rochester Paper Co.* 72 Hun, 485, Affirmed *Bayle v. Rochester Paper Co.* 145 N. Y. 603; *Egan v. Dry Dock, E. B. & B. R. Co.* 12 App. Div. 558; *Cullen v. Norton*, 52 Hun, 9; *Hawley v. Northern C. R. Co.* 82 N. Y. 370.

Remaining in service after knowledge of defects is not negligence *per se*.

Wood, Master & Servant, 681; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Patterson v. Pittsburg & C. R. Co.* 76 Pa. 389, 18 Am. Rep. 412; *Hawley v. Northern C. R. Co.* 82 N. Y. 370.

Messrs. Rogers, Locke, & Milburn, for respondent:

The defendant's method of fastening the windows of its building was not a violation of the statute requiring the construction and maintenance of fire escapes on the building.

The defendant was not bound at common law to anticipate the destruction of its factory by fire, or to alter the adaptation of its internal arrangements to the conditions of the business with reference to the happening of a fire.

Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 90, 15 L. R. A. 194; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661.

The windows as they were had nothing to do with the death of the intestate as an operative cause.

Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 98, 15 L. R. A. 194.

When Huda was on the fourth floor if he had reached the fire escape on the north wall which was nearest to him he would have found a clear way to it through Hull having broken the window out and escaped that way.

This point was absolutely fatal to any right of recovery in this action.

Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 98, 15 L. R. A. 194; *Ruppert v. Brooklyn Heights R. Co.* 154 N. Y. 90; *Bond v. Smith*, 113 N. Y. 378; *Taylor v. Yonkers*, 105 N. Y. 209, 59 Am. Rep. 492; *Morris v. Lake Shore & M. S. R. Co.* 148 N. Y. 182.

As the deceased was familiar with the defendant's method of screwing down the windows, and for a long period had worked under and acquiesced in that state of things, he assumed the risks of the situation, and the plaintiff is not entitled to recover.

Crown v. Orr, 140 N. Y. 452; *Gibson v. Erie R. Co.* 63 N. Y. 452, 20 Am. Rep. 552; *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 367.

Gray, J., delivered the opinion of the court:

The appellate division of the supreme court in the fourth department has certified to this court certain questions for review in an action brought to recover damages for the alleged negligence of the defendant, whereby the

plaintiff's intestate lost his life. A verdict was directed at the circuit for the defendant upon the evidence, and the appellate division, after overruling the plaintiff's exceptions, which were ordered to be first heard there, unanimously ordered judgment to be entered for the defendant. A brief preliminary statement of the facts, as established upon the trial, will aid in the discussion of the questions certified. In the evening of April 12, 1894, the defendant's factory, in the city of Buffalo, was destroyed by fire. The building was eight stories in height, and occupied a space of 160 feet on Scott street by 200 feet in depth. The business conducted therein was the manufacture of glucose, and the deceased was one of the workmen employed. The fire was alleged to have originated in some defect in the electric plant used for lighting the building. When the fire broke out, the deceased was at work upon the sixth floor, and he, with some others, ran down the stairway to the fourth floor, where the thick smoke prevented their further progress. Some of them then broke through a window, and escaped to the ground by a fireman's ladder. The deceased was last seen near the foot of the stairway, and did not follow his companions to the window. What, in fact, happened then to him is not known, and becomes purely a matter of presumption. There were three distinct stairways in this building leading from the top floor to the bottom floor, and two leading from the top floor to a flat roof. A large covered bridge led from the fifth and sixth floors to an adjoining building, which many of the workmen had been in the habit of using as a means of access to and of return from the four upper stories. Upon the outside of the building were three fire escapes extending from the roof to the ground; two being upon the south and one upon the north walls. Two windows upon each floor opened upon balconies which were constructed in connection with the fire escapes. In the process of the manufacture of glucose it was necessary that a high and uniform temperature should be kept up within the factory, and to that end the windows in the building were required to be kept closed. Directions to this effect being unobserved, at first strips of wood were so nailed to the sashes as to prevent the windows from being opened; but, these having been pried off at times, the more effective means had been resorted to, during the previous autumn, of screwing the sashes together, and notices were posted warning the workmen against opening or breaking the windows, under penalty of discharge. The windows in the building were constructed with two light sashes, containing, each, four panes of glass about 16 inches square. The sash frames were from an inch and a quarter to an inch and a half thick. The deceased had been working for the defendant for about twelve years, and the knowledge of the employees as to the fastening of the windows was testified to by several of the plaintiff's witnesses. When the fire occurred, the fire escapes were made use of by many by breaking through the windows, while some escaped by the stairways or by ladders. These facts are sufficient to inform us of the situation, and to enable us to consider the questions

certified. They are: "(1) Whether the defendant's method of screwing down the windows of the building in which the deceased was employed, so that there was no access to the fire escapes except by breaking the windows, and forbidding the employees of the defendant engaged in that building from opening the windows, and requiring them to keep a high temperature in the work rooms, such as was necessary to accomplish the business carried on in these rooms, was a violation of the statute requiring a construction and maintenance of fire escapes on such buildings. (2) Whether doing the acts stated in the first question, or any of them, was evidence of negligence on the part of the defendant that should have been submitted to the jury. (3) Whether the deceased, who was familiar with the defendant's methods as stated in the first question, and for a long period had worked under and acquiesced in the conditions stated in the first question, assumed the risks of the situation; and whether by reason thereof, the plaintiff is not entitled to recover in this action."

The statute referred to in the first question (Laws 1892, chap. 673, § 6) provided for the manner of construction of fire escapes upon factory buildings, and that they should have landings or balconies of a certain size, "embracing at least two windows at each story and connecting with the interior by easily accessible and unobstructed openings." The answer to the first question turns upon the propriety of the resort by the defendant to the methods adopted to keep the temperature of its factory sufficiently high and uniform. That such conditions were necessary is the fact assumed by the question, and it is conclusive here. Obviously, for their maintenance, the windows had to remain closed, and the duty of the defendant to its employees, in the face of that necessity, was not to interpose between them and the means of escape such a barrier in the description of windows constructed as would prevent a ready passage through them. The proof as to these windows is that they were so light in frame as to offer but the slightest difficulty in breaking through, if the time was wanting to unscrew them. The interior of the factory was connected with each balcony upon the fire escape through windows easily accessible by an unobstructed passage, and the requirement of the statute was thus met. If the windows, as "openings," were readily approached from the interior, and could be passed through, it cannot be said that the necessity of having to break them, which the testimony showed was easily done, constituted any greater obstruction than would have been the necessity of uncatching and of lifting them. The reading of the provisions of the statute, upon the subject of fire escapes in factories must be reasonable, and in view of the demands of the case. The construction of the fire escapes must be as prescribed for the outside of the factory building, and, unquestionably, that part of the law which requires a connection to exist with the interior is not to be slighted. But it would be wholly unreasonable to interpret the law as requiring a condition as to the openings upon the fire escapes

which the successful prosecution of the business would forbid. There had to be a closed window during the manufacturing process, and, whether it was composed of one sash, or of two sashes fastened together, was immaterial, so long as it was readily removable by breaking through, and a ready access to and through it was preserved. The evidence shows that there was no serious obstruction at all to a passage to and through the windows. It must be borne in mind that all questions of fact are to be regarded as settled, with the unanimous affirmance by the appellate division, and we must assume every issuable fact in the case as determined below in favor of the defendant. Thus we have not before us any of the questions as to which negligence is alleged by the plaintiff except the one which relates to the defendant's method of preventing its windows from being opened during the operation of its factory, and as to that discussion is largely foreclosed by the assumption of fact that it was "necessary to accomplish the business carried on in these rooms." The first question certified is answered, therefore, in the negative.

The second question certified must be likewise answered in the negative. The discussion of the first of the questions renders amplification of our views quite unnecessary. If the method adopted by the defendant was not a violation of the statute in question, then there was no evidence of negligence in that respect for submission to the jury. At common law there was no duty imposed upon the employer to provide fire escapes in anticipation of the burning of the building in which he employed his workmen. If his building was properly constructed for the purposes of its intended use, such extraordinary and unusual precautions were not demanded of him. The statute of 1887 (chap. 462) created an absolute duty, and its effect was to give a cause of action for its breach in favor of anyone entitled to its observance and injured by a breach. *Willy v. Mulledy*, 78 N. Y. 810, 34 Am. Rep. 536; *Puuley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194. For reasons already stated, I am unable to perceive any breach of duty here in the respect certified to us. It may be observed—as it might have been in our discussion under the first question—that the evidence utterly fails to show that the condition of the windows had anything to do with the death of the deceased workman. It does not appear that he tried ineffectually, or at all, to get through them; and the manner of his death is left to surmise from the probabilities of his situation, when, upon his reaching the fourth floor, in his descent, he was involved in the smoke.

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In considering the third question certified, I think, with the assumption of facts to which the formulation of the question compels us, that but the one answer is possible, and that is that the deceased assumed the risks of the situation. An employee is very reasonably regarded as assuming those risks in his employment which are obvious as well as ordinary. If the master has done all that his duty demanded of him with respect to securing the safety of his workmen, as to the place where they have been set to work, and as to the tools and appliances with which that work was to be done, he will not be liable for a personal injury occurring by reason of a risk which is incidental to the business itself, or which results from the dangers of the environment into which the workman knowingly entered, under proper instructions. In discussing this point we have to assume that the deceased met his death from a cause connected with the fastening of the windows, without, perhaps, sufficient in the evidence to warrant the assumption. But the difficulty is not so much in that assumption as in that found in the question certified. That compels us to assume the knowledge of the deceased of the defendant's methods, and his acquiescence in the conditions under which the work was necessarily done. The court below has passed upon those facts with all the force of findings, and the form of the question certified eliminates them from our review. If the deceased knew the defendant's methods and acquiesced in those resorted to by it in the conduct of its business, we are simply thrown back upon the discussion under the first question,—whether there was any violation of the statute in what the defendant did. Having reached the conclusion that there was none, no other conclusion, in the present stage of the discussion, is possible, than that the defendant added nothing to the risks assumed by its employees, and imposed none which they should not be regarded as assuming. Of course, it is not to be understood from what has been said that it necessarily follows that employees would assume such risks connected with the management of the business as would result from a violation by the employer of the statute in a neglect to provide fire escapes. That presents a different question.

The first two of the questions certified are answered in the negative and the third question is answered in the affirmative, and it therefore follows that *the judgment appealed from must be affirmed*, with costs.

All concur, except **Haight, J.**, absent.

NORTH CAROLINA SUPREME COURT.

J. A. NARRON *et al.*, *Appts.*,
v.
WILMINGTON & WELDON RAILROAD
COMPANY.

(.....N. C.....)

1. **An easement for a railroad right of way cannot be acquired** by occupation under color of title as against an owner who has given no consent thereto, where the occupation is lawfully taken by right of eminent domain.
2. **An easement in land can be granted** only by those who could convey a fee-simple estate.
3. **An exception of all railroads** chartered before a certain date from the provisions of a statute of limitations does not deny them the equal protection of the laws.

(March 15, 1898.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Johnston County in favor of defendant in an action brought to recover damages for the taking of plaintiff's property for railroad purposes. *Reversed.*

The facts are stated in the opinion.

Messrs. Simmons, Pou, & Ward, for appellants:

None of the limitations apply to the case at bar, because no statute of limitations bars proceedings to collect compensation for right of way, taken by the Wilmington & Weldon Railroad Company.

Land v. Wilmington & W. R. Co. 107 N. C. 72; *Utle v. Wilmington & W. R. Co.* 119 N. C. 720.

This court has declared that a reasonable length of time must be given before the proceedings will be barred; and when the legislature neglects to give this time, the courts will, in effect, do so.

Nichols v. Norfolk & C. R. Co. 120 N. C. 495.

The legislature cannot shorten the statute of limitations without giving parties a reasonable time to bring actions, which otherwise would be barred.

Cooley, Const. Lim. 6th ed. pp. 449, 450; *Hare*, Const. Law, p. 714; *Strickland v. Draughan*, 91 N. C. 103.

If a law applies equally to all of a class alike, it is constitutional.

Cooley, Const. Lim. p. 481.

The exceptions to the statute of limitations, and the conditions on which the statutes are to take effect, depend on the discretion of the legislature.

Hare, Const. Law, pp. 715, 716.

The defendant has admittedly taken plaintiff's land. Admittedly the alleged deed it obtained was void.

Kirby v. Boyette, 116 N. C. 165, 118 N. C. 244.

NOTE.—For adverse possession of a railroad right of way as against the railroad company, see *Illinois C. R. Co. v. Houghton* (Ill.) 1 L. R. A. 212, and kindred cases in note thereto.
40 L. R. A.

Wherever the act of supposed disseisin is equivocal in its nature, the presumption is always that it is in accordance with, and not in hostility to, the title of the true owner.

8 Washb. Real Prop. p. 170.

Adverse possession is defined to be the enjoyment of land or such estate as lies in grant under such circumstances as indicate that such enjoyment has been commenced and continued under assertion or color of right on the part of the possessor.

Note to Cramer v. Clow (Iowa) 9 L. R. A. 772.

Color of title is that which on its face professes to pass title.

Id. p. 775, note.

Claim of color of title must be based upon the proper title, and cannot be extended beyond the same.

United States v. Cameron (Ariz.) 21 Pac. 177, cited in the said notes.

Good faith cannot be affirmed of a party holding adversely, when he knows that he has no title, and that under the law he can get none.

Deffeback v. Howke, 115 U. S. 392, 29 L. ed. 425.

The law construes strictly, giving the benefit of doubt to the landowner, all statutes of limitation pleaded by a corporation or public agent against the citizen's claim for compensation.

Randolph, Em. Dom. § 393.

The trustee, and not the *cestui que trust*, is the proper person to be paid.

Lewis, Em. Dom. § 821; *Mills*, Em. Dom. § 110; *Pierce*, Railroads, p. 192.

In this state the policy of the law seems to be to regard the occupancy of the right of way, both by the railroad and by the owner, as mutually permissive, and not as adverse to either.

Raleigh & A. Air Line R. Co. v. Sturgeon, 120 N. C. 225; *Purifoy v. Richmond & D. R. Co.* 108 N. C. 100; *Clark*, Code, § 150; 8 *Elliott*, Railroads, § 1007.

The deed from Heath and wife and Wellons and wife to the defendant was void for uncertainty.

1 *Wood*, Railroads, Minor's ed. pp. 698, 699.

Where a trust estate descends to two or more persons, the statute should not begin to run until all become *sui juris*.

Freeman, Cotenancy & Partition, §§ 875, 376.

The *cestui que trust* could not sell or encumber or charge the trust estate.

27 Am. & Eng. Enc. Law, p. 127.

Messrs. Robert O. Burton and Aycock & Daniels, for appellee:

At the death of Wiley Simms the title passed to his heirs as joint tenants; and one of them having been of full age for more than seven years prior to the beginning of this action, the same is barred.

Laws 1885, chap. 327; Act 1784, The Code, § 1826; *Rowland v. Rowland*, 93 N. C. 214; *Vass v. Freeman*, 56 N. C. (3 Jones, Eq.) 221, 69 Am. Dec. 734; *Powell v. Allen*, 75 N. C. 450.

The original deeds of trust limit the estate to Wiley Simms and his heirs. His heirs, therefore, take, not by the act of the law but by

the original deed. They are not tenants in common.

Guion v. Melvin, 69 N. C. 242.

Cotrustees are joint tenants, and are always so where their joint action is contemplated, or where such tenancy is necessary for the execution of their trust.

11 Am. & Eng. Enc. Law, pp. 1062, 1069; 1 Perry, Tr. § 136; *Webster v. Vandewater*, 6 Gray, 428; *Loring v. Marsh*, 6 Wall. 337, 18 L. ed. 803.

A trustee may either bring suit in his own name or in conjunction with his *cestui que trust*.

Mebane v. Mebane, 66 N. C. 384; *Hancock Bros. v. Wooten*, 107 N. C. 9, 11 L. R. A. 466; Code, § 179.

Wherever the statute of limitations is a bar to the recovery of one of the parties in such action, it operates against the whole, because the disability of one does not save the right of the others.

Riden v. Frion, 7 N. C. (3 Murph.) 577; *McRee v. Alexander*, 12 N. C. (1 Dev. L.) 322; *Montgomery v. Wynns*, 20 N. C. (4 Dev. & B. L.) 527; *Marsteller v. McClean*, 7 Cranch, 156, 3 L. ed. 300; *Weare v. Burge*, 32 N. C. (10 Ired. L.) 169; *Moore v. Armstrong*, 10 Ohio, 11, 36 Am. Dec. 77; *Robertson v. Smith*, Litt. Sel. Cas. 297, 12 Am. Dec. 304; *Freeman, Cotenancy & Partition*, § 375.

If the trustee is barred the *cestui que trust* is also barred.

King v. Rheu, 108 N. C. 696; *Doe, Wellborn, v. Finley*, 52 N. C. (7 Jones, L.) 228; *Bennett v. Williamson*, 30 N. C. (8 Ired. L.) 121.

The bar is complete in this case; not under the charter of defendant, but under the general law as to seven years' adverse possession.

Literton v. Roanoke & T. R. R. Co. 109 N. C. 52; *Land v. Wilmington & W. R. Co.* 107 N. C. 72.

The action should be barred under the five years' statute.

It was not competent for the legislature to pass an act by which all railroad companies should be protected by a five years' period of limitation excepting certain roads.

This is a denial of the equal protection of the laws, and is contrary to the 14th Amendment to the Constitution of the United States.

Cooley, Const. Lim. 484, and note 2; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

The statute of limitations cannot be suspended in particular cases, while allowed to remain in force generally.

Holden v. James, 11 Mass. 396, 6 Am. Dec. 174; *Davidson v. Johnston*, 7 Met. 388, 41 Am. Dec. 448; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 165, 41 L. ed. 666, 671; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Broadfoot v. Fayetteville*, 121 N. C. 418, 39 L. R. A. 245.

There cannot be a reasonable ground, in law, for protecting the new company by a five years' statute, and excluding the old road, which certainly in reason should be preferred, because it has longer been exposed to action and therefore has the greater claim to protection. The main body of the act may be held good and the reservation void.

Albany County Supers. v. Stanley, 105 U. S. 305, 26 L. ed. 1044; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766; *Huntington v. Worthen*, 40 L. R. A.

120 U. S. 97, 30 L. ed. 588; *Presser v. Illinois*, 116 U. S. 252-263, 29 L. ed. 615-618; *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Riggabee v. Durham*, 94 N. C. 800.

Assuming that the 2d section of the act of 1893, chap. 152, is not separable, and that therefore old railroads are not within the terms of that act, yet they are within the terms of the act of 1895, chap. 224.

Beach v. Wilmington & W. R. Co. 120 N. C. 506; *Nichols v. Norfolk & C. R. Co.* 120 N. C. 495.

Furches, J., delivered the opinion of the court:

On the 20th of March, 1871, a part of the land upon which the defendant's roadbed is located was conveyed to Wiley Simms, and on the 6th day of July, 1872, the residue was conveyed to him. These lands were conveyed to Simms, as trustee, for the sole and separate use and benefit of Maria Heath for life, to be held free from all debt, charges, and encumbrances of her husband, A. J. Heath, and at her death for Ora M. Heath, Preston S. Heath, and Ada E. Heath, children of the said Maria Heath. On the 28th day of August, 1885, A. J. Heath and wife, Maria, J. W. Wellons, and Ora, one of the *cestui que trust*, and who had intermarried with J. W. Wellons, made and executed a deed to the defendant corporation granting it the right of way over said lands. Thereafter, and in the fall of 1885, the defendant entered upon the lands, located its roadbed, and has continuously held and occupied the same from that time until the commencement of this proceeding for damages. The trustee, Simms, was not a party to the deed to the defendant, nor did he assent to the appropriation and occupancy by defendant of said land. The said Simms is dead, and the plaintiff Narron has been duly appointed trustee in his stead. Upon these facts, which were agreed to by the parties, the court held that the defendant was the owner of the 130 feet of land, running across said lands for a mile, upon which its roadbed was located; that "it had been possessed of said right of way under known and visible lines and boundaries, and under color of title, for seven years next before the bringing of the action, and that the plaintiffs' claim is also barred by the five-years' statute of limitations." These facts and this ruling of the court present the only question necessary for our consideration in determining the rights of the parties. It is not contended that the defendant is the owner of the land upon which its roadbed is located, but that by the deed of Heath and wife the defendant is the owner of an easement upon the land covered by its roadbed; that this deed is color of title, at least; and that the defendant has occupied this land under said deed for more than seven years, which has perfected its title, if it was at first defective. The defendant further contends that this proceeding was not commenced within five years from the time the defendant entered upon and took possession of its roadbed, and that the plaintiffs' right to recover, if they had any, is barred by the lapse of time, under chapter 152, Acts 1893. An easement must be an interest in or over the soil. It cannot be made by livery,—by deed,—

but lies only in grant. Washb. Easem. 27. It may also be acquired by prescription, or, more properly speaking, under the modern doctrine, by presumption. This presumption of a grant may arise by the continuous occupation for twenty years. Whether this presumption arises from the occupation of a railroad, it may not be necessary for us to decide in this case. But it would seem that the reason for presuming a grant by the continued occupation of the land for twenty years is wanting. This rule is founded upon the idea that, if there had not been a grant, the owner would have put an end to the wrongful occupation before the expiration of twenty years. In this case and that of other railroads it is not necessary that they should have a grant to authorize their entry and occupation. This is authorized by the charter under the state's right of eminent domain; and the owner of the soil has no right to prevent the entry and continuous occupation of the defendant road. This being so, the reason for the rule creating the presumption fails, and it would seem that the defendant would acquire no title by occupation and the lapse of time; and this opinion seems to be sustained by the decisions of the court in *Land v. Wilmington & W. R. Co.* 107 N. C. 72, and *Ulley v. Wilmington & W. R. Co.* 119 N. C. 720. This being so, the defendant must rely upon the deed from Heath and wife and the plea of the statute of limitations. No one but the owner of the soil can grant an easement,—no one who could not convey the fee-simple estate. Washb. Easem. 40. Heath and wife could not have done this. *Kirby v. Boyette*, 116 N. C. 165, 118 N. C. 244. And, as they could not have conveyed the land, they could not create the easement by grant. This leaves the statute of limitation to be considered. At common law there was no limitation to the right of action. This defense is entirely statutory. It does not affect the rights of the parties. It does not pay any debt or satisfy any demand. It only closes the courts,—puts up a legal bar between plaintiff and defendant. The defendant claims that the act of 1893 does this, as against the plaintiffs' demand. In the 1st section of this act it provides a bar against all such actions as this not commenced within five years from the time the defendant's occupation commenced. And, if the act had stopped with this section, the defendant's plea would have been a protection to the defendant, as against the plaintiffs' demand, in the proceeding. But the 2d section of this act provides that it shall not apply to any railroad chartered before 1868, and, as the defendant's road was chartered before 1868, it is admitted that this statute does not bar the plaintiffs' action, if the 2d section is constitutional. But the defendant contends that this section of the act is in violation of the 14th Amendment to the Constitution of the United

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States, and void, for the reason that it does not afford this road the same protection that it does some other roads; that it discriminates against this road in favor of some other roads. If this were true, all our statutes of limitations would be void, as they all have such discriminations. They all except from their operation *feme covert*s, infants, and persons of unsound mind. But we cannot understand how it can be unconstitutional not to give a party that which it has no legal right to demand. The statute of limitations gives no rights to any one, and, in a legal sense, it gives no protection to anyone. It may deprive a party of his legal remedy, and this, it is said, should not be done without giving such party reasonable time to commence his action. *Nichols v. Norfolk & C. R. Co.* 120 N. C. 495. This rule would apply to the plaintiff if it were his right of action that might be affected. But, as the statute of limitations takes from the defendant no right he has, this rule does not apply to him. But the defendant is one of a class,—“all railroads chartered before 1868.” This being so, it is no discrimination against the defendant. *Gallin v. Tarboro*, 78 N. C. 119; *State v. Call*, 121 N. C. 643, and the great number of cases there cited. There is error.

New trial.

Clark, J., concurring:

When an action is brought for ejectment, one who has been in possession under color of title for seven years is protected by the statute, because, having been exposed to an action for that length of time, the statute has run in his favor. So where one has been exposed to an action for trespass for twenty years, the law presumes therefrom the grant of an easement. But here the defendant under its charter enjoys legal possession, and its easement by virtue of the right of eminent domain, and has never been exposed either to an action of ejectment or for trespass for an hour. The plaintiffs could not have maintained an action for either of these causes, and have not now attempted to do so. Their sole remedy is under the constitutional provision giving them a right to compensation. As to that cause of action there was no statute of limitations (*Land v. Wilmington & W. R. Co.* 107 N. C. 72; *Ulley v. Wilmington & W. R. Co.* 119 N. C. 720), until chapter 152 of the Acts of 1893. But that statute conferred the right to plead that defense only upon railroads chartered since January 1, 1868, and the defendant cannot avail itself thereof. Chapter 224 of the Acts of 1895 applies to all railroads, but does not embrace “compensation for right of way;” and chapter 339 of the Acts of 1897, making the act of 1893 apply to railroad companies chartered prior to 1868, cannot affect this action. *Nichols v. Norfolk & C. R. Co.* 120 N. C. 495; *Culbreth v. Downing*, 121 N. C. 205.

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* NATIONAL LIFE ASSOCIATION of Hartford, Connecticut,
v.

William S. MATTHEWS, Superintendent of Insurance.

STATE of Ohio, *ex rel.* HOME MUTUAL LIFE INSURANCE COMPANY of Detroit, Michigan,
v.

SAME.

(.....Ohio.....)

*1. By virtue of the provisions of § 2745, Rev. Stat., the superintendent of insurance of this state may revoke, or decline to renew, a license to transact business in this state to a life insurance company created under the laws of another state, if, "after demand therefor has been made," such company refuses to pay the taxes assessed against it, and which are payable to him according to the terms of said section. This power of the superintendent continues, and may be exercised, notwithstanding the commencement and pendency of an action brought by him against such company to recover the taxes thus assessed.

2. Although § 3587-3596, inclusive, Rev. Stat., under which life insurance companies intending to transact business on the mutual or stock plan are organized, require such companies to have capital stock and stockholders, and although, when thus organized, they have no authority to transact business on the assessment plan, the want of such authority is not a consequence of their having capital stock and stockholders, nor of want of power in the legislature to confer it, but results solely from an omission of the legislature to clothe them with such power. Notwithstanding the want of such authority in an Ohio corporation created under those sections, yet, as the powers of a corporation depend on its charter and the laws of the state where it is organized, if the charter of an insurance company created in another state, together with the laws of such state, authorize it to transact business on the assessment plan, it should be admitted, under § 3630e, to transact business on that plan within this state, upon its complying with this section in other respects, although it may have capital stock and stockholders for whose benefit it was created.

3. However, what constitutes the transaction of the business of life insurance on the assessment plan, within the meaning of that term as used in said § 3630e, should be determined by the laws of this state, and according to those laws that phrase should be held to contemplate a scheme of insurance conducted for the sole benefit of the policy holders of a concern, the principal source of revenue of which must arise from *post mortem* assessments intended to liquidate specific losses.

(March 1, 1898.)

*Headnotes by the COURT.

NOTE.—For benefit societies as insurance companies, see Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. (C. C. App. 6th C.) 28 L. R. A. 33, and note.

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PETITIONS for writs of mandamus to compel defendant to permit petitioners to transact life insurance business within the state. *Refused.*

The facts are stated in the opinion.

Messrs. T. E. Powell, Daniel J. Ryan, and George B. Okey, for relator Home Mutual Life Insurance Company:

The relator complied with all the conditions prescribed by § 3630e, of the Revised Statutes as a condition precedent to the transaction by it of business in this state and of the insurance to it of a certificate of authority so to do by the superintendent of insurance, by depositing with him the documents, certificates, and proofs.

The attempt to force a construction of statutes which would confine and limit the co-operative associations to a system of "passing around the hat" to collect whatever might be possible to pay a loss after the contingency insured against had happened, has uniformly and justly failed.

16 Am. & Eng. Enc. Law, p. 19.

Under an assessment contract a premium may be stipulated, but the liability of the insured cannot be limited thereto.

A simple reading of § 3630 would seem to refute the idea that a company or association organized to do business on the "assessment plan" is confined and limited to *post mortem* assessments.

Hanford v. Massachusetts Ben. Asso. 122 Mo. 50; *State, Covenant Mut. Ben. Asso., v. Root*, 83 Wis. 667, 19 L. R. A. 271; *Home L. Assur. Co. v. Atty. Gen.* (Mich.) 70 N. W. 1031.

Messrs. Henry M. Huggins, J. A. McEwen, and Huggins & Sowers, for relator National Life Association:

The law of Ohio provides a number of effectual methods for the collection of taxes. If the plaintiff owes the state of Ohio any taxes, the courts are open for their collection in the ordinary methods. There is no necessity, for the protection of the citizens of the state, to crush the business of the plaintiff within the state in order to collect a comparatively trifling sum of taxes, while the plaintiff is amply able to pay when called upon to do so by the adjudication of the court in a proceeding begun in the ordinary way for collection.

Mr. M. R. Patterson for defendant.

Bradbury, J., delivered the opinion of the court:

These two actions were brought in this court, by the respective relators, against the superintendent of insurance of this state, to compel him to issue to them, respectively, a certificate authorizing each of them to transact the business of life insurance within this state, under § 3630e, Rev. Stat., that prescribes the conditions upon which life insurance companies, organized under the laws of other states, etc., may be permitted to transact the business of life insurance on the assessment

As to right of foreign insurance companies to do business, see *State, Richards, v. Ackerman* (Ohio) 24 L. R. A. 296, and note; also *People, Stephens, v. Fidelity & C. Co.* (Ill.) 26 L. R. A. 296.

plan within this state. The superintendent of insurance, contending that the method of insurance pursued by these companies, respectively, was not according to the assessment plan, declined to issue the certificate demanded of him.

In respect of the National Life Association of Hartford, Connecticut, the refusal to grant a certificate rests on the additional ground that it had refused to pay the taxes which the superintendent of insurance claimed were assessable against it by virtue of § 2745, Rev. Stat. This section of the statute expressly authorizes the superintendent of insurance, in case "such company refuse to pay said tax, after demand therefor has been made," to "revoke the license of such company to do business in this state." If, upon this ground, he may revoke a license previously issued, it would seem to unquestionably follow that he may also, upon such ground, refuse to issue or renew such license to the defaulting company. An action brought by the superintendent of insurance to recover this tax is pending in the court of common pleas of Franklin county. This effort, however, to recover, according to the ordinary course of justice, through the instrumentality of the courts, the amount claimed to be due from the relator as taxes, does not suspend the power of revocation explicitly given by the section above cited. Even if this power of suspension should be regarded simply as an additional and summary remedy for such default, it ought not, in the absence of a legislative intention to that effect, to be held to require the state, through its officer, to elect between the two remedies. And certainly there is nothing in the statute, or in the nature of the proceedings in the courts to recover the amount already payable, to indicate that the legislature intended that the authority thus conferred on the superintendent of insurance should be held in abeyance during the pendency of such action. However, as the taxes claimed to be due from the relator rest on the assumption that it is not engaged in the business of insurance on the assessment plan, the right to revoke its license must stand or fall upon the determination of that question. If it is transacting business on the assessment plan, then the taxes in controversy were not legally assessable against it, and its refusal to pay them would not justify a revocation of, or refusal to renew, its license.

Both relators are bodies corporate,—the first named, the National Life Association, being organized under the laws of the state of Connecticut; the other, under the laws of the state of Michigan. An inspection of their respective charters shows that their schemes of organization widely differ. The charter of the National Life Association, as far as material to the consideration of any matter before the court, reads as follows:

"Sec. 2. The capital stock of said corporation shall not be less than \$100,000, and may be increased as herein provided, from time to time hereafter, at the pleasure of said corporation, to any further sum not exceeding \$500,000; and each share of said capital stock shall be \$100; . . . provided that no stockholder shall be liable to said corporation for any claims against the same, nor shall the

stockholders, or any of them, be liable in any event beyond the amount of their stock owned by them respectively for any losses whatever,

"Sec. 3. The capital stock of said corporation shall be personal property, and transferable on the books of said association in conformity with its by-laws."

"Sec. 5. . . . The affairs of said corporation shall be managed and conducted by not less than seven nor more than eighteen directors, a majority of whom shall reside in this state, and shall be elected on the second Tuesday in January in each year by the stockholders from among their number. . . . Every officer or director shall be a bona fide stockholder of at least five shares of said capital stock before he shall be qualified to act as such officer or director.

"Sec. 6. Notice of every stockholders' meeting shall be given ten days previous to such meeting in one or more newspapers printed in the city of Hartford. At all such stockholders' meetings no business transacted shall be legal unless a majority of the stock is represented. Each stockholder shall be entitled to one vote for each share of stock held by such stockholder. . . ."

These provisions of its charter show conclusively that it is a corporation created for profit. It has a capital stock of \$100,000, divided into shares of \$100 each, which capital stock may be increased to \$500,000 and similarly divided. These shares are declared to be personal property, transferable on the books of the "association in conformity with its by-laws." The ultimate power to manage its affairs is lodged in its stockholders to the entire exclusion of its policy holders; for the right to attend corporate meetings, as well as to elect its officers, is vested solely in the former. Whatever net profits may accrue from its business will ultimately go to its stockholders, the policy holders having no interest therein; the rights of the latter being measured by the contract evidence by their respective policies. It is true that, in an agreed statement of facts submitted to the court, it is stated that "the plaintiff pays a dividend of 6 per cent per annum on the amount of stock actually paid into its treasury; the same being paid out of moneys raised and used by it for expense purposes, and the amount thereof being \$3,000 per annum. We do not see how this bears upon the question of the character or nature of the concern. There is nothing in its charter to prevent the payment of a larger dividend, if the earnings of the company at any time would warrant it, or to prevent its setting aside or investing its accumulation in any way it may choose for the eventual benefit of its stockholders.

Counsel for defendant strenuously contends that a corporation of the character of the relator—that is, one possessed of a capital stock and created for the profit of the holder thereof—cannot transact the business of life insurance in Ohio on the assessment plan. This contention he rests on a fundamental distinction claimed to exist between the different classes of life insurance companies; the object of one class—that to which the relator belongs—being to make profit for its stockhold-

ers, while the other class, composed of those doing business on the "assessment plan," so-called, is not designed for profit at all, and in fact can have no stockholders among which to divide profits. Without setting forth our statutes that authorize and regulate the creating of life insurance companies, it may be said of them that, while they do not speak to this question with perfect precision, yet, as respects Ohio corporations, many of their provisions seem to conflict with the notion that a stock company can do business on the assessment plan. These statutes divide life insurance companies, other than fraternal, into two classes, into one of which it places those companies that have a capital stock, or, at least, capital, and into the other class such as do not have either capital stock or capital. The general powers of the former class are granted by § 3587, Rev. Stat. The things that may be done by the latter class are set forth in § 3630, Id. By the former section (3587) authority is given "to make insurance upon the lives of individuals and every insurance appertaining thereto or connected therewith on the mutual or stock plan, and grant, purchase, or dispose of annuities." By the latter section (3630) a company or association may be organized to transact the business of life or accident, or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members and for the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of the deceased members of such company or association, etc. The powers of a company belonging to the first class are unlimited as to the individuals it may insure, but are limited to insuring on the "mutual or stock" plan. Section 3587. A company or association belonging to the second class can only insure the life of a member of the company, and its business must be transacted "on the assessment plan." As the insured, by the act of insurance under this plan, becomes a member of the insurance company, and as there are no special restrictions respecting the persons who may apply for insurance and consequent membership, except as to the age and health of the applicant, the powers of the two classes in this respect do not greatly differ. But, as respects the structure of the companies that compose them, and the method by which they do business, the two classes fundamentally and radically differ. One class has a capital stock, or capital, and, of course, stockholders, or members who have contributed to its capital, for whose profit its business is primarily conducted, while the other has neither. The business of the first class is done none the less for the benefit of its stockholders, or members, because some of the companies which compose it,—perhaps all of them, now,—with a view to attract patronage, uniformly issue policies which stipulate that the holder shall share in the profits of the concern. The companies that compose the first of the classes are empowered to transact business on the mutual or stock plan; the other, only on the assessment plan. There may be some other minor distinctions between the two classes, but these are the chief ones. The two classes together seem to cover the entire field of gen-

eral life insurance, and we think, in respect to Ohio companies, this field was designedly divided by the legislature between these two classes, and that the inference to be drawn from this legislation is that the portion assigned to each was intended for its exclusive occupation; and therefore an Ohio life insurance company must confine its transactions to such methods of insurance as pertain to the class to which it belongs. However improbable the supposition may be that men would invest their money in a concern the business of which was prohibited by law from returning any profit on the investment, yet there is nothing in the nature of life insurance on the assessment plan to forbid its being transacted by a corporation possessing capital stock, and having stockholders or members contributing to its capital, by whom its affairs are exclusively controlled. If the general assembly of Ohio, in the exercise of its legislative discretion, chooses to vest this power in corporations to be organized with capital stock and stockholders, and men elect to organize such corporations, and invest their capital therein, we know of no principle on which the exercise of this power could be prevented by an appeal to the judiciary. It might be claimed, with some show of reason, that, if the charter of such a corporation and the statutes under which it was organized limited the benefits that might accrue to its stockholders to lawful interest on the amount actually advanced for stock, it ought not to be held a corporation for profit, and that, while the stockholders were nominally such, their beneficial relation to the company would rather be that of creditors. However this may be, it is speculative, and the subject will be dismissed with the remark that it lies within the province of the legislative, and not of the judicial, branch of the government.

Counsel for relator, in an interesting discussion of the evolution of life insurance, shows that what is called "old line insurance" has in recent years been materially modified by the application to its original methods of insurance of some of the principles and practices that underlie insurance on the assessment plan, and also that, within the last decade or two the crudities of the latter plan have been systematized and improved by the adoption of a portion of the features of the former. That the two plans have been steadily drawing nearer to each other in recent years; that some of their distinctive features have become obliterated,—is true; and doubtless the causes that have produced that result are still in active operation. Our statutes do not seem to recognize, to the extent claimed, these evolutions; and, notwithstanding what may have been accomplished in this way in the sphere of general life insurance, or however near they may have drawn to each other in their methods of transacting business, those statutes quite clearly recognize three distinct methods in which it still may be done. Two of these methods, that upon the stock plan and that upon the mutual plan, are mentioned in § 3587, Rev. Stat.; while reference to the third method, that upon the assessment plan, is found in § 3630, Id. We have already seen that life insurance companies created

under § 8587, Id., and which are required to have capital stock, or fixed capital, at least, cannot transact life insurance on the assessment plan; that the reason why they cannot thus transact life insurance is because the general assembly has not granted that authority to them, and is not founded on any incapacity, on account of the mode in which they are organized, to receive and exercise that power; on the contrary, that, if the general assembly chooses to confer on life insurance companies, organized under § 8587, Rev. Stat., the power to insure lives on the assessment plan, the exercise of such power would be unobjectionable. The power of a corporation, however, depends on its charter and the laws of the state where it is organized; and, although it may be true that our statutes do not authorize stock companies created under them to transact life insurance on the assessment plan, it does not follow that life insurance companies created in other states cannot be clothed with such power by their charters and the laws of the state in which they were organized. Whatever powers the relator the National Life Association of Hartford possesses in this respect is found in § 4 of its charter, which is in the following terms: "Sec. 4. Said corporation is authorized and empowered to make insurance upon the lives of individuals, and to make contracts upon any and all conditions appertaining to or connected with life risks of whatever kind or nature, and to grant annuities, and policies may be issued stipulated to be with or without participation in the profits." This grant of authority is very broad, and, while the object of the concern is, doubtless, ultimate profit for its stockholders, nevertheless, if, under the power thus conferred, the relator, without objection from its stockholders, sought to engage in the business of life insurance in this state on what is clearly and unequivocally the assessment plan, as that is recognized by the statutes of this state, and complied with the conditions prescribed in § 8630e, Rev. Stat., what ground could be assigned as a valid reason for denying it admission to transact business under that section?

That the relator the National Life Association of Hartford has complied with the formal conditions prescribed by § 8630e, Rev. Stat., necessary to entitle it to a license under that section, is admitted, and, as we have seen, the powers conferred by its charter warrant it to transact life insurance on the assessment plan. The only remaining question is whether the scheme of insurance it pursues, or proposes to pursue, within this state, is according to the assessment plan, as that phrase is used in our statutes.

The relator, in the course of its business in this state, has issued five different forms of policies. They do not materially differ as respects the matter now under consideration. One of them is given:

The National Life Association of Hartford.
Conn.

Amount, ———. Premium, ———.

In consideration of the written and printed application for this policy, and the warranties contained therein, together with the condi-

tions and agreements on the back hereof, which, taken together in their entirety, constitute this contract, and of the payment of the premium of \$ ——— at the home office of the association in Hartford, Connecticut, to be evidenced by the receipt of the association, and a payment of a like sum to be made at said office on or before 12 o'clock noon of the ——— day of ——— in every year during the continuance of this contract, this association does hereby insure the life of ———, of ———, county of ———, state of ———, in the amount of ——— dollars (less any indebtedness due the association by the insured or beneficiary), to be paid at the home office within ninety days from receipt of satisfactory evidence at the office of the association in Hartford, Connecticut, as required by it, upon blanks furnished, of a valid claim, conditioned upon the death of the insured from any cause assumed under the terms of this contract, to ———, if living; otherwise, to the legal heirs or assigns of the insured. In witness, whereof, etc.

The "privileges and agreements" on the back of the policy, to which reference is made, so far as material are as follows:

Privileges and Agreements.

This policy shall participate in profits as hereinafter provided, which shall be apportioned at the expiration of the accumulation period. If living, and all premiums have been duly paid, the insured shall be entitled to select one of the following benefits: First. To withdraw all surplus standing to its credit, and continue this policy in force for the original amount, on payment of stipulated premiums, either in (1) cash; (2) paid-up insurance; (3) life annuity. Second. To surrender this policy for its full value, consisting of the entire reserve, together with all surplus accumulations then apportioned by the association, either in (1) cash; (2) paid-up insurance; (3) life annuity. The accumulation period under this policy ends on the ——— day of ———, 19—, at which time the results are estimated at \$ ——— in cash, or \$ ——— in paid-up insurance. Should the insured elect to continue the policy beyond the accumulation period, dividends thereon shall thereafter be apportioned, to be used in reduction of premiums: Provided, that, in all of the preceding privileges, the amount therein referred to shall not conflict with the statutory requirements of any state in which the association is at the time doing business. After this policy has been in continuous force three full years, it may be exchanged for a nonparticipating paid-up policy, provided written application be made for the same while there is no default in the payment of any premium. Paid-up insurance will in no case be given for a larger amount than the original policy, unless the insured shall furnish evidence satisfactory to the association that he is then in an insurable condition. If at any time the proportion of funds credited to this policy (which, together with the entire assets, are hereby pledged for its payment) shall not equal the reserve calculated according to the Actuaries' Mortality Table with interest at 4 per cent.

then this policy may be charged with its share of such deficiency, which, at the option of the executive committee, shall be payable in cash, or be charged as interest-bearing premiums. The expense charged on this policy during the first year shall be the instalments specified, and thereafter three fifths of 1 per cent annually of its face value, and the expenses incurred in protecting and investing the funds of the association. Premiums are payable annually in advance; but if, for convenience of the insured, the same are paid semiannually or quarterly, the balance of any annual premium will be deducted in case this policy becomes a claim.

An examination of §§ 3604 and 3630e, Rev. Stat., before referred to, shows that, for the purpose of granting certificates of authority to transact the business of life insurance in this state, the general assembly has divided life insurance companies created under the laws of other states into such as insure lives on the assessment plan and such as do not. And while, as we have seen, *supra*, the powers of a corporation of this kind, and the scheme of insurance it may pursue, must be ascertained by an inspection of its charter, nevertheless, when it seeks a license to transact business in this state, the question whether that scheme falls within one or the other of those two classes must be determined according to our own laws. This division of life insurance companies, organized under the laws of other states, made for the purpose of providing for their admission in this state to transact business, distinctly appears for the first time in the statute of April 18, 1883 (80 Ohio Laws, p. 180). Under that statute life insurance companies created under the laws of other states, that transacted business on the assessment plan, were admitted into this state on terms that were much more liberal than those extended to such companies as did not pursue that plan. Section 3630e of the act of 1883 (80 Ohio Laws, p. 180), above referred to, which prescribed the terms under which life insurance companies of the former class might be admitted into this state, did not require of them either fixed capital or a deposit of any sum of money whatever as a condition to their admission; while, by the provisions of §§ 3604, 3605, Rev. Stat., all other life insurance companies organized in other states, as conditions to admission herein, were required to possess a prescribed capital, and to deposit with the superintendent of insurance, for the benefit of its policy holders, securities to at least the sum of \$100,000. Doubtless the chief consideration that led to this classification, and consequently to granting to assessment companies admission upon more liberal terms as to capital than were prescribed in respect of other life insurance companies of other states, were that the former relying upon *post mortem* assessments to meet specific losses as they should occur, the possession of a fund accumulated for that purpose would not be necessary to the security of a policy holder, while, in respect to the other class,—those that exacted the payment of a premium in advance, and must rely wholly upon accumulations of capital

already made to pay losses,—the security of their policy holders demanded that they should possess capital security invested and exclusively devoted to that object. Certainly these considerations are sufficient to account for the classifications made, and for the difference in the terms prescribed to the members of each class as conditions for admission to transact business in this state, and are entitled to considerable respect in construing the statute, and in a doubtful case might be decisive.

There is, however, little, if any, ambiguity in the statute of 1883 (80 Ohio Laws, p. 180) in this respect. Section 3630e, Rev. Stat., as then passed, clearly made the transaction of business "on the assessment plan" the test of admissibility under its provisions. If a life insurance company, organized in another state, did not insure according to that plan, it was not entitled to admission under that section (3630e), but must resort for that purpose to §§ 3604, and 3605, Rev. Stat. Manifestly, this phrase relates to the method by which the revenue of an insurance company is to be raised, or (which is the same) to the mode in which the company exacts from its policy holders the consideration to which it is entitled on account of the obligation or risk which it assumes on issuing a policy. In this connection it should be held to mean something specifically different from "premium," for it is used in contradistinction to the latter word. Our statutes do not define the word "premium," nor do they declare the meaning of the phrase "on the assessment plan." But the general assembly should be deemed to have used these terms in the sense in which they were understood at the time the statute was enacted. If, in the subsequent growth and development of life insurance, the different plans on which it is transacted have lost most of their distinctive features, it would not at all affect the construction of the statute. Section 3630e of the statute of 1883 (80 Ohio Laws, p. 180), however, was amended in 1891 (88 Ohio Laws, p. 252). The section as then amended is now in force, and differs from the section it superseded in a number of quite important provisions. The right to a license under the amended section depends upon specific conditions that the section it superseded did not contain. The fifth of these conditions requires of a life insurance company seeking a license under it to show that it "is paying, and for the twelve months next preceding has paid, the maximum amount named in its policies or certificates." The sixth condition is to the effect that it must show that the "liabilities of the assured or members are not limited to fixed or artificial premiums," while the seventh condition requires that it shall have accumulated and securely invested a fund "not less in amount than the proceeds of one periodical payment by or assessment on all certificates or policy holders," etc. The extent to which these conditions impliedly modify the method of raising funds, as contemplated by the phrase "on the assessment plan," as originally used, is difficult to determine. The sixth condition, by requiring the company to show that it does not rely solely on "fixed or artificial premiums," would indicate that it might raise part of its revenue in that way. The provision of the

seventh condition, that it shall maintain and invest a fund "not less in amount than the proceeds of one periodical payment by or an assessment on all certificates or policy holders," points in that same direction. These provisions seem to contemplate that a scheme of life insurance, according to which a portion of the fund designed to pay losses may be raised by fixed periodical payments, would not be incompatible with the "assessment plan" of insurance.

However this may be, as long as the legislature retains this classification of life insurance companies for the purpose of granting to them permission to transact business in this state, the courts must regard it as substantial, and founded on some clearly understood and material features, wherein the two classes differ from each other. The retention of the classification would otherwise be unaccountable. This difference, we have shown, relates solely to the method in which a company exacts payment from a policy holder for the hazard it assumes by issuing a policy. The one class exacts premiums, or a fixed sum, payable periodically in advance, without reference to any specific loss; while the distinguishing feature of the other is an assessment of a sum, usually varying in amount according to the sum to be raised, to be ascertained and levied after the death of the insured. The reason, as we have seen, for this classification, and for granting a license to a member of the "assessment" class on more liberal terms than one belonging to the "premium" class, is that the former class does not necessarily pay its losses from a fund already in existence, but may raise it by a *post mortem* assessment, while the latter class must resort to a fund already accumulated, and which, for the security of policy holders, should be safely invested. The scheme upon which the state exacts taxes from foreign insurance companies rests, also, to some extent, on this distinction. Rev. Stat. § 2745.

We think, therefore, that, notwithstanding the fifth, sixth, and seventh requirements or conditions found in § 3630e, Rev. Stat., as amended in 1891 (88 Ohio Laws, p. 252), to bring a life insurance company into the class that transact business "on the assessment plan," within the purview of our statutes, its chief source of revenue should be *post mortem* assessments to pay specific losses. This view of the matter was, in substance, taken by this court in *State, Atty. Gen., v. Monitor Fire Assn.* 42 Ohio St. 555. The court held that "an annual deposit, paid in advance, based upon the hazards of the risk, and without reference to an amount necessary to pay losses that may occur during the year, is, in fact, a premium paid for carrying the risk, and not a specific assessment authorized by the statute." The question there related to the transaction of fire insurance, but the reasoning by which this court reached the conclusion announced in that case would seem to apply equally to the question of what constitutes insurance on the assessment plan in life insurance. *State, Atty. Gen., v. Western Union Mut. L. Ins. Co.* 47 Ohio St. 167, 8 L. R. A. 129; *State v. Moore*, 38 Ohio St. 7. The policy of the relator, which has been recited, shows quite clearly

that it exacts of its policy holders fixed sums, to be paid in advance at stated periods, and based on the hazard of the risk, and without reference to any specific loss.

An ingenious argument, based on the "privileges and agreements" set out on the back of the policy, has been presented by counsel for relator. In substance, however, these "privileges and agreements" do not differ from those provisions found in the policies of those companies, whether old line or mutual, which allow the holder to participate in the earnings of the company. Considerable stress was laid by counsel for relator on the proviso that appears on the back of the policy, in connection with the "privileges and agreements," to the effect "that, in all the preceding privileges, the amounts therein referred to shall not conflict with the statutory requirements of any state in which the association is at the time doing business." We know of no statute of this state with which those privileges and agreements conflict. These "privileges and agreements," however, assist in giving character to the plan on which the latter transacts its business. This plan falls within the reason of the statute that requires life insurance companies to deposit securities for the protection of policy holders as a condition to admission to transact business. The reason of that requirement, as we have shown, rests upon its necessity. It constitutes the chief reliance of policy holders who may reside within the state. Without such a deposit the guaranty of ultimate payment would be greatly weakened. The plan also conforms very closely to the letter of §§ 3587-3609, inclusive, Rev. Stat. Its features bear a striking resemblance to life insurance contemplated by those sections, but disclose little if any similarity to that which § 3630e, even since the amendment of 1891 (88 Ohio Laws, p. 252), describes.

We think the relator is not entitled to a license, by virtue of § 3630e, to transact business in this state, but in order to obtain a license for that purpose, must comply with §§ 3604, 3605, Rev. Stat.

2. The charter of the other relator, the Home Mutual Life Insurance Company of Detroit, omitting formal provisions immaterial to the questions before the court, is as follows:

ARTICLE III.

Sec. 1. The object of the incorporation of this company shall be to furnish life insurance to its members, for the benefit of the widows, widowers, heirs, and relatives of deceased members and other persons having an insurable interest in the life of such members.

Sec. 2. There shall be one class or division of members in said company, to be known as the whole life class; the object or purpose of which shall be to furnish life insurance to each member therein by such members paying continuous premiums during life.

ARTICLE IV.

Sec. 1. Assessments, premiums, and payments are to be paid by the members of this company periodically at such stated periods as shall be designated in the member's policy, according to the following table of rates for

each \$1,000 insurance, based upon the age of each member at last birthday.

Age.	Monthly.	Bi-monthly.	Quarterly.	Semi-annual.	Annual.
21	\$0 90	\$1 80	\$2 70	\$5 36	\$10 58
22	91	1 82	2 73	5 41	10 70
23	92	1 84	2 76	5 46	10 82
24	94	1 88	2 82	5 58	11 05
25	95	1 90	2 85	5 65	11 17
26	97	1 94	2 91	5 76	11 41
27	98	1 96	2 94	5 82	11 52
28	99	1 98	2 97	5 88	11 64
29	1 00	2 00	3 00	5 94	11 76
30	1 01	2 02	3 03	6 00	11 88
31	1 03	2 06	3 09	6 12	12 11
32	1 04	2 08	3 12	6 18	12 23
33	1 06	2 12	3 18	6 30	12 47
34	1 08	2 16	3 24	6 42	12 70
35	1 10	2 20	3 30	6 53	12 94
36	1 15	2 30	3 45	6 83	13 52
37	1 20	2 40	3 60	7 13	14 11
38	1 25	2 50	3 75	7 43	14 70
39	1 30	2 60	3 90	7 72	15 29
40	1 35	2 70	4 05	8 02	15 88
41	1 40	2 80	4 20	8 32	16 46
42	1 45	2 90	4 35	8 61	17 05
43	1 50	3 00	4 50	8 91	17 64
44	1 55	3 10	4 65	9 21	18 23
45	1 60	3 20	4 80	9 50	18 82
46	1 65	3 30	4 95	9 80	19 40
47	1 70	3 40	5 10	10 10	20 00
48	1 80	3 60	5 40	10 69	21 17
49	1 90	3 80	5 70	11 29	22 34
50	2 00	4 00	6 00	11 88	23 52
51	2 10	4 20	6 30	12 47	24 70
52	2 25	4 50	6 75	13 37	26 46
53	2 45	4 90	7 35	14 55	28 81
54	2 65	5 30	7 95	15 74	31 16
55	2 85	5 70	8 55	16 93	33 52
56	3 05	6 10	9 15	18 12	35 87
57	3 26	6 52	9 78	19 36	38 34
58	3 47	6 94	10 41	20 61	40 81
59	3 69	7 38	11 07	21 92	43 39
60	3 95	7 90	11 85	23 46	46 16
61	4 18	8 36	12 54	24 83	49 16
62	4 44	8 88	13 32	26 37	52 51
63	4 71	9 42	14 13	27 96	55 39
64	4 99	9 98	14 97	29 64	58 68
65	5 28	10 56	15 84	31 36	62 09

Sec. 2. Special or extra assessments may be levied by the board of trustees, when it is necessary to meet mortuary losses. All special or extra assessments, or calls for additional premiums, shall be apportioned among the members in such manner as to equitably distribute the mortality cost among such members in proportion each should have contributed, since becoming a member, on the basis of the American experience table of mortality, due allowance being given for all previous payments."

Sec. 4. The moneys realized from assessments, premiums, and payments shall be apportioned to the general fund, mortuary fund, and emergency fund. The object of the general fund shall be to provide for the payment of general or managing expenses of the company. The object of the mortuary fund shall be to provide for the payment of death losses. The object of the emergency fund shall be to provide a trust fund for the payment of death losses or other benefits provided for in the policy of the member, and to protect the company from extra assessments in case of an extraordinary death rate. The emergency fund shall not at any time be less than the maximum amount at risk on any one life, from and after the date of the incorporation of this company. The board of trustees shall apportion the money so realized from assessments, premiums, and payments between the several funds named, as it may be deemed best for the interest of the company.

40 L. R. A.

These provisions of its charter, together with that section of the statutes of Michigan (1 How. Anno. Stat. § 4217) which prescribes who shall be members of such corporations, and their rights as members, show that the relator the Home Mutual Life Insurance Company has neither capital stock nor stockholders for whose benefit it was created. Its policy holders are its members. They alone have a voice in the election of its officers, and it is for their benefit, at least in theory, that its business is conducted. Therefore the objection, founded on its internal structure, which was interposed to the claim of the other relator, the National Life Association of Hartford, to a license under § 8630e, Rev. Stat., does not apply to the claim of the present relator to a license under that section. The objection interposed to granting to the present relator a license rests upon its method of transacting business, which, the superintendent of insurance contends, is not conducted according to the assessment plan.

In order to obtain a correct notion of the scheme of insurance that it pursues, resort must be had to its form of policy, which is as follows:

"In consideration of the payment of the first ——— premium hereon of ——— dollars, and of the representations, agreements, and warrants made to it by insured, herein named, in his or her application for this policy of insurance, does hereby issue this policy of insurance to ———, of ———, state of ———, and in consideration of the payment in advance thereafter of ——— premiums of ——— dollars, this company does promise to pay the sum of ——— dollars to ———, the beneficiary herein named, if living at the time of the death of the insured, and, if not living, then to the heirs at law of said insured, at the office of said company, in the city of Detroit, Michigan, within ninety days after the acceptance and approval of satisfactory proofs of the death of said insured, provided said death shall occur while this policy is in full force. This policy is issued, delivered, and accepted subject to the conditions and agreements contained herein and on the back hereof, which are made a part of this contract as fully as if recited over the signature hereto affixed. In witness whereof," etc.

The conditions on the back of the policy are in the following terms:

"(1) It is expressly agreed that this policy shall not be in force until the same has been delivered to the insured and the first premium thereon shall have been paid in cash during the insured's lifetime and good health. (2) When this policy has been in continuous force for three years from its date, it shall be incontestable, except for the nonpayment of premiums when due, for understatement of age, or for fraud. (3) No personal liability is incurred by becoming a member of this company. Payments are optional with the insured, to continue as long as he may desire to keep the policy in force. Payments under this policy during its first two years, after providing for its *pro rata* of actual death claims occurring upon policies in the first and second policy years, and thereafter quarterly, an amount limited to one eighth of 1 per cent of the face

value of this policy may be used for expense purposes; the remainder thereof to be apportioned by the trustees of said company among the mortuary, reserve, and emergency funds.

(6) The premiums herein required to be paid by the insured are to provide for the payment of mortuary claims, and for the general fund and reserve or emergency funds of this company, and are based upon the adopted tables of rates, and graded according to the age of the insured and the amount of insurance named herein. Said tables of rates are based upon the American Mortality Tables, and the actual experience of American life insurance companies, and are deemed adequate to meet all present and future liabilities of the company, without necessitating an increase in the rate with advancing age; but, as an absolute protection against the possibility of the mortuary or reserve funds becoming depleted, it is agreed that, should any emergency arise, through epidemic or otherwise, whereby the premiums are insufficient to meet the mortuary requirements as determined by the board of trustees, additional premiums may be levied to meet such emergency, of which special notice shall be served. (7) It is expressly understood and agreed, by and between the insured and this company, that if the insured shall not pay the sum or sums stipulated to be paid in the manner aforesaid, or if any misrepresentations shall have been made or any facts omitted which should have been stated in said application, or if the insured shall violate any of the provisions of this agreement, then this contract shall cease to be binding upon said company, and all payments made shall be forfeited to said company. . . . (9) In case the insured shall fail to pay any premium at the office of the company within the time specified for the payment thereof, a delinquent charge of 25 cents will be added. The membership of the insured in this company shall not lapse or determine until ten days after said company shall have mailed to said insured, as hereinabove provided, a notice that said premium has not been paid; and if said insured shall not pay said premium at the office of said company by twelve o'clock, noon, on the last day specified in said notice, then the insured's membership in this company shall lapse and determine, and this policy shall become null and void, and all payments made thereon shall be forfeited to the company, except when otherwise expressly provided herein. (10) The application of the insured for this policy of insurance, together with the articles of association and by-laws of this company now in force or which may hereafter be legally adopted, shall constitute a part of this policy. . . . (18) When the insured shall reach his life expectancy, computed on his age at the date of this policy, he may, by giving the company six months' notice in writing of his desire to do so, provided the policy is in full force and all payments have been made thereon, discontinue his payments upon the same, and apply his net contribution to the reserve or emergency fund, together with his equitable proportion of all accretions thereto, as determined by the actuary of the company, either to the maintaining of this policy in force until such credits are exhausted, when it shall cease and

determine, or surrender this policy, and withdraw the same in cash, together with any unused dividend accumulations, in full settlement of all liability. (14) Dividends to be declared shall be limited to that part of the reserve fund in excess of \$100,000 and in excess of the amount of one periodical payment from all policy holders. (15) When the policy has been kept in force continuously for a period of ten years from its date, the insured shall be entitled to participate in whatever dividends may be declared thereafter; the same to be determined and apportioned by the actuary of the company, and credited on premium accounts to reduce future payments on this policy. (16) In event the insured shall become totally and permanently physically disabled, said company will pay, upon proof satisfactory to the board of trustees, upon the receipt and surrender of this policy, in full discharge of all claims, the sum of one half the face value hereof, provided the insured shall so request in writing, while this policy is in full force, subject to the agreements contained herein."

Does the scheme of insurance thus displayed coincide with that conducted on the "assessment plan," as that term is used in § 8630e? The obligation of the insured is to pay a fixed sum at stated periods in advance, without reference to any particular death claim. Section 6 of the conditions and agreements on the back of the policy shows that the premiums to be paid by the insured are to provide, indiscriminately, for the payment of death claims, to create a general fund, and a reserve or emergency fund, which latter fund may be increased to at least \$100,000. The obligation of the policy holder to pay a fixed sum periodically for three distinct purposes is subject to the right of the company to levy "additional premiums" to guard against "the possibility of the mortuary or reserve funds becoming depleted." Here there is no obligation or duty laid upon the company to await the exhaustion of these funds, or either of them, before calling upon the policy holder for additional premiums. These contributions, authorized by this emergency clause, though denominated "premiums," bear a close resemblance to assessments. The amount of the call is uncertain, and depends upon the will of the managing body of the concern,—its board of trustees. It is not, however, the chief or usual method of securing an income, and, if the affairs of the company are intelligently and honestly conducted, should never be resorted to, except in the event of some widely-spread and fatal epidemic. The ordinary, regular, and chief source of revenue open to the relator is the fixed periodical payments named in the policy, and, in our opinion, for the purpose of admission into the state, they characterize the method of insurance which the company pursues. The possibility that some grave and unforeseen calamity may call into operation an authority vested in the trustees to call for an additional and uncertain sum should not be regarded as sufficient to assign the company to that class which transacts the business of insurance on the assessment plan. The general assembly, in classifying life insurance companies into those that transact business on

the assessment plan and those that do not, should be taken to have regarded their usual and regular mode of raising revenue, rather than the exceptional or occasional methods to which resort may be had upon the happening of some remote contingency.

We think neither of the relators transacts the business of insurance on the assessment plan, within the meaning of § 3630e, Rev. Stat. *Writ refused*, and petitions dismissed.

SOUTH CAROLINA SUPREME COURT.

George HENDERSON *et al.*, Petitioners,
Appts., STATE of South Carolina, *Resp't.*,
v.

Harry EVANS *et al.*

(.....S. C.....)

1. **The costs and fees of the witnesses of a defendant** tried for a misdemeanor are not chargeable to the county under a statute charging the county with such expenses in felony cases.
2. **A constitutional right of an accused person to compulsory process** for his witnesses does not carry a right of the witnesses to claim fees from the county.

(February 19, 1896.)

A PPEAL by petitioners from a judgment of the General Sessions Circuit Court for Laurens County denying their claim to witness fees in a prosecution against Evans *et al.* for assault and battery. *Affirmed.*

The facts are stated in the opinion.

Messrs. Johnson & Richey for appellants.
Mr. Thomas S. Sease for the State.

Jones, J., delivered the opinion of the court:

Appellants were bound over to attend, and did attend, the court of general sessions for Laurens county, July term, 1897, as witnesses for defendants in the case of the state against Harry Evans and others, charged with assault and battery with intent to kill. After the acquittal of defendants, the appellants applied to the circuit judge for certificates that they were material witnesses, with a view to draw pay as witnesses. The circuit judge, while certifying as to their materiality as witnesses,

NOTE.—As to right of state to require services of witness without compensation, see *note* to Dixon v. People (Ill.) 39 L. R. A. 116.

directed the clerk of the court not to issue pay certificates to appellants, for the reason that defendants were tried for a misdemeanor, and that the county is not liable for costs and fees of defendants' witnesses in a case of misdemeanor. The only question presented here is whether the county of Laurens is liable for the costs and fees of defendants' witnesses in a case of misdemeanor. We hold with the circuit judge that the county is not liable. The right to such fees depends wholly upon statute. In § 622, Gen. Stat., being § 676, Rev. Stat. 1893, it is provided that "each county shall pay

(2) witnesses' fees in the state cases, for actual attendance upon the circuit courts as provided by law." But by an act approved February 4, 1896, entitled "An Act to Amend § 2638 of the General Statutes, being § 45 of the Revised Statutes, Criminal Code, Vol. 2, in Reference to Defendants' Witnesses, and Regulate Their Pay," found at page 102 of the Acts of 1896, it is provided that "in all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor, and in felonies, and no other cases, such witnesses shall receive the same pay as the state's witnesses upon the certificate of the trial judge that the testimony of such witnesses was material to the defense: provided," etc. It is manifest from this act that the liability of a county to pay fees of defendants' witnesses is limited to felonies. It is true that § 18 of article 1 of the Constitution gives the accused the right to compulsory process for obtaining witnesses in his favor in all criminal prosecutions. But no right of the accused is involved in this case, and the accused's right of compulsory process for his witnesses in all cases does not carry a right of his witnesses to claim fees from the county in such cases. The right to such fees must rest upon some express statute, and there is no such statute, except in cases of felony.

The judgment of the Circuit Court is affirmed.

TENNESSEE SUPREME COURT.

William Norman MITCHELL, by Mrs. Jennie Mitchell, His Next Friend, *Appt.*,
v.

NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY COMPANY.

(.....Tenn.....)

1. **A bill of exceptions is not necessary** for the review of a demurrer to evidence which incorporates the evidence.

NOTE.—As to frightening horse by blowing locomotive whistle, see also *Bittle v. Camden & A. R.* 40 L. R. A.

2. **Blowing a locomotive whistle loudly several times under a bridge** which is a much traveled public thoroughfare, over which vehicles of all kinds are constantly passing, is, in the absence of some special necessity therefor, an unnatural and reckless act, creating a liability for resulting damages.

3. **A presumption of negligence arises** from the blowing of a locomotive whistle loudly and repeatedly under a bridge constantly used by all kinds of vehicles.

Co. (N. J.) 23 L. R. A. 283; and *Omaha & R. Valley R. Co. v. Clarke* (Neb.) 23 L. R. A. 504.

(February 11, 1893.)

APPEAL by plaintiff from a judgment of the Circuit Court for Cheatham County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. James L. Watts for appellant.

Messrs. Jacob Leech and J. B. De Bow for appellee.

Snodgrass, Ch. J., delivered the opinion of the court:

The plaintiff in error was in a wagon, driving a pair of mules over a bridge on the Charlotte pike near Nashville. This pike was a public thoroughfare much traveled, and vehicles of all kinds were constantly passing over the bridge. While plaintiff was so passing, an engine of the defendant, Nashville, Chattanooga, & St. Louis Railway Company, passed under it; and while under it, or just as it was passing out from beneath, its whistle was loudly blown several times. This frightened the mules, which ran away, and plaintiff in error was thrown out of the wagon and badly injured. Through a next friend (plaintiff being a minor) he brought this suit. Issue was joined, trial had, and, after all plaintiff's evidence was in, defendant demurred to it as insufficient in law to authorize recovery. In addition to what we have stated as facts of the case which were proved, plaintiff testified that he did not know the cause of the blowing, and made no effort to prove whether there was or not a legal or proper cause or excuse therefor. Upon the demurrer, which admitted all the evidence, and all legitimate inferences arising thereon, the question was whether negligence could be inferred from such blowing of the whistle under a public bridge on a thickly traveled thoroughfare while plaintiff in error was driving over it. The court held it could not, and dismissed the suit. Plaintiff took a bill of exceptions, which is objected to in this court as insufficient. This is immaterial. The demurrer incorporates the evidence, and a bill of exceptions was not necessary. 2 Elliott, Gen. Pr. § 855. On the merits, defendant's counsel, in connection with an ingenious argument of much plausibility, cites as authority for the action of the court the case of *Cincinnati, I. St. L. & C. R. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep. 384, in which it was held that it was not necessarily negligent in a railway company to sound a locomotive whistle at a point where the railroad crosses a highway by a bridge overhead, although the crossing is known to be one of extraordinary danger, and the sounding of the whistle causes a horse to run away. We have stated the principle of this case from its own syllabus as given in 54 Am. Rep. 384. It may admit of question if it is not too strong for a proper analysis of the case, which is a somewhat complicated one, and in which there were certain findings of fact, made by the court below, and certain omissions in finding, to which reference was made, and amid which

findings and omissions the court with difficulty labored to a conclusion satisfactory to itself. But, assuming it to have squarely decided the question that such a blowing of an overhead engine would not be negligence *per se*, or such an act as that a jury or judge authorized to deduct legitimate inferences might not, in the absence of other proof, hold to be negligence, then such conclusion is not satisfactory to us, even upon its own facts. There, however, it will be remembered, the noise and smoke involved in the passage and blowing of an engine were above the animals, which might or might not be thereby frightened. Bad as these are, they are not, in the very nature of things, so terrifying as when puffing and blasting underneath the animal on a bridge above, where sound and sight and smell may all be combined to drive him to the verge of frenzy by terror. In such a case the supreme court of Pennsylvania held such blowing negligence *per se*. That court characterized it as an act of gross negligence. *Pennsylvania R. Co. v. Barnett*, 59 Pa. 259-265, 98 Am. Dec. 346. It was, of course, not decided that any blowing of a locomotive whistle would be negligence, or that every case of injury resulting therefrom would be made out by proving such blowing without more, and this the same court aptly illustrated in a late case. *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. 219. But it was distinctly held that a blowing under a bridge constantly used by the traveling public is *prima facie* negligence, and in that we cordially concur. See also 8 Elliott, Railroads, § 1264, reference to note 3, and cases cited; *Nashville & C. R. Co. v. Starnes*, 9 Heisk. 52, 24 Am. Rep. 296. Ordinarily, the use of a whistle is of machinery and appliances necessary for many practical purposes, and where used under ordinary circumstances no inference of negligence could be drawn; but it is obvious that a blowing under a bridge is, in the absence of some special necessity therefor, an unnatural and reckless act, liable to cause great damage, and the circumstances and surroundings call, therefore, for proof of its necessity, when the act occasions the damage to be anticipated. The proof of such a blowing under such circumstances is sufficient to authorize the presumption of negligence. The onus is shifted to explain and justify or excuse it upon him who does it. This burden may be successfully carried, but it cannot be avoided by demurrer to plaintiff's evidence establishing the act.

It results that judgment sustaining the demurrer must be overruled, and judgment rendered here against demurrant. The case will be remanded for a jury to assess damages.

It is insisted here plaintiff could not recover, because he was driving one runaway mule. We find no such negligence in plaintiff's conduct as precludes a recovery. If he was guilty of any negligence to reduce the amount he might otherwise be entitled to, it is matter for the jury, which shall assess the correct amount to be given under the facts in evidence as demurred to. The defendant in error will pay the costs of the appeal.

VERMONT SUPREME COURT.

STATE of Vermont
v.
Addie SHATTUCK.

(69 Vt. 403.)

1. The burden of proving restrictions in another state upon the remarriage of a divorced person is upon the person alleging them.
2. The marriage in another state where it is valid, of a divorced person incapable of remarrying by the law of his domicile, will not be held void under the law of his domicile unless the statute expressly so provide, although he went outside the state for the express purpose of evading the law, and immediately returned.

(July 17, 1897.)

EXCEPTIONS by defendant to rulings of the Windsor County Court made during the trial of an action charging defendant with adultery which resulted in a conviction. *Overruled.*

The facts are stated in the opinion.

Mr. William B. C. Stickney, for respondent:

There is no question that Coburn had no right to remarry in Vermont.

It shall not be lawful for the libelee to marry a person other than the libellant for three years from the time such divorce is granted, unless the libellant dies.

Vt. Stat. §§ 2703, 2704, 5056.

If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognized as lawful.

Brook v. Brook, 9 H. L. Cas. 219. See *Penegar v. State*, 87 Tenn. 244, 2 L. R. A. 703; *Barney v. Cuness*, 68 Vt. 51.

Messrs. J. G. Harvey and W. W. Stickney, for the State:

The marriage in New Hampshire between William H. Coburn and Grace Hoisington conformed to their statute on that subject.

The proof of marriage was by direct evidence of witnesses present at the celebration, and by a certified copy of the intention and certificate of marriage from the records of Claremont where such registration is required to be kept by the law of New Hampshire.

This evidence is sufficient and satisfactory proof of the marriage, and, taken in connection with the New Hampshire statute, is conclusive.

2 Greenl. Ev. § 461; N. H. Pub. Stat. chap. 174.

The rule of law *omnia rite actu presumuntur*.

NOTE.—As to statutes forbidding remarriage after divorce, see also Hernandez's Succession (La.) 24 L. R. A. 831, and note; *Orvitt v. Smith* (Vt.) 35 L. R. A. 223; and *Crawford v. State* (Miss.) 35 L. R. A. 224.

40 L. R. A.

tur, applies with particular force to cases of presumption in favor of marriage and legitimacy.

Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

A marriage valid where it is celebrated is valid everywhere.

2 Kent, Com. p. 91; *Com. v. Graham*, 157 Mass. 73, 16 L. R. A. 578.

Though a person divorced from a first wife is rendered by the law of the place incapable of contracting a second marriage, yet a marriage entered into by him in another state, where no such disability exists, will be valid.

Putnam v. Putnam, 8 Pick. 433; *Throp v. Throp*, 90 N. Y. 602, 43 Am. Rep. 189; *Roberts v. Ogdensburgh & L. C. R. Co.* 34 Hun, 324.

Where parties resident in one state, to avoid the laws of their place of domicile, go to another state and are married, the marriage, if valid in the country where celebrated, will be held to be valid in the country of their domicile.

Dickson v. Dickson, 1 Yerg. 110, 24 Am. Dec. 444; *West Cambridge v. Lexington*, 1 Pick. 505, 11 Am. Dec. 231; *Sutton v. Warren*, 10 Met. 451; *Sterenson v. Gray*, 17 B. Mon. 193; *Dannelli v. Dannelli*, 4 Bush, 61; *Van Storch v. Griffin*, 71 Pa. 240; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Pearl v. Hansborough*, 9 Humph. 426; *Phillips v. Gregg*, 10 Watts, 158, 35 Am. Dec. 158; *Morgan v. McGhee*, 5 Humph. 13; *State v. Patterson*, 24 N. C. (2 Ired. L.) 356, 38 Am. Dec. 609; *Ponsford v. Johnson*, 2 Blatchf. 51; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 403.

Rowell, J., delivered the opinion of the court:

The charge is that the prisoner, an unmarried woman, committed adultery with Coburn, a married man. It appeared that Coburn's first wife, who is still living, obtained a divorce from him in this state in December, 1895; that on June 13, 1896, he and Grace Hoisington, both of whom were then domiciled in Windsor in this state, went to Claremont, New Hampshire, and were there married by a clergyman authorized by the law of that state to solemnize marriages; and that immediately after the marriage they returned to Windsor, where they have lived ever since, and where they first cohabited as husband and wife, never having cohabited as such in New Hampshire. The only evidence of the law of New Hampshire respecting marriages was chapter 174 of the Public Statutes of that state, entitled *Marriages*. That chapter imposes no restraint upon remarriage by the guilty party to a decree of divorce. The court charged the jury that if it found that the marriage ceremony was performed by the clergyman, and that he was authorized to perform it, as his testimony tended to show, and also found that the said Grace cohabited with Coburn under the belief that the marriage was legal, as her testimony tended to show, the marriage was valid, and Coburn was a person with whom the crime of adultery could have been committed. To this the prisoner excep-

ted, and also for that the court did not charge that there was no evidence in the case to show that Coburn, being disqualified by the laws of this state to contract a lawful marriage, was, notwithstanding such disqualification, competent by the laws of New Hampshire to contract a lawful marriage, and that without such testimony the fact of his marriage to said Grace was not made out. This last exception is not sustainable. As we have said, the chapter of the New Hampshire statutes put in evidence is not restrictive in this behalf; and if it be said that some other part of the statutes may be, the answer is that, as such restrictions upon marriage are exceptional, the burden was on the prisoner to show the restriction, if any there is. *Hutchins v. Kimmell*, 81 Mich. 126, 132, 18 Am. Rep. 164. And, as no restriction exists in the common law of this state, the presumption is that the common law of New Hampshire is like ours in this regard. *Ward v. Morrison*, 25 Vt. 593, 601. The marriage in question must, therefore, be taken to be valid by the law of New Hampshire. But, had it been celebrated in this state, it would be void here, for our statute provides that it shall not be lawful for a divorced libelee to marry a person other than the libellant for three years from the time the divorce is granted, unless the libellant dies; and imposes a penalty on a person who violates that provision, or lives in this state under a marriage relation forbidden by it; and we have recently held that a marriage celebrated in this state in violation thereof between parties domiciled here, was void here. *Oritt v. Smith*, 68 Vt. 35, 35 L. R. A. 223. The prisoner claims that this marriage is void here, notwithstanding it was celebrated in New Hampshire, and is valid there, for that, when a marriage is absolutely prohibited in a state or country as being contrary to public policy, and leading to social evils, the domiciled inhabitants of that state or country cannot be permitted, by passing the frontier, and entering another state, in which the marriage is not prohibited, to celebrate a marriage forbidden in their own state, and immediately return to their own state, to insist on their marriage being recognized as lawful. It is the common law of Christendom that as to form and ceremony a marriage good where celebrated is good everywhere. But as to capacity to marry the authorities are not agreed, some holding that, as in other contracts, it depends upon the law of domicile, and some that it depends upon the law of the place where the marriage is solemnized, as to form and ceremony, and that a marriage good where celebrated is good everywhere, unless odious by the common consent of nations, or positively prohibited by the public laws of a country from motives of policy. It is undoubtedly true that states may control this matter by statute, as Massachusetts does, where it is enacted that when persons resident in that state, in order to evade its marriage laws, and with an intention of returning to reside there, go into another state or country and are married, and afterwards return and reside in Massachusetts, the marriage shall be deemed void. We have no such express provision. The language of our statute is general, and it is a fundamental rule that no statute, whether relating to marriage or otherwise, if

in the ordinary general form of words, will be given effect outside of the state or country enacting it. To bind even citizens abroad, it must include them, either in express terms or by necessary implication. Hence, if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state, just as though the statute did not exist. If they are valid by the international law of marriage and the local law of the place where celebrated, they are valid by the law of such state, and the statute has nothing to do with the question if such international law is a part of the law of the state, as it is here, for a written law not construed to be extraterritorial does not change the unwritten law as to extraterritorial marriages; and therefore parties who are under no disability by international law may choose their place of marriage, and if the marriage is valid there, it will be valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicile would not have made them married. There is, therefore, no foundation for an argument based simply on the idea of an evasion of the law of domicile.

This doctrine is entirely applicable to statutes prohibiting marriage after divorce. Such statutes are not extraterritorial, unless made so by express words or necessary implication, as has been frequently held in this country though there are cases the other way, among which is the recent and well-considered case of *Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 703, where the cases adopting the same view will be found. But the weight of American authority, as well as reason and analogy, sustain the proposition stated. This whole subject is very fully and satisfactorily discussed by Mr. Bishop in chapter 39 of the first volume of his work on Marriage, Divorce, and Separation; and, as we adopt his views, an extended discussion here is not necessary. The subject is also fully discussed in *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, and *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321. In the latter case it is said that the relation of husband and wife being based upon the contract of the parties, and recognized by all Christian nations, the validity of the contract, if not polygamous nor incestuous according to the general opinion of Christendom, is governed, even as regards the capacity of the parties, by the law of the place of marriage; that this status, once legally created, should be recognized everywhere as fully as if created by the law of the domicile; and that, therefore, such a marriage, if valid by the law of the place where contracted, even if contracted between persons domiciled in Massachusetts, and incompetent to marry there, is valid there to all intents and effects, civil and criminal, except so far as the legislature has clearly declared that such a marriage out of the commonwealth shall be deemed invalid. The same doctrine is held in *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, where it is said that, in the absence of express

words to that effect, it is not to be inferred that the legislature intended its enactments to contravene the *jus gentium* under which the question of the validity of the marriage contract is referred to the *lex loci contractus*, and which is made binding by the consent of all nations, and professedly and directly operates upon all; and that, while every country can regulate the status of its own citizens, until the will of the state finds clear and unmistakable expression to the contrary, that law must control. Judge Marshall says in *United States v. Fisher*, 2 Cranch, 389, 2 L. ed. 314, that "where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects." *Brook v. Brook*, 9 H. L. Cas. 193, sustains the prisoner's contention. There a man and his deceased wife's sister, both of whom were lawfully domiciled British subjects, went temporarily to Denmark, and were there married, where their marriage was valid; but it was held void in England because an English statute prohibited such marriages. The law lords delivered separate opinions, and the only ground upon which they agreed was that, as the statute made such marriages between English subjects domiciled in England void because declared by the act to be contrary to the law of God, it must be construed to include such marriages though solemnized abroad. Judge Gray says, in *Com. v. Lane*, above cited, that the judgment in that case proceeds upon the ground that an act of Parliament is not merely an ordinance of man, but a conclusive declaration of the law of God, and that the result is that the law of God, as declared by act of Parliament, and expounded by the House of Lords varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure. Mr. Bishop criticizes the case very sharply, and says it is of the highest importance

that it be sufficiently understood in this country to avoid any accident of its being followed by our courts. He discusses it very fully, admitting that it was difficult for him to write soberly about it, as the decision was announced in apparent oblivion of the course that justice had taken for ages in England, and ignored alike acts of Parliament and judicial decisions. To follow it, he says, would lead us into confusion not to be endured where marriage, good order, and Christian decency are respected. The French law is much like the English in this regard, though more exacting. By the Code Napoleon, a marriage contracted in a foreign country between French people, or between a French person and an alien, is valid if it has been celebrated in the manner followed in such country, provided it has been preceded by the publication required by the Code, and provided the French person has not violated the provisions of the Code concerning the qualifications and conditions required to contract marriage. *Cachard's French Civ. Code*, art. 170. This accords with the further provision of the Code that laws relating to the status and capacity of persons apply to Frenchmen even resident in a foreign country. *Id.* art. 8. On this principle the civilians generally, we think, hold that as to capacity to marry the law of the domicile governs. But the other view as suggested by Judge Story, is founded upon a more liberal basis of international policy that deems it far better to support as valid marriages celebrated in another state or country when in conformity with the laws thereof, although some minor inconveniences may arise therefrom, than to shake general confidence in such marriages, to subject the innocent issue to constant doubts as to their legitimacy, and to leave the parties themselves at liberty to cut adrift from their solemn obligations whenever they happen to become dissatisfied with their lot. Story, *Conf. L.* pl. 124.

Judgment that *there is no error* in the proceedings of the county court, and that the prisoner take nothing by her exceptions.

WASHINGTON SUPREME COURT.

STATE of Washington, *ex rel.* P. H. WINTON, Attorney General, *Appt.*,
v.

HUDSON LAND COMPANY *et al.*, *Respts.*

(..... Wash.)

1. Conveyances made to a corporation when a majority of the stock was owned by citizens will be declared void when a majority of the stock is transferred to and held by aliens, under Const. art. 2, § 33, prohibiting the ownership of lands by aliens, and providing that every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of such prohibition.

2. A lease of land for forty-nine years to an alien is void under Const. art. 2, § 33, prohibiting the ownership of lands by aliens, and providing that all conveyances of land to any alien shall be void.

(March 7, 1898.)

APPEAL by relator from a judgment of the Superior Court for Spokane County in favor of defendants in an action to declare void certain conveyances of real estate which had been made to the defendant company on the ground that the company was an alien. *Reversed.*

The facts are stated in the opinion.

NOTE.—As to ownership of real estate by alien corporation, see also *Oregon Mortg. Co. v. Carstens* (Wash.) 35 L. R. A. 841.

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As to right of foreign corporations in general to own lands, see *note* to *Lancaster v. Amsterdam Improvement Co.* (N. Y.) 24 L. R. A. 322.

Mr. P. H. Winston, Attorney General, in propria persona.

Messrs. Cyrus Happy and Graves, Wolf, & Graves, for respondents:

By the common law aliens were incapable of acquiring and holding real estate.

2 Bl. Com. 249; 2 Kent, Com. 12th ed. 53, 55.

The courts of this country, while holding that an alien cannot acquire real estate by descent or other mere operation of law, hold that he may acquire land by purchase and hold the same until office found by the state.

2 Kent, Com. 12th ed. *supra*.

The common-law prohibition against alien ownership of real estate had its origin undoubtedly in the feudal tenures of the mother country.

Cooley's Bl. Com. p. 872.

Happily we are not troubled with many of the burdens which feudalism imposed.

The payment of taxes upon land has superceded all other burdens under which tenures were held in the days of feudalism.

Therefore we can discover no reason under present conditions for applying this constitutional provision to domestic corporations.

There has never been any common law, or any statute law, against an alien becoming the owner of personal property.

2 Kent, Com. 12th ed. p. 63.

The court is asked to impute to the framers of our organic law the intention that a corporation born and raised in this state shall be exiled, and its lands confiscated, not for any act done by it, but because of the act of a stockholder in transferring his stock. The act which is to work this attainder and corruption of blood, figuratively speaking, is nothing more than the transfer of personal property to one who never labored under any legal disabilities, either at common law or by statute, with respect to personal property.

The statute would seriously impair the value of the stock of all corporations owning real estate, if held to apply to real-estate titles acquired by corporations at a time when it was under no legal disabilities.

What shall constitute citizenship in this country is a matter which the Federal government alone can determine.

For the purposes of jurisdiction confessed by law upon the courts of this country, a private corporation is a citizen of the state where it is created, and necessarily a citizen of the United States, and not an alien.

Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 86 L. ed. 768.

Private corporations are persons within the meaning of the 14th Amendment, and are entitled to its protection the same as natural persons, so far as their property is concerned.

San Mateo County v. Southern P. R. Co. 8 Sawy. 238; *Santa Clara R. Tax Case*, 9 Sawy. 165.

Expatriation can only be effected in accordance with law; and the Congress of the United States must be the source of that law.

Comitis v. Parkerson, 56 Fed. Rep. 556, 22 L. R. A. 148.

Dunbar, J., delivered the opinion of the court:

-40 L. R. A.

This action was brought by the state, on the relation of the attorney general, to declare void certain conveyances of realty made by defendants Harriette N. MacDonald and D. W. MacDonald to the Hudson Land Company, a corporation, upon the ground that said corporation is an alien, under § 38, art. 2, of the Constitution of the state of Washington. It is conceded that, at the time the property was conveyed, a majority of the stock of the corporation was owned by citizens of Washington, but that thereafter a majority of the stock was transferred to, and is now held by, aliens. One parcel of the realty was conveyed absolutely to the company, while another was leased for forty-nine years. To the relator's complaint setting up these facts a general demurrer was interposed, which was sustained by the lower court. The relator electing to stand on his pleading, judgment was rendered against him, from which judgment this appeal is prosecuted.

We think the court erred in sustaining the demurrer to this complaint. This court, in the case of *State, Atty. Gen., v. Morrison* (Wash.) 52 Pac. 228, held that a lease to aliens for ninety-nine years was void, for the reason that it was in contravention of the provisions of the article of the Constitution above referred to, and because parties would not be allowed indirectly to accomplish a result which they are forbidden to do directly, and we think the same reasoning applies to this case. The language of the Constitution is as follows: "The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith, in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be void: provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fireclay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition." It seems to us that this language is not susceptible of construction. A plain policy was plainly enunciated by the constitutional convention. That policy was an inhibition of ownership of lands by aliens except as to the character of lands specially mentioned in the proviso, and the constitutional convention, having in mind, no doubt, the attempt to evade this law which is made in this case, out of an abundance of caution inserted the last provision, *viz*, that "every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition." We cannot understand what meaning could be attached to this last provision of the act if a corporation, the majority of the capital stock of which is owned by aliens, is allowed to become the owner of lands. It is contended by the appellant that, because a majority of the stock of this corporation was owned by citizens at the time the land was transferred to the corpora-

tion, it would work an injury and a hardship upon the corporation, and upon the owners of stock thereof, to hold this transfer void, and that, had it been the intention of the constitutional convention to make such an application of the law as this, language more explicit could, and surely would, have been used. We do not think that language more explicit could have been used. Presumably, the members of the constitutional convention regarded this question as of great importance, and the article doubtless was passed after careful consideration and revision; and the whole article shows that it was the intention of the law that the ownership of lands by aliens should be prohibited, and that it should be prohibited despite of subterfuges which might be resorted to by aliens for the purpose of becoming such owners; and we have already seen the wisdom of the makers of the Constitution in clothing this article in language which is so plain that it is not susceptible of judicial construction. First, attempts have been made in the case just above referred to by aliens to become owners of land through the medium of leases which in effect conferred ownership, and now the Constitution is again sought to be avoided, and benefits obtained under it by indirection which could not be obtained by direct action. We have no doubt that corporations have it within their power to protect themselves from the dire consequences and hardships which are suggested by appellant in his

brief by reason of members of a corporation selling stock to aliens in the corporation; but, if they cannot, our laws confer certain benefits on and exemptions to corporations, which are valuable; and if men see fit to enter into corporations for the purpose of doing business, instead of doing it as individuals, and accept the benefits which the law confers upon the corporation, they must also accept the burdens which are incident to a corporate investment. But, outside of all this, when it once becomes the established law that deeds of this character are void, members of corporations will not be quick to obtain such deeds, and the hardships dilated on by the appellant will be more in theory than practice. But, even if it be conceded that these hardships would have to be endured, the evident spirit of the Constitution must be sustained. The broad doctrine is announced that the ownership of lands by aliens is inhibited. The exceptions to that rule are as plainly announced by the Constitution. These transfers not falling within the exceptions, the conveyance must be held to be void. The lease for forty-nine years will be held void, under the doctrine announced in *State v. Morrison* (Wash.) 52 Pac. 228.

The case will be reversed, with instructions to the lower court to overrule the demurrer to the complaint.

Scott, Ch. J., and Reavis, J., concur.

VIRGINIA SUPREME COURT OF APPEALS.

FIDELITY & CASUALTY COMPANY,
Plff. in Err.,

v.

Anna Lee CHAMBERS *et al.*

(93 Va. 138.)

1. **Possession by an insured of the policy** is, upon demurrer by the insurer to the evidence in a suit upon the policy, conclusive evidence that the premium was paid.
2. **That an insured person had taken drinks** just before he received an injury will not, if he was not drunk, bring him within the clause of the policy that it shall not "cover any

accidental injury which may happen to me while under the influence of intoxicating drinks."

3. **Voluntary exposure to unnecessary danger**, within the meaning of an accident insurance policy, is not shown by the facts that the insured, without knowing that a train was due, sat on a bag on the railroad track at a highway crossing, and upon being warned of the approach of a train started away, but turned back for the bag, and was struck before he could get away.

(April 23, 1896.)

ERROR to the Circuit Court for Greenville E County to review a judgment in favor of

NOTE.—*Voluntary exposure to unnecessary danger within meaning of insurance policy.*

- I. Construction compared with negligence.
- II. Consciousness of danger.
- III. Risks incident to duty or necessity.
- IV. Unexpected results.
- V. What constitutes, particular cases.
- VI. Proof of, as a defense.

I. Construction compared with negligence.

Conditions in accident insurance policies against liability in case of voluntary exposure to unnecessary danger are construed most strongly against the insurer, and liberally in favor of the insured. *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 277.

And the terms "negligence" and "voluntary exposure to unnecessary danger" as used in such a condition are not necessarily or usually synonymous. **40 L. R. A.**

Lehman v. Great Eastern Casualty & I. Co. 7 App. Div. 424; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 187, 20 L. R. A. 765; and see *UNITED STATES MUT. ACCI. ASSO. v. HUBBELL*.

Voluntary exposure to unnecessary danger, within the meaning of a condition in an accident policy against liability in such case, means something more than contributory negligence or the want of ordinary care on the part of the assured. *Follis v. United States Mut. Acci. Asso.* 94 Iowa 435, 23 L. R. A. 78.

And mere negligence short of voluntary exposure to unnecessary danger will not defeat a recovery upon such a policy. *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 287.

Under a condition in an accident insurance policy against liability in case of injury from voluntary exposure to unnecessary danger, the assured does not contract for the exercise of reasonable care and caution, or against contributory negli-

plaintiffs in an action upon a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cabell & Cabell, for plaintiff in error:

Counsel for appellee ask to be permitted to introduce before this court evidence that is not in the record, for the purpose of raising before this court a question for the first time—a question that was not raised in the trial court, not presented to judge or jury, and nowhere appears in the record. This cannot be done.

Roanoke Land & I. Co. v. Karn, 80 Va. 591; *Spotts v. Com.* 85 Va. 531; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346; *Parriah v. Parriah*, 88 Va. 529; *Ronald v. Bank of Princeton*, 90 Va. 815; *Milburn Wagon Co. v. Nisewarner*, 90 Va. 714; *Lake v. Tyree*, 90 Va. 719; *Aultman v. Salinas*, 44 S. C. 299; *Baruch v. Long*, 117 N. C. 509; *George Campbell Co. v. Angus*, 91 Va. 438.

It is not all the evidence which the demurrant is called on to waive. He waives only so much of his evidence as conflicts with that of his adversary.

1 Barton, Law Pr. 677, 678; 1 Robinson, Old Pr. 404; *Humphreys v. West*, 3 Rand. (Va.) 516; *Biggers v. Alderson*, 1 Hen. & M. 60; *Stephens v. White*, 2 Wash. (Va.) 203.

This policy was never paid for, and really never delivered. One of the conditions in the policy is: "This policy shall not take effect unless the premium is paid previous to any accident under which claim is made."

But had it been paid for there could have been no recovery in this case because several express warranties which formed the basis of the obligation were untrue, or were not complied with.

Richards, Ins. 62; *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, 98 Pa. 46; *Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *Jeffries v. Economical Mut. L. Ins. Co.* 22 Wall. 53, 22 L. ed. 835; *Aetna L. Ins. Co. v. France*, 91 U. S. 512, 23 L. ed. 402.

In his application Kirkland warranted to be true: "My habits of life are correct and temperate."

The evidence clearly shows that this was untrue. He was certainly a drinking man.

Again, Kirkland warranted to be true that he was "in a sound condition, mentally and physically."

"He was quite deaf, did not hear well."

Kirkland was sitting in the middle of the railroad track with his back to the way the train came from, complaining of being sick and weak, and carrying on a conversation with a negro woman.

Even to cross such a track has been judicially held to be an obvious danger.

Wood, Railway Law, § 1518.

In a recent case decided by the United States circuit court of appeals Judge Simonton says: "The track of a railroad over which frequent trains are passing is a place of danger. A person who goes on it unnecessarily or without valid cause voluntarily incurs a risk for the consequences of which he cannot hold others responsible."

See also *Bancroft v. Boston & W. R. Corp.* 97 Mass. 278; *Tuttle v. Travellers' Ins. Co.* 184 Mass. 175, 45 Am. Rep. 316; *Williams v. United States Mut. Acci. Asso.* 138 N. Y. 866; *Cornish v. Accident Ins. Co.* L. R. 23 Q. B. Div. 453; *Knapp v. Preferred Mut. Acci. Asso.* 53 Hun, 87; *Travelers' Ins. Co. v. Jones*, 80 Ga. 541; *Sawtelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216.

Messrs. Turnbull & Goodwyn, for defendants in error:

Appellant failed to ask that the verdict of the jury be set aside and a new trial awarded it.

This not having been done the appeal should be dismissed.

Newberry v. Williams, 89 Va. 298; *Richmond & D. R. Co. v. Scott* (Va.) 20 S. E. 826.

Policies of this character are contracts to be construed like other contracts, and words of exception contained therein are to be construed most strongly against the insurer.

United States Mut. Acci. Asso. v. Newman, 84 Va. 58.

The evidence shows conclusively that deceased was not drunk at the time of the accident. The evidence does show that he would take a drink occasionally, but this is not sufficient to vitiate the policy.

Travelers' Ins. Co. v. Harvey, 82 Va. 949.

gence,—no such consideration entering into the question except remotely and secondarily. *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 280, 78 Fed. Rep. 754, 24 C. C. A. 305.

So, in *Shevlin v. American Mut. Acci. Asso.* 94 Wis. 180, 36 L. R. A. 52, it was said that authority is not wanting that the exception, where the language is voluntary exposure, etc., is not confined to injuries caused by gross negligence.

In the above case, *Keene v. New England Mut. Acci. Ins. Co.* 161 Mass. 149, *infra*, V., was distinguished upon the ground that in that case the condition was against injury caused by voluntary exposure to unnecessary danger, while in the case at bar the word "voluntary" does not occur, the use of which contemplated a conscious exposure to danger, or gross negligence.

And *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157, *infra*, V., was distinguished upon the ground that in that case the condition was against liability for injury caused by wilful and wanton exposure, which means a greater degree of negligence than a mere failure to exercise ordinary care, while in the case at bar the condition is

against liability for injury caused by exposure to unnecessary danger only.

It has been held, however, that the use by the court of the words "gross negligence" in an action upon an insurance policy, in referring to the defense that the insured had unnecessarily exposed himself to danger, though erroneous, is not a ground for reversal where the instructions were full and elaborate as to what would constitute an unnecessary exposure to danger within the meaning of a condition in the policy against liability in case of such exposure. *Wilson v. Northwestern Mut. Acci. Asso.* 53 Minn. 470.

And in *Sawtelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216, which was an action upon an accident insurance policy conditioned against liability in case of injury from exposure to unnecessary danger, hazard, or perilous adventure, it was held that the act of the assured in passing from car to car upon a railroad train while it was at full speed, in the night-time, is negligence as a matter of law, and that negligence and exposure to unnecessary danger are equivalent terms.

See also *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U.

Where evidence of intoxication is conflicting the decision of the lower court must be sustained.

Sutherland v. Standard L. & Acci. Ins. Co. 87 Iowa, 505.

There is nothing in the definition of the word "accident" that excludes the negligence of the injured party as one of the elements contributing to produce the result.

2 May, Ins. § 530; Beach, Inj. § 245; 1 Am. & Eng. Enc. Law, p. 87.

Voluntary exposure to unnecessary danger involves the idea of intentionally doing some act which ordinary prudence would pronounce dangerous.

Beach, Ins. § 246.

A degree of consciousness of danger is necessary before there would be that voluntary exposure to unnecessary danger required to prevent indemnity.

Beach, Ins. §§ 276, 277, note 3; 1 Am. & Eng. Enc. Law, p. 91; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205; *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 206, 18 L. R. A. 267.

Cardwell, J., delivered the opinion of the court:

This is a writ of error to a judgment of the circuit court of Greensville county upon a demurrer to the plaintiff's evidence, the jury having ascertained the plaintiffs' damages at \$2,000, the amount covered by the insurance policy sued on, and the defendant in error moves to dismiss the writ of error as improvidently awarded, upon the ground that the record does not show that there was a motion for a new trial in the court below. This is not an open question in Virginia. It was raised and determined in the case of *Norfolk & N. R. Co. v. Dunnaway* (decided at the present term), 93 Va. 29, wherein it was held "it was not necessary for a motion for a new trial to be made in the trial court in order to have a judgment on a demurrer to evidence reviewed in the appellate court."

It is also insisted by counsel for defendants in error that, in addition to the rule governing

where there is a demurrer to plaintiff's evidence, all evidence introduced by the defendant in the court below in support of its defense based upon the ground of a violation of the conditions or restrictive provisions in the policy should not be considered, as this evidence does not first make it appear that the conditions or restrictive provisions in the policy sued on are in the print required by § 3252 of the Code or written with pen and ink in or on the policy. This section provides: "In any action against an insurance company or other insurer, founded on a policy of insurance issued after the 1st day of July, 1878, no failure to perform any condition of the policy, nor violation of any restrictive provision thereof, shall be a valid defense to such action, unless it appears that such condition or restrictive provision is printed in type as large or larger than that commonly known as long primer type, or is written with pen and ink in or on the policy." This presents to this court an entirely new question of great importance, which the record does not show to have been raised in the trial court; and as it has not been fully argued, and as the judgment of the lower court must be affirmed on the merits of the case, it is not necessary to decide it, and we therefore express no opinion on that question.

At the trial the plaintiffs introduced in evidence the policy of insurance sued on, and then proved by parol testimony that the insured, L. A. Kirkland, was struck and killed by a locomotive of the Atlantic & Danville Railroad on the 28d of December, 1891, and in rebuttal examined witnesses to show that the representations in the application for the insurance alleged by defendants to have been false were in fact not false, and that the accident by which the deceased lost his life was not caused by his intoxication, or the result of the use of intoxicants, or from voluntary exposure to unnecessary danger. The defendant insurance company sought by its testimony to make defense to the action upon the grounds that the insured made false representations in his application for the insurance; second, that the insurance premium on which the

S. App. 704, 58 Fed. Rep. 842, 7 C. C. A. 264, *infra*, III.

II. Consciousness of danger.

Consciousness of danger is necessary before there can be a voluntary exposure to unnecessary danger, within the meaning of a condition in an accident insurance policy against liability in case of injury from such exposure. *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 187, 20 L. R. A. 765.

Voluntary exposure to unnecessary danger, within the meaning of a condition in an accident insurance policy against liability for injury from such exposure, refers only to dangers of a real, substantial character, which the assured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation. *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. A. 305; *Fidelity & C. Co. v. Chambers*.

And it implies knowledge on the part of a person injured of the existence of the danger. *Carpenter v. American Acci. Co.* 46 S. C. 541.

And a conscious intentional exposure to some- 40 L. R. A.

thing which one is consciously willing to take the risk of. *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149; *De Loy v. Travelers' Ins. Co.* 171 Pa. 1.

To constitute voluntary exposure to unnecessary danger, within the meaning of such a condition, the act must be done designedly and not accidentally, and must have been one done in obedience to and regulated by the will of the person who does it, who must have intentionally and consciously assumed the risk of the obvious danger. *Lehman v. Great Eastern Casualty & I. Co.* 7 App. Div. 424.

In *Lehman v. Great Eastern Casualty & I. Co.* 7 App. Div. 424, *supra*, *Cornish v. Accident Co. L. R.* 23 Q. B. Div. 453, *infra*, V., was distinguished upon the ground that in that case the language of the condition was "exposure of the insured to obvious risk or injury" the difference depriving that case of any authoritative value; and *Williams v. United States Mut. Acci. Asso.* 82 Hun, 269, 133 N. Y. 367, *infra*, III., was distinguished upon the ground that in that case the assured in a spirit of bravado sat down upon a railroad track in front of an approaching engine, which was a conscious, deliberate act.

So, such a condition does not cover involuntary

policy was issued had not been paid; and, third, that the insured had sustained the injury in consequence of the violation of certain conditions or restrictive provisions in the policy, or that it was caused by his intoxication, or was the result of the use of intoxicants. By a demurrer to the evidence the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can be drawn therefrom by the jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom. *Johnson v. Chesapeake & O. R. Co.* 9 Va. 171, and authorities cited. The plaintiffs' evidence made out their case, and we will consider the defense made by defendant, subjected to the well-established rule just stated. Was the premium paid? We are of opinion that this defense cannot avail, because of the fact that at the time of the accident the insured had in his possession the policy of insurance, and the possession of it is such evidence of the payment of the premium as, upon a demurrer to evidence, is conclusive upon the court. Beyond this, it was agreed that if Inman, the agent of the insurance company, who issued the policy, and who had been summoned as its witness, had been present, he would have testified that he delivered the policy to Wiley Jones to be delivered to Kirkland when he paid for it, and only then. The defendant not only did not introduce Wiley Jones as a witness, but did not account for his absence.

The representations in the application for the insurance alleged to have been false are: "My habits of life are correct and temperate," and "I am in sound condition mentally and physically." The first, as it appears in full in the application is: "My habits of life are correct and temperate, and I understand that the policy will not cover any accidental injury which may happen to me either while under the influence of intoxicating drinks or in consequence of my having been under the influence thereof." Policies of this character are contracts, to be construed like other con-

tracts, and words of exception contained therein are to be given the construction most favorable to the insured. *United States Mut. Acci. Assn. v. Newman*, 84 Va. 52; 1 Am. & Eng. Enc. Law, 2d ed. p. 286, and notes. The evidence of the defendant, if given its full force and effect, does not show that the insured was drunk at the time of the accident. It does show that he would take a drink, and had taken drinks that morning, but it does not even tend to show that the accident was in consequence of his intoxication, or as the result of drinking, nor that the injuries were received in consequence of "bodily infirmity." In the case of *Prader v. National Masonic Acci. Assn.* 95 Iowa, 149, the evidence was that the deceased left home sober, with two friends, and they drank from a quart bottle of whisky, of which some was left when they returned; that the deceased then drank two glasses of wine, and soon after was injured by slipping into a hole, and it appeared that those in whose company he was considered him sober. It was held (supreme court of Iowa) that the evidence did not show that the deceased was injured while under the influence of intoxicating liquors. See also *Travelers' Ins. Co. v. Harvey*, 82 Va. 949; *Standard L. & Acci. Ins. Co. v. Jones*, 94 Ala. 434. Plaintiffs' witnesses, who saw deceased but a short while before he was killed, say that he was not drunk, and, although one of the witnesses helped him on the cars, it was not because he was drunk, but because he was sick and weakly. He had spoken to one of the witnesses of going to see a doctor "about his throat or the gripe." W. S. Goodwin testified that the deceased was in his law office but a short while before the accident, and was sober at that time. Even where evidence of intoxication is conflicting, the decision of the lower court must be sustained. *Sutherland v. Standard L. & Acci. Ins. Co.* 87 Iowa, 505. The only evidence in the record as to "bodily infirmity" consists of the statements by some of the witnesses that he was "quite deaf; didn't hear well." We do not think this question enters seriously into the consideration of this case. The provision in

exposure to necessary danger. *Follis v. United States Mut. Acci. Assn.* 94 Iowa, 435, 28 L. R. A. 78.

And if the external circumstances would have such a controlling influence upon a man of ordinary prudence and intelligence that he would take a certain course, that course would not be considered voluntary on his part within the meaning of a condition in an accident insurance policy against liability for injuries caused by voluntary exposure to unnecessary danger. *Duncan v. Preferred Mut. Acci. Assn.* 27 Jones & S. 145.

The act of a person cannot be held to have been voluntary within the meaning of such a condition if it was such as a man of ordinary prudence would be induced to do by the circumstances. *Duncan v. Preferred Mut. Acci. Assn.* 27 Jones & S. 145.

Voluntary exposure to unnecessary danger within the meaning of a condition in an accident insurance policy against liability in case of injury therefrom involves the idea of intentionally doing some act which reasonable and ordinary prudence would pronounce dangerous. *Equitable Acci. Ins. Co. v. Osburn*, 90 Ala. 201, 13 L. R. A. 267; *Follis v. United States Mut. Acci. Assn.* 94 Iowa, —, 28 L. R. A. 78.

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There is a clear distinction between a voluntary act and a voluntary exposure to danger, within the meaning of such a condition in an accident insurance policy. Hidden danger may exist, but exposure thereto without knowledge of the danger does not constitute a voluntary exposure to it. *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 206.

And the approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto within the meaning of such a condition. The acts may be voluntary, and yet the exposure involuntary. *Jones v. United States Mut. Acci. Assn.* 92 Iowa, 662; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 206.

Thus, a passenger on a railroad train does not voluntarily expose himself to unnecessary danger within the meaning of a condition in an accident insurance policy against liability in case of injury from such exposure, where he fell asleep from weariness, and the motion of the cars, and while it was quite dark and he was in a dazed and unconscious condition of mind, and, not knowing or realizing what he was doing, he involuntarily arose from his seat and walked unconsciously to the

the policy is that the insurance company shall not be liable for injuries received in consequence of bodily infirmity," and there is not the slightest testimony in the record to show that the injury was so received.

The policy held by the deceased insured him "against bodily injuries sustained through external, violent, and accidental means." That the insured came to his death "through external, violent, and accidental means" is not questioned, and it only remains to be determined whether the evidence brings the case under the exception in the policy which provides that it does not cover injuries caused by "voluntary exposure to unnecessary danger." The words "voluntary exposure," as used in an accident-insurance policy, imply conscious intentional exposure; something which one is willing to take the risk of. It must appear that the act, in order to come within the exception, was one which reasonable and ordinary prudence would pronounce dangerous, and that the accident was in consequence thereof. It is consequently not every act of negligence which will defeat a recovery under such a provision, and, in general, the question whether the conduct of the insured is such as to preclude a recovery is for the jury under all the circumstances of the case, and where there is a demurrer to evidence, as in this case, for the trial judge. 1 Am. & Eng. Enc. Law, 2d ed. pp. 307, 308, and cases cited in notes 5, 6, p. 307, and notes 1, 2, p. 308. The only evidence upon this point is that of Fanny Hill (colored), a witness introduced by the defense. She says that she was talking to deceased in the county road where the railroad track crosses it. He was sitting on a bag and on the railroad track, with his back up the railroad. The train came down around the curve, when she hollowed to him, and he started off, but reached to get his bag, and as he reached to get it the engine struck him in the left side of the back. The train was coming so fast around the curve that it was as much as she could do to get out of the way herself. There is not the slightest evidence to show that the deceased knew that a train would be along at or near that time, nor that he had good reason to know it. The fact that he immediately got off the track when apprised that

the train was coming negatives the idea of conscious intentional exposure to danger. The most that can be made of this evidence is that the deceased, in thinking that he had time to get his bag off the railroad track, was simply mistaken. In the case of *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 287, the court held that a recovery may be had on a policy of insurance against accidental injuries, or death "effected through external, violent, and accidental means," when the evidence shows that the insured, running rapidly from the postoffice, 50 yards distant, to get the mail for the postmaster from a railroad train, which was fast approaching, and which did not stop at the station, attempted to check his speed on getting near the train, but stumbled, and fell against the steam-chest of the engine, receiving fatal injuries, although the insured was not in the employ of the postmaster, and volunteered to get the mail from the train, and although there were exceptions contained in the policy against "intentional injuries" and "voluntary exposure to unnecessary danger." Somerville, J., in his opinion, says: "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy." The fact that a person insured against injury or death by accident was guilty of negligence which contributed to an injury received by him will not prevent a recovery on the policy. *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157. It should be borne in mind that this is not a suit against the railroad company, where the question of contributory negligence would come in. If every negligent or careless act of the insured from which accident results without "conscious intentional exposure" on his part is to be made to serve as a defense to an action on the policy, policies of this character would become of little utility.

We are of opinion that *there is no error in the judgment of the circuit court, and it is therefore affirmed.*

platform of the car and fell therefrom and was thereby injured. *Scheiderer v. Travelers' Ins. Co.* 58 Wis. 13, 46 Am. Rep. 618.

See also *FIDELITY & C. Co. v. CHAMBERS, and JOHNSON v. LONDON GUARANTEE & ACCI. CO.*

Nor does one who was a member of a fishing party, who with a companion took a boat and went out to inspect the lines and hooks which they had set in the night, having no knowledge of snags and trees which were in the water, who was drowned by the upsetting of the boat from striking a snag or tree, expose himself to unnecessary danger within the meaning of an accident policy conditioned against liability for injuries or death resulting from such exposure. *Collins v. Bankers' Acci. Ins. Co.* 96 Iowa, 216.

In *Collins v. Bankers' Acci. Ins. Co.* 96 Iowa, 216, *supra*, *Shaffer v. Travelers' Ins. Co.* (Ill.) 22 N. E. 589, and *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, *infra*, V., were distinguished upon the ground that in those cases the facts giving rise to the danger were known, and the parties were aware of the risk they were taking.

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Actual knowledge of the danger, however, is not always essential to constitute a voluntary exposure to unnecessary danger within the meaning of a condition in an accident-insurance policy against liability for injuries caused by such exposure. Reckless and wanton conduct short of actual knowledge of danger might constitute voluntary exposure to unnecessary danger if the unnecessary danger is such as a reasonably prudent man ought to have known. *Carpenter v. American Acci. Co.* 46 S. C. 541.

And where a man acts so recklessly and carelessly as to show an utter disregard of a known danger, or where the danger is so obvious that a prudent man exercising reasonable foresight would not have done the act, he may be said to have voluntarily exposed himself to danger within the meaning of such a condition. *De Loy v. Travelers' Ins. Co.* 171 Pa. 1.

But it is not sufficient to relieve an accident insurance company from liability under a policy conditioned against liability in case of injury from voluntary exposure to unnecessary danger, that

NORTH DAKOTA SUPREME COURT.

Lewis R. CORNWELL, *Resp't.*,
v.

FRATERNAL ACCIDENT ASSOCIATION of America, *Appt.*

(6 N. D. 201.)

*1. One who has started to hunt prairie chickens with a loaded gun at a season of the year when it is unlawful to kill prairie chickens has not, by such act, committed the offense of attempting to kill prairie chickens.

2. One who hunts for game with a loaded gun cannot be said to have voluntarily exposed himself to unnecessary danger by such act, within the meaning of the provision in an accident-insurance policy which declares that, for injuries sustained by reason of a voluntary exposure to unnecessary danger, there can be no recovery.

3. Nor is an attempt to scale a bank with a loaded gun in hand a voluntary exposure to unnecessary danger, within the meaning of such a provision.

(November 19, 1896.)

APPEAL by defendant from a judgment of the District Court of Ransom County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas A. Curtis, for appellant:

A plaintiff will in no case be permitted to recover where it is necessary for him to prove his own illegal act, or where an essential element of his cause of action is his own violation of law.

Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 2 L. R. A. 520.

The respondent in his testimony says he saw what he supposed were chickens, and was going to get some, thus clearly showing that he was violating the laws of the state.

Duran v. Standard Life & Acci. Ins. Co. 63 Vt. 437, 13 L. R. A. 637; *Day v. Highland Street R. Co.* 135 Mass. 113, 44 Am. Rep. 447; *Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56;

*Headnotes by CORLISS, J.

the acts of the assured were unnecessary; it must also appear that they were such as reasonable and ordinary prudence would pronounce dangerous, and that the injury followed as a consequence thereof. *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 204; *Fidelity & C. Co. v. CHAMBERS*.

The question whether the assured was aware of and appreciated the danger in which he placed himself, and intentionally and purposely risked it, in an action upon an accident insurance policy conditioned against liability in case of injury from exposure to unnecessary danger, is one of fact which may properly be left to the jury under appropriate instructions by the court. *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. A. 305.

III. Risks incident to duty or necessity.

The words "voluntary exposure to unnecessary danger and hazardous adventure," within the meaning of a condition in an accident insurance 40 L. R. A.

Baldwin v. Barney, 12 R. I. 392, 84 Am. Rep. 670; *Platz v. Cohoes*, 89 N. Y. 223, 42 Am. Rep. 286; *Johnson v. Irasburgh*, 47 Vt. 28, 19 Am. Rep. 111; *Travelers' Ins. Co. v. Seater*, 19 Wall. 531, 22 L. ed. 155.

It is immaterial whether the policy contained any provision against violation of the laws of the state, or simply against violating laws or rules of a corporation, which was the condition of this certificate.

28 Am. & Eng. Enc. Law, p. 458 and cases cited.

The shooting or attempting to shoot prairie chickens during the prohibited period was contrary to law, and respondent was liable to punishment therefor.

Comp. Laws, §§ 7693, 7694.

As to attempts to commit a crime, see—

1 Bishop, New Crim. L. § 237; *Johnson v. State*, 14 Ga. 55; *State v. Marshall*, 14 Ala. 411; *Cunningham v. State*, 49 Miss. 685.

Respondent made an attempt within the law to shoot the chickens, and because an intervening providence interposed, he cannot protect himself from responsibility, and recover.

Com. v. Jacobs, 9 Allen, 274; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, 48 Am. Rep. 469.

Mr. P. H. Rourke, for respondent:

The mere act of hunting in the close season is not criminal. The inhibition of the statute is directed against the killing of prohibited game.

Laws of 1891, chap. 69, § 1, p. 92.

This is a criminal statute, and it cannot be extended by implication or construction.

Sutherland, Stat. Constr. § 850; *United States v. Sheldon*, 2 Wheat. 119, 4 L. ed. 199; *Shaw v. Clark*, 49 Mich. 384, 43 Am. Rep. 474; *Van Buren v. Wylie*, 56 Mich. 501; Bishop, Statutory Crimes, § 220.

The act of the respondent was not an attempt to commit crime. No act was done toward the killing, it was simply preparation.

Mulligan v. People, 5 Park. Crim. Rep. 105; *State v. Clarissa*, 11 Ala. 57; *Griffin v. Western Mut. Ben. Asso.* 20 Neb. 620; *Hicks v. Com.* 86 Va. 223; 4 Am. & Eng. Enc. Law, p. 664; 6 Lawson, Criminal Defenses, 723.

policy against liability in case of injury from such exposure, do not include such exposure as is incident to the ordinary habits and customs of life of the assured, but refer to something beyond the ordinary, such as wanton or gross carelessness. *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 230, 58 Fed. Rep. 945, 22 L. R. A. 620, 7 C. C. A. 588.

And the death of the assured by an accident while in the discharge of his legal duties in the line of his employment is not the result of his voluntary exposure to unnecessary danger within the meaning of such a condition, but is an accident for which the contracting parties intended that the association should be liable. *National Ben. Asso. v. Jackson*, 114 Ill. 533.

So, a condition in an accident insurance policy against liability in case of injury caused by voluntary exposure to unnecessary danger does not cover voluntary exposure to necessary danger. *Follis v. United States Mut. Acci. Asso.* 94 Iowa, 435, 23 L. R. A. 78.

And where one is placed in a position of peril.

The following have been held not indictable as attempts:

Purchasing spirituous liquors with intent to introduce it into prohibited territory is not sufficient to constitute an attempt to introduce in violation of law.

United States v. Stephens, 8 Sawy. 116.

Buying a gun is not an attempt to commit murder.

Reg. v. Cheeseman, 9 Cox, C. C. 103.

Buying a box of matches is not an attempt to set fire to a stack of corn.

Reg. v. Taylor, 1 Fost. & F. 511.

Nor is sending for a magistrate to solemnize a marriage an attempt to contract an incestuous marriage.

People v. Murray, 14 Cal. 459.

Delivering poison to a person, asking him to put it in the spring of another person, is not an attempt to administer poison.

Stabler v. Com. 95 Pa. 318.

To the minor offenses which are not wrong in themselves, but are made so by statute; the doctrine of attempts does not apply.

4 Am. & Eng. Enc. Law, p. 668; 17 Cent. L. J. p. 26; 1 Bishop, New Crim. L. § 761.

If it is conceded that at the time of the accident the insured was engaged in an unlawful act, this would not of itself defeat a recovery. There must be some causal connection between the violation of law and the injury received.

1 Am. & Eng. Enc. Law, 2d ed. p. 319; *National Ben. Asso. v. Bowman*, 110 Ind. 355; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652; *Utter v. Travelers' Ins. Co.* 65 Mich. 553; *Accident Ins. Co. v. Bennett*, 90 Tenn. 257; *Duran v. Standard L. & Acci. Ins. Co.* 63 Vt. 437, 13 L. R. A. 637.

The violation of law must be the approximate cause of the accident.

1 Am. & Eng. Enc. Law, 2d ed. p. 320; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, 49 Am. Rep. 489; *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541; *Murray v. New York L. Ins. Co.* 96 N. Y. 614, 48 Am. Rep. 658; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652; *Griffin v. Western Mut. Ben. Asso.* 20 Neb. 620, 57 Am. Rep. 848.

The risk assumed extended to all innocent

and chooses the course which seems to him the least dangerous, it cannot be said that he exposed himself either to obvious or to unnecessary danger, within the meaning of a condition in an accident insurance policy against liability for injuries caused by such exposure, whether he acted voluntarily or not. *North West Commercial Travelers' Asso. v. London Guarantee & Acci. Co.* 10 Manitoba L. Rep. 537.

So, one who in case of the wreck of a ship placing the crew in peril voluntarily goes to their rescue does not voluntarily expose himself to danger, within the meaning of a condition in an accident insurance policy against liability for injury or death caused by such exposure, where there is no evidence that in doing so he exposed himself to unnecessary danger, as it was his duty to aid in rescuing them. *Tucker v. Mutual Ben. Life Co.* 50 Hun. 50.

And the killing of a yard-switchman or yard-brakeman in a railroad yard while handling broken cars in the discharge of his regular duty as such cannot be held to arise from voluntary exposure to unnecessary danger within the meaning 40 L. R. A.

amusements and pastimes to which society is accustomed, as well as the ordinary vocation of the assured. The words "voluntary exposure" as used in an accident policy imply commission of intentional exposure—something which one is willing to take the risk of.

Keene v. New England Mut. Acci. Asso. 161 Mass. 149.

It must appear that the act in order to come within the exception was one which reasonable and ordinary prudence would pronounce dangerous.

1 Am. & Eng. Enc. Law, 2d ed. p. 307; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205.

A hidden danger may exist, yet the exposure thereto without any knowledge of the danger does not constitute a voluntary exposure. The act may be voluntary, yet the exposure involuntary.

1 Am. & Eng. Enc. Law, 2d ed. p. 309; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205; *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 18 L. R. A. 267; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 167, 20 L. R. A. 765.

Corliss, J., delivered the opinion of the court:

From a judgment in favor of the plaintiff, based upon a verdict in his favor directed by the court, the appeal in this case was taken. The object of the action was to recover the amount due under an insurance policy issued by defendant to the plaintiff. Among other provisions, the policy contained one entitling the plaintiff to \$1,000 for the loss of a hand through external, violent, and accidental means. The plaintiff lost his left hand by the accidental discharge of a gun he was carrying. Only two defenses are relied on. The facts do not appear to be in controversy.

It is first urged that the plaintiff was injured while violating the laws of this state. The policy declares that it does not cover injuries resulting wholly or partly, directly or indirectly, from violating rules or laws of a corporation. We shall assume, for the purposes of this case, that this language embraces the laws

of such a condition in an accident insurance policy, but is an accident for which the contracting parties intended that the association should be liable. *National Ben. Asso. v. Jackson*, 114 Ill. 533.

And a locomotive engineer who while backing his engine up a grade with a car in front as a precaution to check his speed directs the fireman to run the engine, and goes upon and over the tender to get into such car and draw the brakes, and in doing so slips and falls between the car and the tender and is killed, does not thereby wilfully expose himself to unnecessary danger or peril within the meaning of such a condition. *Providence L. Ins. & Invest. Co. v. Martin*, 32 Md. 310.

The question whether he was guilty of a wilful exposure to unnecessary danger or peril within a condition of the policy in such case, is one of fact for the jury. *Providence L. Ins. & Invest. Co. v. Martin*, 32 Md. 310.

So, a drover accompanying his cattle to market and caring for them while in the course of transportation, and doing whatever is customary and what other cattle dealers under like circumstances and conditions would do, does not so voluntarily

of this state, and does not relate solely to laws of a corporation, and rules of a corporation, as is contended by counsel for the plaintiff. What law of this state, then, was the plaintiff engaged in the violation of at the time he was injured? He had started out with his loaded gun for the purpose of killing prairie chickens. To have killed them at that season of the year (it being December 12) would have been a violation of chapter 69 of the Laws of 1891. But the plaintiff was not engaged in the killing of anything at the time the accident occurred. He was climbing a bank, and, his foot having slipped, he caught hold of a limb, and was in the act of drawing himself up by means thereof, when in some way the gun was discharged, the contents lodging in his left hand, shattering it so terribly that amputation was necessary. The only possible ground on which it can be claimed that the plaintiff was violating the laws of this state at the time the gun was discharged, and that the injury he sustained resulted from such violation, is that he was guilty of attempting to kill prairie chickens. Under provision of §§ 7693, 7694, Rev. Codes, an attempt to commit a crime is of itself a substantive offense. Section 7693 declares that "an act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime;" and § 7694 provides that "every person who attempts to commit any crime and in such attempt does any act toward the commission of such crime, but fails or is prevented or intercepted in the perpetration thereof, is punishable, when no provision is made by law for the punishment of such attempt, as follows," etc. It is too clear for discussion that, at the time the plaintiff was injured, he had not done any act tending to effect the commission of the offense of killing prairie chickens out of season. Intent had ripened into preparation. But the plaintiff had not, in deeds, passed beyond the point of preparation, and entered upon the execution of his criminal project. It is impossible to formulate a rule which will constitute an unerring guide in assigning to cases which occupy the debatable ground their respective places upon one side or the other of the line which separates preparation from legal at-

tempt. The question, must, from its very nature, always remain difficult of solution. The wisest course for tribunals to pursue with respect to it is to deal with each cause as it arises, in the light of a few general principles applicable to such cases. We shall content ourselves with the statement of our conclusion that the plaintiff had not, within the meaning of our law, attempted the killing of prairie chickens, although he had formed the purpose to shoot them, and had made preparations to accomplish such object. The authorities fully sustain our view. *Mulligan v. People*, 5 Park. Crim. Rep. 105; *State v. Clarissa*, 11 Ala. 57; *Hicks v. Com.* 86 Va. 228; *Stabler v. Com.* 95 Pa. 318, 40 Am. Rep. 658; *State v. Butler*, 8 Wash. 194, 25 L. R. A. 434; *People v. Murray*, 14 Cal. 159; 1 Bishop, Crim. L. § 760, 762, 764; *Reg. v. Cheeseman*, 9 Cox, C. C. 108; *Reg. v. Taylor*, 1 Fost. & F. 511.

The second ground of defense is that the plaintiff voluntarily exposed himself to unnecessary danger. The policy provides that it shall not cover such injuries as result from voluntary exposure to unnecessary danger. There is no merit in this defense, under the facts of this case. It will hardly be insisted that one who, in the ordinary way, hunts for game, has by such an act exposed himself to unnecessary danger, within the meaning of such a provision in an insurance policy. Nor can it be said that the plaintiff voluntarily exposed himself to unnecessary danger by essaying to scale the bank, or by attempting to draw himself up the bank with his left hand, while the loaded gun was held in his right hand. We cannot say that this act was one which reasonable men would pronounce dangerous. To go through a dense thicket with the hammer of a gun raised, and the muzzle pointed towards one, would be to voluntarily expose one's self to unnecessary danger. But no reasonably prudent man would have deemed it probable, or even possible, that injury would result from scaling a bluff with a loaded gun in hand. The danger was a hidden danger. No one can be said to have voluntarily exposed himself to unnecessary danger when no hazard is visible to an ordinarily prudent man. He would justly be chargeable with having voluntarily exposed

himself to unnecessary danger as to defeat an action upon an insurance policy conditioned against liability in case of injury from such exposure, as it is his right, if not his duty, to incur all the risk and danger incident to caring for and looking after his cattle in the cars. *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704, 58 Fed. Rep. 342, 7 C. C. A. 264.

And a mason who worked upon a swinging scaffold in pointing the walls of an eight-story brick building, the scaffold being suspended from the roof by means of ropes which passed over a projection in the building, and was drawn toward the building so as to bring it into position by guy ropes, one of which broke, throwing him to the street below, did not thereby unnecessarily expose himself to danger within the meaning of a condition in an accident-insurance policy against liability for injury caused by such exposure, as it was contemplated by both parties when the policy issued that he would be exposed to the dangers incident to his occupation. *Wilson v. Northwestern Mut. Acci. Assn.* 53 Minn. 470.

Nor does the cashier of a bank, as a matter of 40 L. R. A.

law, voluntarily expose himself to unnecessary danger, within the meaning of a condition in an accident-insurance policy against liability for injury caused by such exposure, because he called at a saw mill for the purpose of having some lumber cut the requisite length for a cabinet to be used in the bank, and while waiting he sawed off a board twice and then stood by the side of a table in which the saw was moving, watching the workmen, and, while turning or moving around, he stepped upon a block concealed in the saw-dust on the floor, and instinctively threw out his arm to recover his balance, which came in contact with the moving saw which cut off his hand. *Hees v. Van Auker*, 11 Misc. 422.

And a commercial traveler traveling about his ordinary business, who was frozen to death on a prairie about 8 miles from a place to which he was returning from one of his trips in company with a driver, when his wagon broke down and the weather became suddenly cold and stormy and he was too numb to walk and unable to ride horseback, and so remained while the driver went for assistance, but was frozen to death before his return,

himself to unnecessary danger who should essay to leap a wide and deep chasm. But no such charge could be laid at the door of one who, in the night, should unexpectedly walk into an unprotected ditch. The authorities fully sustain our ruling upon this point. *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 265; *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 18 L. R. A. 267; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 167, 20 L. R. A. 765. See also

1 Am. & Eng. Enc. Law, 2d ed. 809; *May, Ins.* § 409; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 58 Fed. Rep. 945, 22 L. R. A. 620, 7 C. C. A. 581; *Follis v. United States Mut. Acci. Asso.* 94 Iowa, 435, 28 L. R. A. 78; *Providence L. Ins. & I. Co. v. Martin*, 82 Md. 810; *Marz v. Travelers' Ins. Co.* 39 Fed. Rep. 821; *Sutherland v. Standard L. & Acci. Ins. Co.* 87 Iowa, 505.

The judgment of the District Court is affirmed.

All concur.

MICHIGAN SUPREME COURT.

Benjamin JOHNSON

v.

LONDON GUARANTEE & ACCIDENT
COMPANY, *Plff. in Err.*

(.....Mich.....)

1. **Alleged error in failing to direct a verdict** for defendant accident insurance company on the ground that plaintiff had voluntarily exposed himself to unnecessary danger is not available on appeal where no request therefor was made in the trial court.
2. **The owner of a farm does not voluntarily expose himself to unnecessary danger**, within the provisions of an accident insurance policy, by attempting to drive a bull from a calf pasture into which it has broken, if he does not believe, and has no reason to believe that there is any danger to himself in so doing.
3. **One insured as a grocer's secretary and treasurer in an accident insurance company**, whose policy provides that if he is injured while engaged in work or duty classified as more hazardous than the occupation for which he is insured he shall recover at the rate fixed for the increased hazard, does not, as matter of law, change his occupation to farming by returning to a farm owned by him less than a week after his employment as such secretary and treasurer ceases.
4. **One must act with gross or wanton**

did not expose himself to obvious or unnecessary danger within the meaning of a condition in an accident insurance policy against liability in case of injury from such exposure, where he was sufficiently warmly clothed for the weather as it was when he set out. *North West Commercial Travelers' Asso. v. London Guarantee & Acci. Co.* 10 Manitoba L. Rep. 537.

So, it is a question for the jury, in an action upon an accident insurance policy conditioned against liability in case of injury from voluntary exposure to unnecessary danger, whether the insured thus exposed himself, where he was a seller of books and newspapers on board a railway train, and was engaged in his business when the policy was taken out, and being nearsighted and wearing glasses, he got off his train after having gone on it and left his coat, and was afterwards injured by getting on the train, which was moving at a slow rate of speed, at a place where he had every reason to suppose that it would stop so that he could have boarded it while it was standing still. *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704, 58 Fed. Rep. 342, 7 C. C. A. 264.
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negligence to make his act a voluntary exposure to unnecessary danger, within the provision in an accident insurance policy.

(November 23, 1897.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to enforce payment of the amount alleged to be due on a policy of accident insurance. *Affirmed.*

Statement by **Grant, J.:**

Plaintiff took out an accident policy in the defendant company in the year 1892, for the sum of \$3,000, with a weekly indemnity of \$15, "against bodily injuries sustained through external, violent, and accidental means." A written application was made, which was a part of the policy. The premium was \$4 per \$1,000. In his application he represented that he was "engaged in the business or occupation of secretary and treasurer to Hull Bros. Company, grocers," under the classification "select;" and the policy contained the same language. The policy was twice renewed. At the time of the application, and until the time of the accident, he resided on his farm in Monroe, Michigan. As a part of the policy, he agreed "that, if injured while engaged in work or duty classed as more hazardous than my occupation above stated, I shall be entitled to

And whether the assured at the time of receiving an injury was engaged in doing something outside of the occupation covered by his policy, or whether, though in the pursuit of an occupation covered by the policy, he exposed himself to unnecessary danger, within the meaning of a condition in the policy against liability for injury caused by such exposure, and whether he exhibited due regard for his personal safety, such as an ordinarily prudent man charged with the duty and placed in like circumstances would have done,—are questions of fact for the determination of the jury. *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704, 58 Fed. Rep. 342, 7 C. C. A. 264.

But the act of one, after crossing a railroad track and warning others approaching it to look out for the engine, in retracing his steps and going upon the track and squatting or kneeling down and remaining until he was struck by an approaching train, when the whistle was being blown and the bell rung, and the locality was lighted by an electric light, cannot be held not to be a voluntary exposure to unnecessary danger within the meaning of a condition in an accident insurance policy

recover only such amount as the premium paid by me would purchase at rates fixed for such increased hazard." A part of the business of his farm was raising cattle. He kept a bull. The bull had broken into his calf pasture. On October 29, 1895, while returning from his greenhouse to his dwelling, about 11 o'clock, he saw the bull in this pasture, and went in to drive him out. The cause of the injury is thus stated in his notice to the company: "Where and how did the accident occur?" "The bull had broken through a fence, into a pasture kept on purpose for calves. He undertook to drive him out, when the bull turned suddenly, and tossed him." "What were you doing at the time?" "Walking around; looking about." "State just what happened." "Seeing the bull in the calves' pasture, he undertook to drive him out, when the bull suddenly turned around, and tossed him." Some time before the accident, Hull Bros. had sold out their entire stock and business, and plaintiff had no employment from them except to assist in collecting accounts. At the time he was superintending the building of a greenhouse, and had been home for about a week. He testified that two men "were managing my farm at the time of the accident. It was their business to take care of the stock. Between them they had the entire charge of it. That included the bull. I left everything in charge of the two men. When I was there, I took charge of it as I saw fit." A letter written in his name by his sister-in-law, under date of November 5, 1895, contained the following statement: "I left Detroit about the middle of September. Some weeks before that, I bought a plant of five greenhouses from Mr. C. Hogg, of Van Dyke avenue, Detroit, and came home to add the florist's business to what I already had on the island, and took the management of the farm, fruits, and greenhouses; having two men working the farm and vegetable garden. I have already told you, when I filled out your form, just how I came to meet with the accident, and cannot understand what more you want to know." Under date of November 2, she wrote to defendant the following letter: "I have submitted your letter to Mr. Ben Johnson. He came home after Hull Bros. sold out to Mr. J. L. Hudson,

against liability in case of injury from such exposure, on the theory that the persons warned by him were intoxicated, and that their condition provoked him to follow them with the intention of interfering in their behalf if threatened with danger, where there was no evidence of inebriation on their part except their testimony that at the close of their day's work they had taken one or more drinks. *Williams v. United States Mut. Acci. Assn.* 133 N. Y. 366.

IV. Unexpected results.

Voluntarily placing one's self in a position of exposure to an obvious danger is within a condition in an accident-insurance policy against death or injury happening in consequence of exposure to any obvious or unnecessary danger, where the precise injury happens which there was reason to fear. *Tuttle v. Travelers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316.

But it must appear that the injury followed the exposure as a consequence thereof. *Jones v. United States Mut. Acci. Assn.* 92 Iowa, 652; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 206.

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about the middle of September; but, before that time, he bought a greenhouse plant in Detroit, and was working to get it in place, and was still working at it at the time of the accident. Mr. Ben Johnson owns Johnson's island, in the city of Monroe, upon which place he has cattle, and has been raising small fruits for the last five years. He does not wish to hold back any information in regard to the accident. If there should be anything more you wish to know, let me hear from you." Plaintiff introduced testimony showing that the bull had never before shown signs of viciousness, although he testified: "I have heard of the boys going along the river, and teasing the bull, and I presume sometimes the bull had cause to be ugly." In his claim for indemnity, the following question and answer were given:

Q. What was your weekly salary or income at the time you were injured?

A. None; the business in liquidation.

He had a contract for employment with Hull Bros., which did not expire until some time after the injury. He testified: "I received a salary up to a week before the accident. I was not receiving any salary at the time because there was no money. I was not receiving any money for my time." Insurance is classified by defendant as "select, preferred, ordinary, medium, hazardous, and extrahazardous." Under this classification, farming was deemed hazardous, and the annual premium was \$15 per \$1,000. The plaintiff recovered \$260, the full amount claimed.

Messrs. Charles S. McDonald and S. S. Babcock, for plaintiff in error:

The words "voluntary exposure," as used in accident policy, "imply conscious, intentional exposure, something which one is willing to take the risk of."

Keene v. New England Mut. Acci. Assn. 161 Mass. 151.

In the case at bar the trial judge charged: "In order to make plaintiff's act upon this occasion a voluntary exposure to unnecessary danger, he must have acted with gross or wanton negligence, or otherwise it was not a vol-

In *Jones v. United States Mut. Acci. Assn.* 92 Iowa, 652, *supra*. *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, and *Shaffer v. Travelers' Ins. Co.* (Ill.) 22 N. E. 589, *infra*, V., were distinguished upon the ground that in both cases the assured proceeded to do an act voluntarily which was fraught with danger, and the injury resulted therefrom, and was what would have been reasonably expected to follow the act done.

Unusual and unexpected results, not the logical outcome of the exposure, are not to be considered as having been caused by voluntary exposure to unnecessary danger, within the meaning of such a condition.

Thus, one who had visited a house of ill-fame and passed out to the street therefrom at about midnight, when he was killed in a controversy arising about the payment for a hack, in which his companion took the principal part, will not be held to have voluntarily exposed himself thereby to unnecessary danger so as to prevent a recovery upon an accident-insurance policy conditioned against liability in case of injury or death from such exposure. *Jones v. United States Mut. Acci. Assn.* 92 Iowa, 652.

untary exposure to unnecessary danger." Such is not the law.

Miller v. American Mut. Acci. Ins. Co. 92 Tenn. 187, 20 L. R. A. 765; *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443.

There is the knowledge, common to all men, of the dangerous propensities of animals of this nature.

Dickson v. McCoy, 39 N. Y. 400; *Barnum v. Terpening*, 75 Mich. 557; *Linnahan v. Sampson*, 126 Mass. 510, 30 Am. Rep. 692.

By "vicious propensity" is meant a propensity to do any act that might endanger the safety of the persons and property of others in a given situation.

Keshan v. Gates, 2 Thomp. & C. 289; *McIlvaine v. Lantz*, 100 Pa. 586, 45 Am. Rep. 400; *Hammond v. Melton*, 42 Ill. App. 186; *Keshan v. Gates*, 2 Thomp. & C. 288.

There is evidence coming from the plaintiff that he had some actual knowledge of the dangerous propensities of this bull, and sufficient to put him upon his guard.

Cockerham v. Nixon, 38 N. C. (11 Ired. L.) 269; *Rogers v. Rogers*, 4 N. Y. S. R. 373; *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600.

It is the propensity to commit mischief that constitutes the danger, and therefore it is sufficient if the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of.

Reynolds v. Hussey, 64 N. H. 64.

As a prudent man he should have sent the dog to drive the animal. He knew that it was the prudent way, and that the dog would do the work, and all danger be avoided, and in law he was bound to take the more prudent course.

Travelers' Ins. Co. v. Jones, 80 Ga. 541; *Standard Life & Acci. Ins. Co. v. Jones*, 94 Ala. 434; *Bean v. Employers' Liability Assur. Corp.* 50 Mo. App. 459; *Smith v. Preferred Mut. Acci. Assn.* 104 Mich. 635.

Change of occupation means engaging in another employment as a usual business.

Stone v. United States Casualty Co. 34 N. J. L. 871.

Should the jury find that at the time plain-

Nor does one who while intoxicated accosts a woman in the street, and persists in doing so in the face of remonstrances, whereupon he is knocked down and seriously injured by a man who thinks he has a right to protect her, thereby wilfully expose himself to unnecessary danger or peril within a condition in an accident-insurance policy against liability for injury caused by such exposure. *Mair v. Railway Pass. Assur. Co.* 37 L. T. N. S. 856.

And a passenger upon a railroad train did not voluntarily expose himself to unnecessary danger within the meaning of a condition in such a policy against liability for injuries caused by such exposure, where the train stopped on a bridge, because the draw was open and he went to the front platform of the coach and stepped off through a hole in the floor of the bridge, causing his death, where others also got out of the coach, some of them in advance of him, and the bridge, with the exception of such hole, was entirely safe. *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205.

V. What constitutes; particular cases.

The question of voluntary exposure to unnecessary danger, within the meaning of a condition 40 L. R. A.

tiff was insured by the defendant he was engaged in other occupation in addition to that of secretary and treasurer of the firm with which he was connected, and did not disclose that fact to the agent of the defendant, and thereby secured a more favorable rating than he would had he disclosed all the facts, he can recover no greater sum than he would have been insured for under a more hazardous risk.

Standard Life & Acci. Co. v. Taylor, 12 Tex. Civ. App. 387.

The court erred in its charge to the jury in leaving the question whether or not Mr. Johnson was a farmer at the time of his injury.

Williams v. United States Mut. Acci. Assn. 133 N. Y. 366; *Miller v. Travelers' Ins. Co.* 39 Minn. 548.

Mr. Emanuel T. Berger, with **Messrs. Sloman & Groesbeck**, for defendant in error:

The instruction as to voluntary exposure to unnecessary danger was correct.

Cotten v. Fidelity & C. Co. 41 Fed. Rep. 506; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 58 Fed. Rep. 952, 7 C. C. A. 581, 22 L. R. A. 630.

The defense of change of occupation was clearly and intelligently submitted to the jury upon the theory of the defense. The court even thrust the burden upon the plaintiff, instead of the defendant, contrary to the decisions of this court.

Hess v. Preferred Masonic Mut. Acci. Assn. (Mich.) 3 Det. L. N. 908; *Emlaw v. Travelers' Ins. Co.* 108 Mich. 554.

Grant, J., delivered the opinion of the court:

1. Counsel urge that the court erred in not directing a verdict for the defendant, on the ground that the plaintiff had voluntarily exposed himself to unnecessary danger. The complete answer to this is that counsel preferred no such request at the trial. The case was tried upon the theory that upon this point the question belonged to the jury to decide. This question is therefore not before us.

2. Error is alleged upon the following portion of the instructions: "In order to make

against liability in an accident-insurance policy, is one of fact for the jury, under proper instructions from the court. *Carpenter v. American Acci. Co.* 48 S. C. 541; *Fidelity & C. Co. v. Chambers*.

And where there is a demurrer to the evidence it is a question for the trial judge. *Fidelity & C. Co. v. Chambers*.

Thus, whether crossing a railroad track in front of an advancing train is or is not negligence or voluntary exposure to unnecessary risk is a question materially dependent on the circumstances of the case, the distance to be covered, and the speed at which the train was approaching; and where the distance across was only 12 feet there is no error in leaving it to the jury under proper instructions. *Traders' & T. Acci. Co. v. Wagley*, 45 U. S. App. 39, 74 Fed. Rep. 457, 20 C. C. A. 588.

And the question whether the assured voluntarily exposed himself to unnecessary danger within the meaning of such a condition is one of fact for the jury where, in crossing a railroad consisting of three tracks, after he had got upon the first track he was called to by several persons from different directions to look out for the train, and instead of stopping to ascertain where it was he took

his act upon this occasion a voluntary exposure to unnecessary danger, he must have acted with gross or wanton negligence, or, otherwise, it was not a voluntary exposure to unnecessary danger." In this connection the court also charged as follows: "I charge you also that a voluntary exposure means a conscious or intentional exposure. If the insured in this case believed or had good reason to believe that he was endangering his safety by attempting to drive this bull from this inclosure, then I charge you that he cannot recover. If, on the other hand, he did not believe or had any reason to believe that there was any danger to himself in that attempt, then I charge you that it was not a voluntary exposure to unnecessary danger." This charge is sustained by the authorities. *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 58 Fed. Rep. 952, 22 L. R. A. 620. That case was taken to the circuit court of appeals and affirmed, all the judges concurring in the opinion. 7 C. C. A. 588. See also 2 Bacon, Ben. Soc. § 492, where will be found a full citation of authorities.

8. Was plaintiff engaged in an occupation more hazardous than that in which he was classified in the policy? The defendant requested the court to instruct the jury that plaintiff was in fact engaged in the more hazardous employment; also, that if they found that he was engaged in another occupation in addition to that of secretary and treasurer, and did not disclose that fact to the defendant, he could recover only the lesser sum under the more hazardous risk. These requests were refused, and the jury instructed that if the plaintiff had ceased to belong to the occupation in which he was insured, and had, in fact, become a farmer, he could only recover for the more hazardous occupation. The question is one of fact, to be determined by the court only when there is no dispute as to the evidence, and but one rational conclusion can be drawn therefrom. A man may be engaged in two or more occupations, in which case he can only recover for injury received in the employment for which he is insured. *Standard Life & Acci. Ins. Co. v. Taylor*, 12 Tex. Civ. App. 387. The provisions of the policy in that case were similar to those in this. Taylor was insured as a blacksmith, employed by a railroad com-

pany. In fact, he also acted as a switchman and car coupler, occupations more hazardous than blacksmithing. Held, that recovery for injuries received while acting as a switchman or coupler must be limited to the increased hazard. We think there was no evidence tending to show that plaintiff was a farmer, within the terms of the policy, until his employers, Hull Bros., had ceased to do business. The fact that he lived upon his farm, and carried it on through others, does not make him a "farmer," within the meaning of that term as used in these accident policies. He was at home only from Saturday night to Monday morning, and on Wednesday night, of each week. There is no testimony to show that during that time he was engaged in the actual work of a farmer, so as to incur the more hazardous risks incident to that business. It does not follow that plaintiff's policy lapsed when his regular employment with Hull Bros. ceased, or that he had necessarily become a farmer or engaged in the business of farming by spending his time at his home when the necessity for his being in Detroit had ceased. *Stone v. United States Casualty Co.* 84 N. J. L. 871. In that case a school teacher, out of employment, had let contracts for the erection of two dwellings for his own use, and, while overlooking one, fell, and was killed. Held, that he had not changed his employment, but was engaged in an individual act, which did not avoid the policy. See also 2 Bacon, Ben. Soc. 491; *Hess v. Preferred Masonic Mut. Acci. Asso.* (Mich.) 70 N. W. 460, post, 414.

There was testimony tending to show that plaintiff had not changed his occupation. The letters, upon which considerable reliance is placed, were not written by the plaintiff himself, or dictated by him, but were written by his sister-in-law while he was suffering from his injuries. They are explained by him and by her in such a manner that they were properly left to the jury, in connection with the other testimony, to determine their exact meaning. There was sufficient conflict in the evidence to justify the submission of the question to the jury.

The judgment is affirmed.

The other Justices concur.

a faster pace and crossed the second track, and was struck by the train and killed upon crossing the third. *Duncan v. Preferred Mut. Acci. Asso.* 27 Jones & S. 145.

And one who has occasion to cross railway tracks in order to reach a point for which he has started, and as he is about to do so observes a train approaching from the south upon the easterly track and waits for it to pass, and then, without taking the precaution to notice a train which is coming toward him from the north upon the track next to him, starts forward and is immediately struck and killed, does not voluntarily expose himself to unnecessary danger within the meaning of such a condition. *Lehman v. Great Eastern Casualty & I. Co.* 7 App. Div. 424.

So, a person found on a dark night between the station platform and the railroad track with his legs crushed by the wheels of a car when the train has but just started cannot be said, as a matter of law, to have voluntarily exposed himself to unnecessary danger within the meaning of a condition in such 40 L. R. A.

a policy against liability for injury caused by such exposure. *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 354, 26 L. R. A. 406.

And one who was hit by a detached car which had been kicked along the track by an engine the sight of which was cut off by his umbrella while crossing the track at a quick pace at a place where from one to two thousand persons had crossed daily for years, though notice had been posted up by the railroad company to prohibit it, was not thereby voluntarily exposing himself to unnecessary danger, hazard, or perilous adventure, within the meaning of an accident-insurance policy containing a condition against liability in case of injury from such exposure. *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149.

In *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149, *supra*, *Tuttle v. Travelers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 216, *infra*, was distinguished upon the ground that in that case the person injured made the railroad track his place for travel, and did so unnecessarily.

Lloyd B. HESS

v.

PREFERRED MASONIC MUTUAL ACCIDENT ASSOCIATION of America, *Pf.*
in Err.

(.....Mich.)

1. **A bank cashier does not, as matter of law, lose his right to recover** under an accident-insurance policy providing that it shall be wholly void as to all accidents occurring while engaged in any professional employment or exposure not rated as a preferred occupation, by sawing off blocks from a board for his own use.
2. **An accident-insurance company has the burden** of proving, in an action against it upon a policy, that an injury to plaintiff shown to be the result of an accident was within some exception named in the policy.
3. **That a bank cashier insured against accidents by a policy** providing that it shall be void as to all accidents occurring while engaged in any profession, employment, or exposure not rated a preferred occupation, uses a buzz-saw, will not prevent a recovery for an accident caused by his slipping and falling against the saw after he had ceased to use it.
4. **An inconsistency in the instructions** due to the fact that some instructions are more favorable to one of the parties than he is entitled to is not available to such party.

(Grant, J., dissents.)

(March 23, 1897.)

So, one who while on his way home crossed a railroad trestle bridge which was much frequented by foot passengers, and was reasonably safe for use as a bridge over the creek which it spanned, having a walk and railing on one side, and fell from the bridge and received injuries from which he died, cannot be held, as a matter of law, to have voluntarily exposed himself to unnecessary danger within the meaning of an accident insurance policy conditioned against liability in case of injury from such exposure. *Follis v. United States Mut. Acci. Asso.* 94 Iowa, 435, 28 L. R. A. 78.

And the question whether an attempt to board a street car by the front platform while the car was moving at a very slow rate of speed was a voluntary exposure to unnecessary danger within the meaning of such a condition in an accident-insurance policy is one for the determination of the jury as a matter of fact. *Johanns v. National Acci. Soc.* 16 App. Div. 104.

And so is the question whether or not the efforts of an insured person to get on a train moving at a rapid rate was a voluntary exposure to unnecessary danger within the meaning of such a condition. *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704, 58 Fed. Rep. 342, 7 C. C. A. 264.

And the fact that a person who had gone into a train house to become a passenger on a train, and who was afterwards found dead upon the track immediately after the passing of the rear car of a train, was doing a dangerous act in leaving a car while it was in motion is not, in the absence of evidence as to the cause of his fall, conclusive proof that he voluntarily exposed himself to unnecessary danger, within the meaning of such a condition, and does not sustain the burden of proof thereon resting upon the insurance company, this being a question for the jury and not for the court. *Badenfeld v. Massachusetts Mut. Acci. Asso.* 154 Mass. 77, 13 L. R. A. 263, 40 L. R. A.

ERROR to the Circuit Court for St. Joseph County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. P. Stewart and Moore & Moore, for plaintiff in error:

Plaintiff was injured while engaged in operating a buzz saw in violation of his policy of insurance, and therefore cannot recover.

Knapp v. Preferred Mut. Acci. Asso. 53 Hun, 84; *American Acci. Co. v. Carson* (Ky.) 30 S. W. 879; *Hull v. Equitable Acci. Asso.* 41 Minn. 281; *Duran v. Standard L. & Acci. Ins. Co.* 63 Vt. 437, 13 L. R. A. 637.

Plaintiff was injured because he voluntarily exposed himself to unnecessary danger.

Plaintiff's injury was the result of his own negligence.

Tuttle v. Travellers' Ins. Co. 134 Mass. 175, 45 Am. Rep. 816; *Neill v. Travellers' Ins. Co.* 7 Ont. App. Rep. 578; *Cornish v. Accident Ins. Co.* L. R. 23 Q. B. Div. 453; *Sartelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216; *Morel v. Mississippi Valley L. Ins. Co.* 4 Bush, 535; *Shaffer v. Travelers' Ins. Co.* 31 Ill. App. 112.

The court erroneously charged the jury that the plaintiff was not bound to show that he had complied with the terms of the policy, but the burden was upon the defendant to show that he had not.

A condition precedent is something that must take place before a liability can exist. In other words, the plaintiff must show that he has complied with all the provisions and

So, in *Sutherland v. Standard L. & Acci. Ins. Co.* 87 Iowa, 505, which was an action upon an accident-insurance policy conditioned against liability in case of injury from unnecessary exposure to danger, it was held that the question whether the fact that the assured was riding on the rear platform of a railroad car showed such want of care as to defeat a recovery is one for the jury, and does not of itself show such want of care as to defeat a recovery.

In *Sutherland v. Standard L. & Acci. Ins. Co.* 87 Iowa, 505, *supra*, *Bon v. Railway Pass. Assur. Co.* 56 Iowa, 667, 41 Am. Rep. 127, *infra*, was distinguished upon the ground that in that case the person injured stood on the steps of the platform.

And in *Pratt v. Travelers' Ins. Co.* (N. Y.) cited in 7 Am. L. Rev. 595, which was an action upon an accident-insurance policy conditioned against liability for injury caused by wilful exposure or want of due care, it was held that it is for the jury to say whether, if the assured, who was smoking when getting on the train, was passing in the dark from the ladies' car into the smoking car for the purpose of continuing to smoke, he was careless or in the exercise of due care.

So, riding upon the platform of a railway car running from 15 to 30 miles an hour is not, as matter of law, a voluntary exposure to unnecessary danger within the meaning of a condition in an accident-insurance policy against liability for injury caused by such exposure. *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. A. 305.

And for one to attempt to get on a train of cars while it is moving not faster than a man could walk, when by some means he falls under the cars and is killed, though an imprudent act is not a wilful and wanton exposure of himself to an unnecessary danger or peril within the meaning of a

conditions of the policy before the defendant can be made liable.

1 Bouvier, Law Dict. 313; *Stone v. Ellis*, 9 Cush. 95; *Jenness v. Straw*, 35 Mich. 21.

On petition for rehearing.

That a man who operates a buzz saw, and is unskilled in the use of it,—so unskilled that he does not know how to start or stop it,—is not using due diligence for his personal safety and protection, seems to us self-evident.

Morel v. Mississippi Valley L. Ins. Co. 4 Bush, 535.

Knapp v. Preferred Mut. Acci. Asso. 53 Hun, 84, accords with the express decisions of many of the accident insurance decisions of the country, and in spirit with them all.

Niblack, Mut. Ben. Soc. § 409; *Stone v. United States Casualty Co.* 34 N. J. L. 371; *Union Mut. Acci. Asso. v. Frohard*, 134 Ill. 228, 10 L. R. A. 883; *North American L. & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212; *Travellers' Preferred Acci. Asso. v. Kelsey*, 46 Ill. App. 371; *Neafie v. Manufacturers' Acci. Indemnity Co.* 55 Hun, 111; *Eggenberger v. Guarantees Mut. Acci. Asso.* 41 Fed. Rep. 172; *Kinney v. Baltimore & O. Relief Asso.* 35 W. Va. 886, 15 L. R. A. 142; *Standard L. & Acci. Ins. Co. v. Martin*, 133 Ind. 378; *Summers v. United States Ins. A. & T. Co.* 13 La. Ann. 504; 1 Am. & Eng. Enc. Law, p. 303; *National Acci. Soc. v. Taylor*, 42 Ill. App. 99.

Messrs. Howard, Roos, & Howard, for defendant in error:

In order to constitute a change of occupa-

condition in an insurance policy against liability thereon in case of injury from such exposure, as his act cannot be justly characterized as wilful or wanton. *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157.

And a passenger on a railway train who was overcome by the heat of the car or affected with nausea which impelled him to go out on the platform, where he was in a more dangerous position than he would have been had he remained in the car, and was injured, cannot be said, as matter of law, to have voluntarily exposed himself to unnecessary danger within the meaning of a condition in an accident-insurance policy against liability for injury in case of such exposure. *Marx v. Travelers' Ins. Co.* 39 Fed. Rep. 321.

Whether he voluntarily exposed himself to unnecessary danger within the meaning of such condition is a question for the jury. *Marx v. Travelers' Ins. Co.* 39 Fed. Rep. 321.

And one who approached an arriving railroad train at a rapid rate for the purpose of getting the mail bag for the postmaster, making an effort to check his speed as he reached a sloping bank which led down to the side track of the railroad, in doing which he stumbled and came in collision with the engine, whereby he was killed, will not be held to have been guilty of voluntarily exposing himself to unnecessary danger within the meaning of such a condition, though he was a volunteer, and it was not a part of his duty to get the mail bag. *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 267.

So, one who rides in a bicycle race, and is injured thereby, cannot be said, as a matter of law, to have voluntarily exposed himself to unnecessary danger by entering into the race, within the meaning of a condition of an accident-insurance policy against liability for injuries caused by such exposure. *Keeffe v. National Acci. Soc.* 4 App. Div. 392.

The question in such case is one of fact for the 40 L. R. A.

tion, the change must be of a permanent, rather than of an incidental, nature.

Niblack, Mut. Ben. Soc. 2d ed. § 786; *Union Mut. Acci. Asso. v. Frohard*, 134 Ill. 228, 10 L. R. A. 883; *Stone v. United States Casualty Co.* 34 N. J. L. 371; *Provident L. Ins. & I. Co. v. Martin*, 32 Md. 310; *North American L. & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43; *Tucker v. Mutual Ben. Life Co.* 50 Hun, 50; *National Acci. Soc. v. Taylor*, 42 Ill. App. 97; *Travelers' Preferred Acci. Asso. v. Kelsey*, 46 Ill. App. 371; *Hess v. Van Auken*, 11 Misc. 422.

Voluntary exposure to unnecessary danger means wanton or grossly imprudent exposure.

Manufacturers' Acci. Indemnity Co. v. Dorgan, 16 U. S. App. 290, 58 Fed. Rep. 945, 22 L. R. A. 620, 7 C. C. A. 581; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157.

In order for the plaintiff to voluntarily expose himself to unnecessary danger, there must be such an exposure as is beyond the ordinary or a wanton piece of gross carelessness.

Manufacturers' Acci. Indemnity Co. v. Dorgan, 16 U. S. App. 290, 58 Fed. Rep. 945, 22 L. R. A. 620, 7 C. C. A. 581.

The exposure must be intentional, as where one acts so recklessly and carelessly as to show an utter disregard of a known danger.

De Loy v. Travelers' Ins. Co. 171 Pa. 1; *Fidelity & C. Co. v. Chambers*, 93 Va. 138, 40 L. R. A. 432; *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149; *Tuttle v. Travelers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157; Niblack,

jury. Keeffe v. National Acci. Soc. 4 App. Div. 392.

And the question whether a person who goes to work upon a scaffold knows that it is insecure, is one for the jury, in an action upon an accident-insurance policy conditioned against liability for injuries caused by voluntary exposure to unnecessary danger. *Wilson v. Northwestern Mut. Acci. Asso.* 53 Minn. 470.

And the mere act of cleaning a gun not known to be loaded is not voluntary exposure to unnecessary danger within the meaning of such a condition, where an accident results from an unknown defect in the gun. *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 187, 20 L. R. A. 765.

And where one knew that a mule was ill-tempered and dangerous and addicted to kicking, and yet stood near her hind feet and slapped her on the hip in a way calculated to provoke her to kick, it is a question for the jury whether or not he exposed himself voluntarily to unnecessary danger within the meaning of a condition in an accident insurance policy against liability for injury caused by such exposure. *Carpenter v. American Acci. Co.* 46 S. C. 541.

While the general rule would seem to be that the question is one for the jury, as above stated, however, there are many cases which seem to adopt the rule that the neglect of the assured may be so flagrant as to amount to voluntary exposure to unnecessary danger as a matter of law.

Thus, a person acquainted with the locality, who drives a horse and carriage in which he is riding on a dark night into a place where there is a network of railroad tracks, where he is run over by a train of cars and killed, knowingly exposes himself to unnecessary hazard and danger, within the meaning of a condition in an accident-insurance policy against liability for injury caused by such exposure. *Neill v. Travelers' Ins. Co.* 7 Ont. App. Rep. 573, 31 U. C. C. P. 394.

Mut. Ben. Soc. 2d ed. 704; Bliss, Ins. ¶ 400; May, Ins. ¶ 530; 7 Am. L. Rev. 594.

It is incumbent on the company in such cases to prove the misconduct and negligence of the insured.

Niblack, Mut. Ben. Soc. 2d ed. 704-707; *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149; *Freeman v. Travelers' Ins. Co.* 144 572; *Badenfeld v. Massachusetts Mut. Acci. Asso.* 154 Mass. 77, 13 L. R. A. 263; *Orrell v. Hampden F. Ins. Co.* 18 Gray, 431; *Cluff v. Mutual Ben. L. Ins. Co.* 99 Mass. 817, 13 Allen, 308; *Hodsdon v. Guardian L. Ins. Co.* 97 Mass. 144, 93 Am. Dec. 73; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Pierce v. Cohasset Mut. F. Ins. Co.* 123 Mass. 572; *Germain v. Brooklyn L. Ins. Co.* 30 Hun, 585; *Redman v. Aetna Ins. Co.* 49 Wis. 431; *Grangers' L. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446; *Jones Mfg. Co. v. Manufacturers' Mut. F. Ins. Co.* 8 Cush. 82, 54 Am. Dec. 772; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 59 Am. Dec. 192; *Haskins v. Hamillon Mut. Ins. Co.* 5 Gray, 432; *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541, 66 Am. Dec. 380; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610.

The plaintiff was standing near the saw when he fell, and it is only reasonable to suppose, in the absence of evidence to the contrary, that he was using every caution commonly exercised by prudent men, and was not exposing himself voluntarily and knowingly to danger.

Badenfeld v. Massachusetts Mut. Acci. Asso. 154 Mass. 77, 13 L. R. A. 263; *Buesching v.*

And, death of the assured through attempting in broad daylight to cross the main line of a railroad in front of an approaching train, by which he was run over and killed at a place where there was no station or proper crossing and no obstruction to prevent a person about to cross from seeing an approaching train, falls within a condition in an accident-insurance policy against liability for accidents happening by exposure of the insured to obvious risk of injury, in the absence of evidence that he was short sighted or deaf. *Cornish v. Accident Ins. Co.* L. R. 23 Q. B. Div. 453.

So, a workman upon his way to work, whose way is obstructed by a train of freight cars standing across the street, voluntarily exposes himself to unnecessary danger so as to prevent a recovery upon an accident-insurance policy conditioned against liability for injuries caused by such exposure, where, after waiting ten or fifteen minutes, he attempts to cross through the train by climbing upon the drawheads of the cars, when he can go around the end of the train, though less conveniently, and the train is moved, and his foot is crushed by the coming together of the drawheads or bumpers of the two cars between which he attempts to pass. *Bean v. Employers' Liability Assur. Corp.* 50 Mo. App. 456.

And where a person who has crossed a railroad track meets two others about 100 feet from the track, whom he warns to look out for the engine, after which he turns and retraces his steps and goes upon the track and squats or kneels down upon it and is run over by a train moving only about 4 miles an hour, the whistle of which is being blown and the bell rung, the locality being lighted by a electric light, it is a case of voluntary exposure to unnecessary danger within the meaning of such a condition in an accident-insurance policy, whether the act was one of suicide or not. *Williams v. United States Mut. Acci. Asso.* 133 N. Y. 366, 40 L. R. A.

St. Louis Gaslight Co. 73 Mo. 219, 39 Am. Rep. 503; *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 76; *Hoyt v. Hudson*, 41 Wis. 105, 22 Am. Rep. 714; *Gay v. Winter*, 34 Cal. 153; *Parsons v. Missouri P. R. Co.* 94 Mo. 286; *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410; *Lancaster v. Washington L. Ins. Co.* 62 Mo. 121.

Moore, J., delivered the opinion of the court:

The plaintiff sued the defendant to recover for the loss of a hand which was cut off by coming in contact with a buzz saw. The case was tried by a jury, who rendered a verdict in favor of plaintiff. Defendant appeals.

When the plaintiff was insured by the defendant, he was cashier in a bank. His claim is: That he wanted a cabinet for use in the bank, and went to a planing mill to have some boards sawed off with which to make the cabinet. That he told Mr. Bloom, an employee, what he wanted. That the employee started the cut-off saw, and cut off some boards for the shelves, and took them to the band saw, to put more work upon them. That while the employee was doing this, plaintiff saw the ends of the cherry boards on the floor near the cut off saw, and thought he could use them for handles to the cabinet, and requested a fourteen-year-old boy to saw them off for him. The boy started the saw, but did not saw off the blocks as plaintiff expected him to do, and the plaintiff said he thought he could do it himself, and that he did saw them off. That after he had sawed off the blocks,

And walking a mile and a half on a dark night on a 6-foot way or space between two parallel railroad tracks of one of the most crowded railroads in England, with up and down trains constantly passing, where four tracks were afterwards found necessary to accommodate the traffic, amounts to an exposure to obvious and unnecessary danger, within the meaning of an accident-insurance policy conditioned against liability in case of injury caused by such exposure. *Lowell v. Accident Ins. Co.* cited in 29 U. C. C. P. 231.

So, it is voluntary exposure to unnecessary danger, within the meaning of a condition in an insurance policy against liability in case of such exposure, to attempt to cross a bridge 15 feet high upon ties from 10 to 12 inches apart with no walk or planking of any kind or any railing, on a dark night, where a platform or walk extended the whole length of the bridge on the opposite side with a fence or railing to protect persons from falling off, upon which he might have crossed. *Folitts v. United States Mut. Acci. Asso.* 94 Iowa, 435, 23 L. R. A. 78.

And one who in walking along a railroad track steps upon a trestle several feet in length consisting of cross-ties elevated some 6 or 8 feet above the bottom of the bridge and requiring several steps from one cross-tie to another, to pass over it on a dark and rainy night, having his hands filled with packages, knowing that it is dangerous, and who makes a misstep and falls through, seriously injuring himself, voluntarily exposes himself to unnecessary danger within the meaning of such a condition in an accident insurance policy, where there are other ways to reach his home, though it is his usual route, and many others traveled that way, and he had crossed many times before. *Travelers' Ins. Co. v. Jones*, 80 Ga. 341.

Nor can a recovery be had under an accident

he stood close up to the table, watching the boy, who was about 20 feet away, piling lumber. That he was simply waiting by the side of the table. That he cannot say how long he had been waiting; it may have been one minute, or it may have been five. That there were sawdust and little blocks of wood on the floor. That he stepped on something, and stumbled, and lost his balance, and threw out his arms to save himself from falling, when his wrist came in contact with the saw, and his hand was cut off. He further testified that when he told the proprietor of the mill what he wanted done, he was requested by him to show Mr. Bloom how he wanted the work done, and that he went into the mill for that purpose.

One of the defenses interposed was that the plaintiff cut off his hand purposely. It will not be necessary to discuss that defense, because the jury have found against the defendant upon that proposition. The other defenses are that the injury occurred while the assured was doing what was forbidden by the policy. Its terms were: "The member is required and agrees to use all due diligence for his personal safety and protection;" that the insurance shall not cover "voluntary exposure to unnecessary danger;" and also contained the following provision: "Inasmuch as eligibility to membership in this association is confined by its charter to persons whose occupations are comprised within the classification commonly known as 'Preferred Risks' by casualty companies, a copy of which classification is printed upon the back of this certifi-

cate, it is therefore agreed that this certificate shall be wholly void as to all accidents occurring to the insured when engaged in any profession, employment, or exposure not herein rated as a preferred occupation." It is the claim of the defendant that the insured "was engaged in a profession, employment, or exposure not rated as a preferred occupation in the policy," and for that reason cannot recover; and that, as a matter of law, the judge should have so determined, and directed the jury to return a verdict for the defendant,—citing a number of cases in support of that contention, all of which are distinguishable from the case here, except the case of *Knapp v. Preferred Mut. Acci. Asso.* 53 Hun, 84. This case does sustain the contention of appellant, but it is contrary to the great weight of authority. In *Niblack, Mut. Ben. Soc.* § 409, it is said: "A change of occupation means 'an engaging in another employment as a usual business.' It does not apply to temporary employments during leisure hours, to acts done outside of one's usual and ordinary business, or to casual employment in a different business." A provision of a policy limited the liability of the company to a less sum than that named in the policy if the insured should be injured in any occupation or exposure classed as more hazardous than that specified in the policy. It was held the terms "occupation" or "exposure" classed by this company as more hazardous refer to distinct classified occupations or employments, and to bring the case within the provision limiting the liability of the company the assured must be within

policy containing a condition against liability in case of death or injury in consequence of exposure to any obvious or unnecessary danger, for the killing of the assured by a railroad train while he was running on the track in front of it in the night to get a train approaching in the other direction on a parallel track. *Tuttle v. Travelers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316.

And in such a case a claim that his death did not happen in consequence of his exposure to the risk, but from a new force or power which intervened in the way of the engine coming upon him without having sounded a bell or whistle, is not tenable. *Tuttle v. Travelers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316.

And an intelligent man, in the exercise of his own free will and without necessity and with knowledge of the danger, who stands upon the platform of a moving railway car with his hands in his pockets, or upon the steps of the platform of such car while the train is being propelled at a speed of about 25 miles an hour, voluntarily exposes himself to unnecessary danger within the meaning of a condition in an accident-insurance policy against liability in case of injury from such exposure, where the position is in fact dangerous. *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. A. 306. See also *Bon v. Railway Pass. Assur. Co.* 56 Iowa, 664, 41 Am. Rep. 127; *Sawtelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216.

So, alighting from a train after it has gone from 150 to 175 feet beyond the station, while the train is running from 1 to 6 miles an hour, whereby the assured is injured, is a voluntary exposure to unnecessary danger within the meaning of a condition in an accident-insurance policy against liability for injury from such exposure, where he was on the train when it pulled into the station, and could have then got off. *Smith v. Preferred Mut. Acci. Asso.* 104 Mich. 624.

40 L. R. A.

And jumping from a freight train in rapid motion, on which one is riding without permission, is an exposure to unnecessary danger within the meaning of such a condition in an accident-insurance policy. *Shevlin v. American Mut. Acci. Asso.* 94 Wis. 180, 36 L. R. A. 62.

And in *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574, which was an action upon an accident insurance policy containing a condition against liability for injury caused by unnecessary exposure to danger or peril, among other things it was held that where the insured was injured internally while jumping in great haste from a railroad car at a station and running a considerable distance, which action was not necessary to his safety, but was voluntarily undertaken to effect an important object requiring haste, the injury was not caused by accidental means within the meaning of the policy.

So, one who goes to work upon a scaffold which is insecure, knowing it to be so, exposes himself to unnecessary danger so as to prevent a recovery upon an accident-insurance policy conditioned against liability for injuries caused by such exposure, where he is injured by the falling of such scaffold. *Wilson v. Northwestern Mut. Acci. Asso.* 53 Minn. 470.

And an insured person who, to escape the police who are seeking admittance to the room in which he is, attempts to let himself down from the window to the sidewalk, about 15 feet below, with a piece of seldedge about 6 inches wide torn from bed ticking cloth, which breaks and lets him fall, causing his death, voluntarily exposes himself to unnecessary danger so as to defeat a recovery upon an accident-insurance policy conditioned against liability in case of injury or death from such exposure. *Shaffer v. Travelers' Ins. Co.* 61 Ill. App. 112.

And a person engaged in selning for fish in a

one of such classes,—that is, engaged in one of the more hazardous occupations. *Niblack, Mut. Ben. Soc.* § 412. A case involving the same principles which should control the disposition of this case is *Stone v. United States Casualty Co.* 34 N. J. L. 371, in which the court said: "The injuries excluded from the compensation of the policy are described as those that are 'received in any employment, or by any exposure, either more hazardous in itself or classified by the company as more hazardous.' These terms, literally rendered, required that the insured, to come within their effect, must, at the time of the injury, be in an employment more dangerous than his own. The language has respect to the employments, and not to individual acts. It is true that a certain degree of ambiguity is introduced by the expression 'other exposure,' but, looking at the body of the policy, we find these terms used in the sense of the risks arising from a business or occupation. By adhering to the literal signification of the terms employed,

these indorsements, prefixed to the several classes of employments, lose all force as independent stipulations, and serve the simple purpose of graduating such employments for service to that provision of the policy which prohibits the assured from passing, at his own option, from one business to another. Understood in this view, they are properly a part of the classification, but if they are to be received as containing new terms of the contract, they are entirely out of place. If the company intended to say to the assured that if he did any act which did not strictly belong to his occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he could claim nothing under his policy, it was easy for them to do so in plain language. Such a stipulation would obviously be one of a most important character, and we would expect to find it in the body of the instrument. A qualification of the agreement so restrictive of the rights of the party insured

river which was very swift and full of sudden step-offs or holes and of swirls or eddies, who suddenly came to one of the step-offs or holes, and to a swirl or eddy, and, stepping into the hole where the water was very deep and being unable to swim, was drowned, thereby voluntarily exposed himself to unnecessary danger, within the meaning of an accident-insurance policy containing such a condition; and an answer in an action upon such a policy stating such facts makes a prima facie defense. *Conboy v. Railway Officials & E. Acci. Asso.* (Ind. App.) 43 N. E. 1017.

But an answer in an action on the policy in such case which fails to allege that the deceased knew of the dangers and voluntarily exposed himself thereto, is insufficient on demurrer. *Conboy v. Railway Officials & E. Acci. Asso.* 17 Ind. App. 62, Reversing 43 N. E. 1017, *supra*.

VI. Proof of, as a defense.

A condition in an accident-insurance policy against liability thereon in case of injury caused by voluntary exposure to unnecessary danger, not inserted in the body of the policy but indorsed thereon, is not a condition precedent; it is a separate proviso qualifying the general words in the policy, and if it is such as to defeat an action on the policy, it is a matter of defense. *Cronkrite v. Travelers' Ins. Co.* 75 Wis. 118.

So, letters of the executive committee of an accident insurance company, and of the secretary, addressed to the beneficiary of an insured person who was killed, stating that his claim must be rejected on the ground that the testimony establishes that the deceased voluntarily exposed himself to unnecessary danger which was the cause of his death, does not operate as a waiver of all other defenses, or as an estoppel against setting up contributory negligence or other violation of the essential conditions of the policy. *Traders' & T. Acci. Co. v. Wagley*, 45 U. S. App. 39, 74 Fed. Rep. 457, 20 C. C. A. 588.

And the fact that the assured was in an enfeebled physical condition may be taken into account in determining whether he was making an imprudent, wanton, and reckless exposure of himself within the meaning of a condition in an accident-insurance policy against liability in case of such exposure. *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 58 Fed. Rep. 945, 22 L. R. A. 620, 7 C. C. A. 588.

So, the burden of proof to establish voluntary exposure to unnecessary danger in an action upon 40 L. R. A.

an accident policy conditioned against liability in case of injury from such cause rests with the defendant. *Follis v. United States Mut. Acci. Asso.* 94 Iowa, 435, 28 L. R. A. 78; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572; *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 354, 26 L. R. A. 406; *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149; *Wright v. Sun Mut. L. Ins. Co.* 29 U. C. C. P. 221.

And where the plaintiff in an action upon an accident insurance policy proves a prima facie claim within the policy, it rests with the defendant to show that the deceased voluntarily exposes himself to unnecessary danger within the meaning of a condition in the policy against liability for injury from such exposure, to show it as a defense. *Neill v. Travelers' Ins. Co.* 7 Ont. App. Rep. 573, 31 U. C. C. P. 394.

And the evidence of it should be clear and convincing. *Wright v. Sun Mut. L. Ins. Co.* 29 U. C. C. P. 221.

And where a person is found dead in a cattle guard on a railroad, having been run over by a passing train, the cattle guard being at the side of a street and near the end of the railroad station platform which extends to and adjoined the street, death will not be deemed to be due to suicide or an exposure to obvious and unnecessary danger in an accident-insurance case, where there is no express evidence as to how he got into the cattle guard. *Wright v. Sun Mut. L. Ins. Co.* 29 U. C. C. P. 221.

But the presumption that the assured did not voluntarily put his life in jeopardy because of the known instinct which prompts everyone to preserve life, arising in an action upon an accident-insurance policy conditioned against liability in case of injury from voluntary exposure to unnecessary danger, is overcome by the presumption, aided by the finding of the jury, that the assured was in his right mind and capable of controlling his action. *Follis v. United States Mut. Acci. Asso.* 94 Iowa, 435, 28 L. R. A. 78.

So, refusal of the court to charge, in an action upon an accident insurance policy conditioned against liability in case of injury from voluntary exposure to unnecessary danger, that if plaintiff's injuries happened in consequence of such exposure the verdict must be for the defendant, though correct in law in the abstract, is not reversible error, where the court charged that if the injuries were unintentional and did not happen in consequence of voluntary exposure the plaintiff could recover, otherwise not. *Hess v. Van Auken*, 11 Misc. 422.

F. H. B.

ought not to be admitted unless the terms of this indorsement will bear no other rational interpretation. If the terms used are imperfect or ambiguous it is the fault of the defendants. It is their contract, and the construction of it must be most strongly against them." And it was held the plaintiff was entitled to recover.

The case of *Union Mut. Acci. Asso. v. Frohard*, 134 Ill. 228, 10 L. R. A. 388, is an instructive case. The opinion states: "The principal contention of appellant is that the deceased was killed while engaged temporarily in an act or occupation classed as more hazardous than the one in which he was accepted, and that appellee is therefore entitled to recover only the amount provided for such hazardous risk and occupation. The contention of appellee is that there was no change of occupation within the meaning of the by-laws and certificate of insurance. The deceased was a hardware merchant. He did not follow the occupation of hunter for hire or profit. He was killed while engaged in the act of hunting as a recreation, and it does not appear that he had hunted with a gun on any occasion since the issuance of the policy, other than that upon which the accident occurred.

The language of . . . [the policy] is, 'Any member receiving an injury while engaged, temporarily or otherwise, in an occupation more hazardous than the one in which he was engaged when insured,' etc. 'Occupation' is defined by lexicographers to mean 'that which occupies or engages the time or attention; the principal business of one's life; vocation; employment; calling; trade.' The classification of hazards in . . . [the] by-laws is made upon the basis of occupations. Merchants and those following other vocations are placed in division 'A.' grain measurers and others in division 'B.' . . . The by-laws in question must receive a reasonable construction. It would be unreasonable and absurd to hold that the merchant who at one time measured a few bushels of grain, at another hung a few rolls of wall paper upon his own premises, at another drove a team of horses in a carriage or wagon, and at still another rowed a skiff for exercise or recreation became, within the true intent and meaning of these by-laws, at these several times a grain measurer, a paper hanger, a teamster, and a boatman, respectively. The word 'occupation,' as found in these by-laws, must be held to have reference to the vocation, profession, trade, or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations. . . . It is urged, however, that the contract of insurance contains the words, 'in any act or occupation,' instead of the mere words, 'in another occupation,' found in the by-laws, and that the words, 'while engaged, temporarily or otherwise, in an act,' cannot be ignored, but that they have a definite and clear meaning, and must be given legal force and effect. It is to be noted that the words used in the contract are words selected and used by the corporation itself, and are therefore to be interpreted most strongly against it, or that, at all

events, they are to be construed according to their common and literal meaning, in favor of the insured. . . . We have already seen that the classification of hazards made in the by-laws is predicated only upon occupations. There is not in the by-laws or in the record any classification of hazards in respect to acts, —in other words, there is no act which is classified as more hazardous or less hazardous than another, and no act which is classed as more hazardous than the occupation designated in the certificate of insurance issued to the deceased. The case, then, does not stand otherwise than it would if the word 'act' were not found in the contract." See *North American L. & Acci. Ins. Co. v. Burroughs*, 69 Pa. 48, 8 Am. Rep. 212; *Tucker v. Mut. Ben. Life Ins. Co.* 50 Hun, 50. Upon the feature of the case just discussed, the court, correctly as we think, charged the jury as follows: "It is provided in the conditions printed in the policy or certificate of membership, among other things, 'Said policy shall be wholly void as to all accidents occurring when engaged in any profession, employment, or exposure not rated in the policy as a preferred occupation;' and it is claimed by the defendant that plaintiff was so engaged at the time he lost his hand. It is claimed by the plaintiff, however, that he was not using the saw at all for any purpose at the time he lost his hand, and had not been for some time prior thereto. The burden of proof to show that the plaintiff was using the saw at the time he lost his hand is upon the defendant, and if you find that the defendant has failed to prove its contention in this regard by a preponderance of evidence, then you will have no further occasion to consider this branch of the case. In considering the question as to whether the plaintiff was engaged in any employment, profession, or exposure not rated in the policy as a preferred occupation at the time he lost his hand, I charge you that engaging in an occupation on the part of the person insured against injury by accident does not mean a casual engaging such as most men do, or may do, or may resort to during the intervals of time when their usual employment does not engage them, but rather to engaging in such employment as a usual business; and, even though you find that the plaintiff incidentally engaged in sawing off blocks from boards at the time he lost his hand, you would not for that reason be required to find that he was injured while engaged in a profession, occupation, or exposure not rated in the policy as a preferred occupation. The language of this condition of the policy must meet with a reasonable construction at your hands. If the plaintiff was actually engaged in sawing blocks at the time he lost his hand, it will then be a question of fact for you to determine whether this act was one that pertained incidentally to his regular occupation, or whether it pertained to that more hazardous occupation not classed as preferred. With the burden of proof on this issue upon the defendant, and in determining this question you can and should take into consideration whether under the evidence the plaintiff was engaged, if you find he was engaged, at the time of the injury, in sawing blocks for his own use, or whether he was engaged in sawing blocks

for someone else; and if you find from the evidence and circumstances surrounding the case, as shown to you here in the evidence, that the sawing off of these blocks was for his own use, and if you find that the plaintiff, sawing them off at the time he lost his hand, was incident to his ordinary occupation, you will be at liberty still to find for the plaintiff. Nearly every man, whatever his occupation in the ordinary affairs of life, occasionally does an act or thing in connection with his ordinary avocation which might also pertain to some other occupation. For instance, the man insured in this company as a bank cashier might, while engaged in chopping his own firewood, accidentally cut his foot with an ax, and still it would not necessarily follow that he had changed his occupation from a bank cashier to a woodchopper. This chopping his own wood could be an incident to his occupation as a bank cashier, although it might also be an incident to the occupation of woodchopping. The same rule would hold in regard to sawing off blocks from a board. A man insured as a bank cashier might, for his own use, desire or engage in sawing off blocks from a board, and still it would not necessarily follow that for that reason he had changed his occupation, or was engaged in an act pertaining to a profession, occupation, or exposure not classed in this policy as a preferred occupation. As I stated above, this is a question of fact for you to decide from all the evidence that has been introduced in the case. Of course, if you do not find from the evidence that the plaintiff was engaged in the act of sawing when he lost his hand, you will have no occasion to inquire further on this branch of the case. It is claimed by the plaintiff that he had quit sawing a few minutes before the accident. If you find from the evidence that this was the case, then it would be entirely immaterial whether some time before the accident he had been engaged in an act of sawing. That question becomes material only in case you find that he was actually engaged in operating the saw at the time he lost his hand." We think the case in principle is like the case of *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 45.

This brings us to a consideration of the question whether, when the assured has shown the injury to be the result of an accident, the burden is then upon the defendant to show, by way of defense, that the accident was within the exceptions named in the certificate of insurance. We think this question must be answered in the affirmative. *Freeman v. Travelers' Ins. Co.* 144 Mass. 572. In this case the court cited with approval from *Piedmont & A. Life Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610, as follows: "In an action upon a policy which contains many provisos and conditions, there is a practical wisdom, which courts have recognized, in compelling the insurance company to allege and prove the want of compliance with any particular proviso or condition on which it relies." *Niblack, Mut. Ben. Soc.* p. 707, and cases there cited. See *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 44. It is urged that plaintiff cannot recover, because he voluntarily exposed himself to unnecessary danger, and his injury was the result of his own negligence. In relation to

this defense, the judge charged the jury, after calling their attention to the provisions contained in the certificate of insurance: "A member of this company must not be negligent; and if he receives injuries through his own carelessness or negligence, or rather contributory negligence, he could not recover under this policy because he agrees to use all due diligence for his personal safety and protection. In other words, he must be ordinarily diligent in trying to protect himself. He cannot be negligent, and run into danger, and then charge the company, if he does it deliberately. Negligence, in its legal sense, is no more or less than a failure to observe fully that degree of care, precaution, and diligence which the circumstances justly demand whereby an injury is occasioned. It means the doing of something which a person of ordinary care, prudence, and discretion would not do under the particular circumstances whereby an injury is occasioned. If you find in this case that there was negligence in such a degree as I have mentioned, negligence on the part of the plaintiff as I shall hereafter instruct you, he could not recover. If an injury occurred within either of the exceptions I have read to you, there could be no recovery, because the terms of the policy exclude such injuries. For, if the person is injured under this policy while voluntarily exposing himself to unnecessary danger, it would not be accidental. A condition of the certificate is to the effect that insurance under said policy or certificate shall not extend to or cover accidental injuries caused by the insured voluntarily exposing himself to unnecessary danger; and the defendant claims, under this condition and provision, the plaintiff cannot recover in this case. In order for the defendant to successfully defend under this condition, it must show by a preponderance of the evidence that the plaintiff did voluntarily expose himself to unnecessary danger at the time of the loss of his hand. I charge you, as a matter of law, that he did not voluntarily expose himself to unnecessary danger by going into Beckley & Austin's planing mill. The mere going into the planing mill could not be such an exposure; and whether, while in there, he exposed himself voluntarily to unnecessary danger is a question of fact for you to determine, and the burden of proof is on the defendant to show that the plaintiff did so expose himself. Upon this question I charge you that the plaintiff had a right to go into the planing mill; and if, while in there, he conducted himself as a man of ordinary prudence and caution would conduct himself under like circumstances, then he cannot be said to have voluntarily exposed himself to unnecessary danger; and the burden of proof is upon the defendant to show that the plaintiff, while in the planing mill, did not conduct himself as a man of ordinary prudence and caution would or should conduct himself. It is claimed in this case by the defendant that the plaintiff purposely and intentionally sawed off his hand. If he intentionally and purposely sawed off his hand, of course he cannot recover in this case. This is, however, entirely a question of fact for you to determine; and I charge you also that on this proposition, the burden of proof is on the defendant to show

that the plaintiff did intentionally and purposely saw off his hand. It is for you to say whether, under the evidence in this case, the defendant has proved that question by a preponderance of the evidence. I also instruct you on the part of the defense: The plaintiff must prove by a preponderance of evidence that the injuries for which he seeks to recover were received from external, violent, and accidental means within the provision and outside of the exceptions of the policy upon which this suit is brought. He must satisfy you that he did not voluntarily expose himself to unnecessary danger, and also that he was not injured while doing or performing any act or thing pertaining to any occupation classed by the defendant association as more hazardous than the occupation under which the contract was issued, plaintiff having been insured as cashier of the First National Bank. If the plaintiff fails to prove either one of these elements, it will be your duty to render a verdict for the defendant. If the plaintiff voluntarily exposed himself to unnecessary danger, your verdict must be for the defendant. By the words "doing or performing" anything pertaining to an occupation classed by the defendant association as more hazardous than the occupation under which the contract was issued, it is meant any act naturally belonging to or done by a man engaged in that occupation. It was not necessary for the plaintiff to be engaged in the actual act of sawing. For the purposes of this case, any act naturally done by a man who acts as a sawyer, whether of preparation for the act of sawing or done after the act of sawing, is an act pertaining to the occupation of a sawyer. Again, if the injury to the plaintiff resulted in whole or in part from his own negligence, then he cannot recover. Again, if the plaintiff stood leaning against the table, and his foot slipped, so as to throw him or his arm upon the table, causing this injury, he was guilty of negligence, and cannot recover. The plaintiff must prove by a preponderance of the evidence that the injuries for which he seeks to recover were received from external, violent, and accidental means, within the provisions and outside of the exceptions of the policy upon which this suit is brought. That, you understand, would be the law governing this particular contract. This injury, if at all, must be external, it must be violent, and it must be by accident; and the plaintiff is bound to show that. If the plaintiff voluntarily exposed himself to unnecessary danger, of course your verdict must be for the defendant." He also charged the jury: "Now, gentlemen, one very important question that arises for your consideration in this case is, Was the injury received by Mr. Hess because he voluntarily exposed himself to unnecessary danger? If you shall find in the affirmative of this proposition, that ends this case, and your verdict should be for the defendant, 'No cause for action.' And this question is for you to determine under all the evidence in the case. If you so find upon the affirmative of that proposition, then the defendant should prevail. Was this act of Mr. Hess a voluntary exposure to unnecessary danger? To make him guilty of a voluntary exposure to unnecessary danger, 40 L. R. A.

he must intentionally have done some act which a reasonable, ordinary, and prudent person would pronounce dangerous. The undisputed evidence shows that he went into this planing mill on a matter of business between himself and the proprietor. The evidence also shows that other persons were at the time in the mill, and there is some evidence that it was not an unusual thing for persons having business there to go into that mill, and transact business with the proprietors or their servants, as the case might be. Now, it is true that Mr. Hess voluntarily went into this planing mill, but there is a clean distinction between a voluntary act and a voluntary exposure to danger. The approach to an unknown or unexpected danger does not make the act voluntary exposure thereto. The result of the act does not necessarily determine the motives which prompted the action. The act may be voluntary, yet the exposure may be involuntary. As I said before, these are matters for you to determine under all the circumstances surrounding this case, and in the light of the evidence as you find it."

So far as the question of the negligence of the plaintiff is involved, the charge was quite as favorable for the defendant as it was entitled to have it made. See *Niblack Mut. Ben. Soc.* pp. 704-707; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572; *Tucker v. Mutual Ben. Life Co.* 50 Hun, 50; *Providence L. Ins. & I. Co. v. Martin*, 32 Md. 310; *Fidelity & C. Co. v. Chambers*, 93 Va. 138, 40 L. R. A. 432; *Keene v. New England Mut. Acci. Assn.* 161 Mass. 149; *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 267; *Schneider v. Provident L. Ins. Co.* 24 Wis. 25, 1 Am. Rep. 157; *Hess v. Van Auken*, 11 Misc. 422; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 58 Fed. Rep. 945, 7 C. C. A. 581, 22 L. R. A. 620; *May, Ins. § 580*. It is urged that this charge is inconsistent with itself. So far as this criticism is well taken, it grows out of the fact that the circuit judge gave some of the requests to charge on the part of the defendants which were more favorable to it than the law would justify. So far as there was error in the charge as given, it was in the defendant's favor and it cannot complain. The error assigned in relation to the admission of testimony, we do not think it necessary to discuss, as we are satisfied it is not well taken.

Judgment is affirmed.

Long, Ch. J., and Montgomery and Hooker, JJ., concur.

Grant, J., dissenting:

I cannot concur in that part of my Brother Moore's opinion wherein he approves the following charge of the court: "In considering the question as to whether the plaintiff was engaged in any employment, profession, or exposure not rated in the policy as a preferred occupation at the time he lost his hand, I charge you that engaging in an occupation on the part of the person insured against injury by accident does not mean a casual engaging such as most men do, or may resort to during the intervals of time when their usual employment does not engage them, but rather to engaging in such employment as a usual busi-

ness; and, even though you find that the plaintiff incidentally engaged in sawing off blocks from boards at the time he lost his hand, you would not, for that reason, be required to find that he was injured while engaged in a profession, occupation, or exposure not rated in the policy as a preferred occupation. The language of this condition of the policy must meet with a reasonable construction at your hands. If the plaintiff was actually engaged in sawing blocks at the time he lost his hand, it will then be a question of fact for you to determine whether this act was one that pertained incidentally to his regular occupation, or whether it pertained to that more hazardous occupation not classed as preferred. With the burden of proof on this issue upon the defendant, and in determining this question you can and should take into consideration whether, under the evidence, the plaintiff was engaged, if you find he was engaged at the time of the injury in sawing blocks for his own use, or whether he was engaged in sawing blocks for someone else; and if you find from the evidence and circumstances surrounding the case, as shown to you here in the evidence that the sawing off of these blocks was for his own use, and if you find that the plaintiff, sawing them off at the time he lost his hand, was incident to his ordinary occupation, you will be at liberty still to find for the plaintiff. Nearly every man, whatever his occupation in the ordinary affairs of life, occasionally does an act or thing in connection with his ordinary avocation which might also pertain to some other occupation. For instance, the man insured in this company as a bank cashier might, while engaged in chopping his own firewood, accidentally cut his foot with an ax, and still it would not necessarily follow that he had changed his occupation from a bank cashier to a woodchopper. This chopping his own wood could be an incident to his occupation as a bank cashier, although it might also be an incident to the occupation of woodchopping. The same rule would hold in regard to sawing off blocks from a board. A man insured as a bank cashier might, for his own use, desire or engage in sawing off blocks from a board, and still it would not necessarily follow that for that reason he had changed his occupation, or was engaged in an act pertaining to a profession, occupation, or exposure not classed in this policy as a preferred occupation." The policy of insurance prohibited plaintiff from engaging "in any profession, employment, or exposure not herein rated as a preferred occupation."

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I recognize the rule that such a policy is not avoided when the insured engages in those acts which are common to those engaged in the occupations referred to, or, in other words, are common to mankind. As the learned circuit judge said, the plaintiff might chop his own firewood, he might saw off blocks from a board with a wood or hand saw, but it is different when he goes into a dangerous place and assumes to run a dangerous machine with which he is unfamiliar. Plaintiff might, without avoiding his policy, go out in his row boat; but if he should deliberately undertake to shoot a dangerous rapid he would voluntarily expose himself in a manner not authorized by his policy. A man may enter his own manufactory, or that of another, to observe the engine or other machinery, without avoiding such a policy; but if he should undertake to manage the engine, either for pleasure or business, he would then become "engaged in an exposure" prohibited. Fishing, hunting, boating, woodchopping, and many other like acts which men usually do are not prohibited by these policies; but the rule cannot be extended to include every danger and risk to which the insured may see fit to expose himself. This case is parallel to *Knapp v. Preferred Mut. Acci. Assn.* 53 Hun. 84, wherein the plaintiff was attempting to operate a buzz saw. The court said: "The work of operating a buzz saw is proverbially dangerous, and is probably not less so when engaged in for amusement than when practised as a business or occupation." It appears to me contrary to reason to hold that an insured may, for amusement or temporary utility, expose himself to a risk far more dangerous to him than to one who is engaged in the business. The court should have instructed the jury that if this injury occurred while he was using the saw he could not recover. Counsel cites the case of *This Plaintiff v. Van Auken*, 11 Misc. 422,—another case growing out of this same accident. This point, however, was not involved in that case. The contrary request was preferred in that case, and refused. The ruling was sustained upon the ground that there was no evidence upon which to base it. That is not this case. There was evidence from which the jury might have found that plaintiff was injured while using the saw. For this error I think the case should be reversed, and a new trial ordered.

Rehearing denied June 18, 1897.

OHIO SUPREME COURT.

UNITED STATES MUTUAL ACCIDENT ASSOCIATION of New York, *Plff. in Err.*,

v.

Keith M. HUBBELL.

(56 Ohio St. 516.)

***1. Death caused by accidental drowning** is death "through external, violent, and accidental means," within the meaning of the stipulation of an accident policy which gives indemnity against death by such means.

2. The term "voluntary exposure to unnecessary danger," in an accident policy does not embrace every exposure of the assured that might have been avoided by the exercise of due care on his part. It relates to dangers of a substantial character, of which the assured at the time had knowledge, and to which he purposely and consciously exposed himself, intending at the time to assume all the risks.

3. And where a traveling salesman, who holds an accident policy issued to him as such salesman, is confronted, while in pursuit of his business, with possible danger because of a slough in a public road on his regular line of travel, over which he has passed twice a year for thirteen years, and makes inquiry of other men living in the vicinity as to the existence of danger at the time, and receives opinions, some expressing fears of danger, and others to the contrary, and acting on his own judgment, formed from such opinions and from his previous knowledge, and from appearances at the time, in good faith concludes that there is no danger to his life in crossing, and attempts to cross, and is accidentally drowned, such attempt is not a "voluntary exposure to unnecessary danger," within the meaning of the policy.

(June 8, 1897.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Superior Court of Cincinnati, in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

Statement by **Spear, J.:**

The action of the plaintiff below (defendant in error here), commenced in the superior court of Cincinnati, was upon two policies of accident insurance, for \$5,000 each, issued by the association on the life of her husband, Wakeman Hubbell, whose death was alleged to have been caused by accidental drowning. The answer set up that a condition of each of the policies was that the "contract shall not extend to or cover voluntary exposure to unnecessary danger," and "that the said Wakeman Hubbell met his death solely in consequence of voluntary exposure to unnecessary danger, on or about the 28th day of December, 1892, while attempting to cross a slough caused by backwater from the Tombigbee river, near Vienna, in the state of Alabama; that the said Wakeman Hubbell well knew the dangerous

condition of said slough, and was warned of said danger by others, but persisted, notwithstanding such warnings and known danger, in an effort to make such crossing, and in such effort lost his life by drowning. That this defendant denies that such drowning was accidental, or due to any cause whatever other than such voluntary exposure to unnecessary danger." The reply denied the new matter. In the charge to the jury, the judge, after stating the issues, at request of plaintiff, gave the following instructions: "(1) It is not disputed that the policies set forth in the petition were duly issued, and were in force at the date of the death of Mr. Hubbell. If, therefore, you find that he died by drowning at the time and place named in the petition, and that his death was accidental, and that the plaintiff was his wife, the plaintiff is entitled to recover the insurance, unless you should find that Mr. Hubbell voluntarily exposed himself to unnecessary danger. (2) If the jury find that Mr. Hubbell was familiar with the ford at and before the date on which he lost his life, and that he judged from the appearance of the slough and the landmarks thereabout, and from such information as he had, that there was no danger to his life in crossing, and, in the exercise of his judgment, in good faith, though erroneous, undertook to cross, and lost his life thereby, the plaintiff will be entitled to recover. (3) Even if the jury should find that Mr. Hubbell had been warned by some person or persons that the ford was dangerous, he would not be bound by such warning, but was entitled to act upon the opinion of others, and upon his own knowledge and experience of the ford, if you find that he had such knowledge and experience." And at the request of defendant, the following: "(1) If the jury find that Mr. Hubbell, being aware of the danger to his life, attempted to cross the ford, it cannot be said that it was a necessity that he should cross at that time; and if, therefore, he voluntarily exposed himself to a known danger, the danger was, within the meaning of the policy, unnecessary. (2) If the jury find that there was another road to Vienna, and it was not necessary for Mr. Hubbell to cross the slough to reach Vienna, then it was unnecessary for him to expose himself to the danger of fording it. (3) The jury must find from the evidence that Wakeman Hubbell was accidentally drowned, or the plaintiff cannot recover. (4) The burden of proof is on the plaintiff to show affirmatively that Wakeman Hubbell was accidentally drowned as alleged in the complaint, and, without such affirmative proof, plaintiff cannot recover. (5) The words 'voluntary exposure to unnecessary danger' mean an exposure willingly undertaken of a hazard which necessity does not require."

Exception was entered by defendant to each of the propositions given for plaintiff. A verdict for plaintiff having been returned, and judgment thereon rendered, which was affirmed by the circuit court, the association prosecutes error here to obtain a reversal of those judgments.

*Headnotes by the COURT.

NOTE.—See note on page 432.
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Messrs. Follett & Kelley and Milton Sater, for plaintiff in error:

When the facts constituting the alleged exposure are undisputed, the question as to whether the provision of the policy has been violated is one of law.

Shuffer v. Travelers' Ins. Co. 31 Ill. App. 112; *Tuttle v. Travellers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316; *Williams v. United States Mut. Acci. Assn.* 133 N. Y. 370; *Sawtelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216; *Cornish v. Accident Ins. Co.* L. R. 28 Q. B. Div. 453; *Lovell v. Accident Ins. Co.* 3 Ins. L. J. 877, 5 Ins. L. J. 559; *Burkhardt v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205; *Travelers' Ins. Co. v. Seaver*, 19 Wall. 531, 22 L. ed. 155; *Bon v. Railway Pass. Assur. Co.* 56 Iowa, 664, 41 Am. Rep. 127.

The court should have held, as a matter of law, in this case, that the provision of the policies exempting the company from liability for voluntary exposure to unnecessary danger had been violated, and should have granted defendant's motion to instruct the jury to return a verdict for the defendant.

Conboy v. Railway Officials & E. Acci. Assn. (Ind. App.) 43 N. E. 1017; *Carpenter v. American Acci. Co.* 46 S. C. 541; *Follis v. United States Mut. Acci. Assn.* 94 Iowa, 435, 28 L. R. A. 78; *Beau v. Employers' Liability Assur. Corp.* 50 Mo. App. 459; *Keene v. New England Mut. Acci. Assn.* 161 Mass. 149; *Tuttle v. Travellers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316; 1 Am. & Eng. Enc. Law, 2d ed. pp. 306 et seq.; 1 Beach, Ins. §§ 276 et seq.; 2 Bacon, Ben. Soc. § 492; Niblack, Mut. Ben. Soc. § 367 et seq.; *Neil v. Travelers' Ins. Co.* 17 Can. L. J. 44; *Travelers' Ins. Co. v. Jones*, 80 Ga. 541; *Badenfeld v. Massachusetts Mut. Acci. Assn.* 154 Mass. 77, 13 L. R. A. 263, note; *Duncan v. Preferred Mut. Acci. Assn.* 27 Jones & S. 145; *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 267; *Standard Ins. Co. v. Langston*, 60 Ark. 381.

Messrs. Ramsey, Maxwell, & Ramsey, for defendant in error:

This case is not to be determined by any of the general rules of law relating to negligence, but solely by a consideration of the express language of the contract.

Schneider v. Provident L. Ins. Co. 24 Wis. 28, 1 Am. Rep. 157; *Collins v. Bankers' Acci. Ins. Co.* 96 Iowa, 216; *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 267; *Fidelity & C. Co. v. Chambers*, 93 Va. 138, 40 L. R. A. 432; *Keefe v. National Acci. Soc.* 4 App. Div. 392; *Lehman v. Great Eastern Casualty & I. Co.* 7 App. Div. 424; *Tucker v. Mutual Ben. Life Co.* 50 Hun, 50; *National Benefit Assn. v. Jackson*, 114 Ill. 533; 2 May, Ins. 2d ed. § 530.

The burden of proof was upon the defendant to show that Mr. Hubbell's exposure to danger was both voluntary and unnecessary.

Freeman v. Travelers' Ins. Co. 144 Mass. 572; *Badenfeld v. Massachusetts Mut. Acci. Assn.* 154 Mass. 77, 13 L. R. A. 263; *Keene v. New England Mut. Acci. Assn.* 161 Mass. 149; *Jones v. United States Mut. Acci. Assn.* 92 Iowa, 652.

Spear, J., delivered the opinion of the court:

The evidence shows that the deceased was 40 L. R. A.

about sixty years of age, a traveling salesman by occupation, and at the time of the occurrence in good health, and in full possession of his mental faculties. He was drowned while crossing at a public ford through a slough caused by backwater from the Tombigbee river, near Vienna, in the state of Alabama, on the afternoon of December 27, 1892. The ford was a part of the state road lying between a cross roads settlement known as "Buntins" and Vienna, the places being about 9 miles apart. There was no other public road connecting the two points, although there was a byway through plantations around by a place called the "Lee Place," some 3 1/4 miles further, which way also led over a slough caused by like backwater, the condition of which was not then known. Hubbell had traveled the state road twice a year for thirteen years, and was more or less acquainted with the ford where the occurrence took place. He had stayed near Buntins the night of the 26th, and left that place about 3 o'clock in the afternoon of the 27th, in a buggy drawn by two horses hired of a liveryman near there, and driven by a colored man named Emmitt Cavett. It was understood in the neighborhood that a colored boy, having in charge some mules, a few days before, had to go around by the Lee place because the water at the ford was up so that fording was thought to be dangerous, and this information was conveyed to Hubbell, but the water at the ford was subject to rapid changes, and might be high at one time, and easily fordable in a few hours after. Hubbell made inquiries of a number of persons living in the vicinity of Buntins as to its condition. The evidence tends to show that opinions were expressed—some favorable and others unfavorable—with respect to the presence of danger there; but no one claimed to have knowledge, and the exact condition of the ford that afternoon was not known. There had been a little rain thereabouts within the few days past, but not much, and the roads were fairly good. It had rained above. Vienna was on Hubbell's regular route and was to be his next stopping place. He had upon his person some \$700 or \$800 in money collected within the two or three days previous. On the way to the ford, and a short distance from Buntins, the driver turned off the state road, intending to drive around by the Lee place. Hubbell stopped him, and a conference ensued, in which the driver said to Hubbell that one Wilder had told him that they could not go the direct road, because, he said, he had sent a boy over there, and he could not cross, and that they would have to go by the Lee place. Wilder was one of those of whom Hubbell had inquired, and who mentioned the circumstance of the boy with the mules, which was two days before. By direction of Hubbell, the driver against his own inclination, turned back, and they continued on the public road. The driver's objection, expressed later, was not that he feared bodily danger, but it was cold, and he feared getting wet. They presently reached the slough. The road dipped into the water. They stopped. It was 30 to 35 feet to the opposite slope. There was no current. Hubbell said to the driver that the water was not more than 3 or 4 feet deep, ac-

cording to old signs setting out there, and that he always noticed them. "That's no water there to stop us, at all. You've been kicking all along about the slough being so bad, and I've been traveling here about thirteen or fourteen years. I never found this slough in as fine a fix as it is now, in all my traveling here, and you acknowledge yourself you never saw it in such good fix,—no water nor mud on the sides of the road,—and that is the reason I wanted to come this road instead of the road around. Public roads are always kept up. I have traveled here when the roads were three times as bad, and also have crossed this slough, and more water there than seems to be there now." They entered the water, and again stopped. Hubbell's valise was on the floor of the buggy, behind the seat. The driver asked if he had anything he didn't want to get wet. Hubbell replied: "Yes; I don't want my valise to get wet. Go ahead and get it, though I don't think the water will reach that high." The driver then got the valise and put it on the seat. They started across. Giving the words of the driver: "We made a few steps, when the horses commenced swimming. The water then struck us in the face, and he jumped and caught the lines. It seemed that he wanted to turn around. This pulled the horses out of the road when he pulled the lines, and I caught hold of the lines to try and get back in the road, and I was going on all right, and would have kept on all right if the buggy had not struck a stake driven into the ground. Then the buggy hung. [This stake was not seen by him nor was its presence known to him until the buggy struck it.] He asked me what I would do now. I told him I was going to cut the horses loose. Mr. Hubbell said: 'Let the horses alone, and save me and yourself. I will pay for the horses. I have paid for one pair, and I will pay for these. Save me. Can't you swim?' I told him, 'Yes.' He said, 'You swim out, and take me out on your back, for I can't swim a lick.' I told him, 'We were directed to come this way, and after I got here I would have turned around, but you said there was no danger, which I did not think there was myself, any further than just me getting wet.' 'I wish I had have let you turn around when you wanted to, but you heard Mr. Whitten say to me to keep right in the middle of the road. Don't you think noways hard of me, Emmitt. Do all you can to get me out of here.' I said I could not swim with him on my back. 'Well, what in the world am I going to do, Emmitt? 'I am freezing.' I said: 'Oh, no, you are not freezing; you are just a little cold. You have on better clothes than I have, and I lack a heap from freezing.' He then had hold of me, when we were talking. He said: 'I am afraid for you to leave me.' I said: 'How am I to get you out? I can't swim with you on my back.' He then asked: 'What am I going to do? How am I to get out?' He said: 'You must not leave me here at all.' I asked him: 'Then what are we going to do, just stay here and drown? We will freeze or drown unless I go off and get a boat. He then turned me loose, and told me to go and get a boat just as quick as I could. I left him then,

and started to hunt for a boat. I stepped into the water and tried to swim, and I failed to swim myself. He was talking to me the whole time: 'Emmitt, you are drowning, and what will I do?' This he repeated time and again, and finally, at last, I got to the shore. He says: 'Emmitt, go ahead, old boy. Mr. Eiland told me you are all right, and I believe you are; and also Mrs. Dillard.' I was now at the shore, and used every effort to get a boat. Cavett's effort to get a boat in time proved unavailing. When help reached the scene, Hubbell was found out of the buggy, drowned.

This extended statement of the circumstances surrounding the case has been given because it seems to us that the facts, when fully stated, have the effect to much simplify the question of law involved. The construction of the clause "voluntary exposure to unnecessary danger" has not heretofore been presented to this court, although the question has been the subject of numerous adjudications in other jurisdictions. A citation of the authorities pro and con will be found in the full briefs of counsel, which, with the able discussion of the legal propositions there so fully given, permits a disposal of the case with more brevity than might otherwise be fitting. The policy covered, with the exception before stated, and others not important to be recited, death "through external, violent, and accidental means." It will not be doubted that the definition of "death by accidental means" given by the trial judge to the jury, *viz.*, "Any event which takes place without the foresight or expectation of the person acted upon or affected by the event," was a proper definition, and there is no reasonable question that the facts proved warrant the conclusion by the triors that the assured came to his death by accidental means. And it is now settled by uniform adjudications that, although the drowning is the result of the action of water internally, yet the water is external, and that accidental death by drowning is produced "through external, violent, and accidental means," within the import of an accident policy. It being thus sufficiently shown by the evidence of plaintiff that the assured came to his death within the general terms of the policy, the burden rested upon the company to prove that a recovery was defeated by reason of the exception pleaded, *viz.*, that death was the result of "voluntary exposure to unnecessary danger." It is clearly not enough, in such case, to show that the deceased was negligent. "Negligence," in its usual legal significance, has no place in measuring the liability of a company under an ordinary accident insurance policy, for its presence would overturn the primary theory of the contract. Accidents are the result, very largely, of the failure to observe due care; and yet the contract is intended as a remuneration in case of accident, and it is to procure the obligation of the company to pay this remuneration that the assured pays the premium. As stated by Allen, J., in *Keene v. New England Mut. Acci. Assn.*, 161 Mass. 149, "By taking a policy of insurance against accidents, one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadvertence." A literal construction of the

words "voluntary exposure to unnecessary danger" might embrace any exposure not actually required by the circumstances, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of ordinary care. But it must be borne in mind that language of exceptions in such policies, limiting the liability of the company, are to be construed favorably to the insured, and doubts and ambiguities resolved against the insurer. The words of the exception are not, therefore, to be literally interpreted. We think reason as well as the clear weight of authority leads to the conclusion that the words of the exception should be held to relate to dangers of a substantial character which the assured realized. The voluntary exposure requires an exercise of the will. The party must intentionally and consciously assume the risk. This necessarily involves knowledge that the danger exists, and that the risk will follow an attempt to brave it. The act done may be voluntary, but it cannot involve "voluntary exposure" unless the exposure is understood. Before the party can voluntarily expose himself to danger, he must know of its existence. See *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 24 C. C. A. 305, 78 Fed. Rep. 754.

We are not called upon to pass on the weight of the evidence, but some features may with propriety be adverted to, and its general legal effect indicated. The policy describes Mr. Hubbell as engaged in the occupation of traveling salesman, and the contract was intended to cover risks incurred in the pursuit of that business. He was pursuing this line of business, and was on one of the usual routes of travel, when he met his death. In the line of duty to his employer, it was important that he make Vienna without unreasonable delay, and, unless the way involve substantial risks, it was his duty to reach that point that day. In this sense, it was necessary for him to make the trip then. He had not gone out of his way to seek perils, nor for any ulterior or outside purpose, but was on a public highway, and the only one leading to his destination. It is a significant circumstance, also, that no one whom he heard speak on the subject indicated that the road itself was at all out of repair. The water on it was still—not running—water, and hence it was not natural to anticipate any washing or impairment of the road. The presence of the backwater over it was the only source of probable danger to be considered. Fords are common in many sections of the country, especially in the newer portions. To refuse to cross them is to refuse to travel. There is no evidence in the record that the road itself was out of order, and it was the belief of the prudent driver, even, that, had the team been kept in the road, a safe crossing would have been made. If the crossing of the ford at that time was dangerous, and Hubbell was conscious of the danger and consciously

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assumed the risk, that was a voluntary exposure to it, and would prevent a recovery. But the attempt to cross because it was a ford was not necessarily and *per se* a dangerous act, and plaintiff showed a right to recover unless the circumstances were such as disclosed to Hubbell that the attempt to cross would be dangerous. This does not imply that he might recklessly, and in a foolhardy way, rush into probable danger, even though he was at the time pursuing his legitimate calling. But where different men, having substantially equal means of judging, would differ in opinion as to the safety of an act, it cannot be said to be foolhardy. The attempt to cross under the conditions which surrounded Hubbell would be largely a matter of temperament. A very timid person would be likely to shrink and refuse; a courageous one would be likely to go ahead. The former would see troops of lions in the way; the latter would think the way clear. That Hubbell thought the way free from substantial danger, his conduct abundantly attests. His panicky grasping of the lines when imminence of peril dawned upon him is not to be counted against him. Even under the rule of contributory negligence, his actions in the face of great peril, though unwise, would not condemn him. It is a recognized rule that where one is confronted with a sudden emergency the failure on his part to exercise the best judgment possible does not establish lack of care. We think that Hubbell's previous acquaintance with this ford and the landmarks thereabouts, and the information received from others at the time, justified him in exercising his own judgment; and if he did so in good faith, and in the belief that there was no danger to his life in crossing, however erroneously he judged, his act in attempting to cross was not a voluntary exposure to unnecessary danger. Nor was the warning of others more than a circumstance to be considered. Such warning was but the expression of an opinion, and he had received opinions to the contrary. It was a part of the circumstances. It did not of itself forbid the exercise of personal judgment. The question, therefore, of whether the attempted crossing was or not a voluntary exposure to unnecessary danger, was for the jury, and not, as now contended by plaintiff in error, solely a question of law to be determined by the court. Indeed, counsel at the trial seem to have regarded it as a question for the jury, as is indicated by their first request to charge.

We find no error in the charge given at the request of plaintiff below. The record shows, as against the objections of plaintiff in error, that not only substantial but technical justice was done by the judgments of the superior and circuit courts, and they should not be disturbed.

Judgment affirmed.

WISCONSIN SUPREME COURT.

Wallace P. COOK *et al.*, *Repts.*,
v.

MINNEAPOLIS, ST. PAUL, & SAULT
STE. MARIE RAILWAY COMPANY,
App.

(.....Wis.....)

***1. A fire started by defendant's negligence**, after spreading one mile and a quarter to the northeast, near plaintiffs' property, met a fire having no responsible origin, coming from the northwest. After the union, fire swept on from the northwest to and into plaintiffs' property, causing its destruction. Either fire, if the other had not existed, would have reached the property and caused its destruction at the same time. *Held*:

(a) That the rule of liability in case of joint wrongdoers does not apply.

(b) That the independent fire from the northwest became a superseding cause, so that the destruction of the property could not, with reasonable certainty, be attributed in whole or in part to the fire having a responsible origin; that the chain of responsible causation was so broken by the fire from the northwest that the negligent fire, if it reached the property at all, was a remote, and not the proximate, cause of the loss.

2. After the fire swept everything of a combustible character clean, on both sides of defendant's right of way, plaintiffs' horses, that were running at large, went upon the railway track and were killed by a passing train without negligence on the part of the trainmen. The right of way had never been fenced as required by law. *Held*:

(a) That the rule of absolute liability, under the statute requiring railway companies to fence their tracks, applies only where the loss is produced, in whole or in part, by reason of the failure to fence.

(b) That in the circumstances stated the chain of causation reaching from the failure to fence was broken by the fire that would unquestionably have destroyed the fence if it had existed, so that the failure to fence cannot be said to have contributed to the entry of the horses upon the railway track.

3. The rules require the printing of a case by the appellant, and one brief on each side, on appeal to this court; they also permit a reply on each side. Costs as of right, for printing, are limited to such as are reasonably necessary or permitted under the rules.

(March 22, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Marinette County in favor of plaintiffs in an action brought to recover damages for injuries caused by fire alleged to have been negligently set out by defendant, and for horses killed by it. *Reversed*.

Statement by **Marshall, J.**:

The complaint sets forth four causes of action at law:

(1) For compensation for the destruction by

*Headnotes by MARSHALL, J.

NOTE—For liability for fires which spread to the property of others, see *Brown v. Brooks* (Wis.) 21 L. R. A. 255, and *note*; also *Day v. H. C. Akeley* 40 L. R. A.

a fire on the 20th day of May, 1893, of a lumber camp, several buildings, the camp equipment for a large number of men, some lumber, and a quantity of posts, poles, ties, slabs, and other personal property at Corliss, Wisconsin, of the alleged value of \$58,820.79, upon the ground that a fire was started at a point on defendant's right of way about a mile and a quarter southwest of such property by the escape of cinders from one of defendant's engines to dry, combustible material negligently left on its right of way, which fire spread to such property and did the mischief complained of.

(2) To recover for the loss of two horses of the value of \$500, killed May 20, 1893, by one of defendant's engines on its right of way, where such horses strayed because defendant failed to fence such right of way as required by law.

(3) To recover compensation for the loss of one horse of the alleged value of \$225, killed by one of defendant's engines on its right of way, on the 18th day of March, 1892; where it strayed because defendant failed to fence such right of way as required by law.

(4) To recover compensation for the loss of a cow of the alleged value of \$50, killed the 27th day of August, 1892, by one of defendant's engines on its right of way, where it strayed because defendant failed to fence such right of way as required by law.

The judgment prayed for was \$60,825, with costs.

The answer put in issue the origin of the fire alleged to have destroyed the property mentioned in the first cause of action, the value of such property, and also all other disputed matters covered by the verdict, hereinafter mentioned. On the trial facts were admitted entitling plaintiff to recover on the third and fourth causes of action, and there was no controversy upon the evidence but that the horses mentioned in the second cause of action were killed by one of defendant's engines as alleged, and that defendant failed to comply with the laws of this state in respect to fencing its right of way. The circumstances leading up to the entry of the horses upon the right of way were that, because of danger of the destruction of the stables where the horses were located on the 20th day of May, 1893, they were turned loose and driven toward a place of safety away from the defendant's track; that later in the day and after the fire had swept over the country up to the right of way, the horses returned to the vicinity of their stables and in doing so went upon the defendant's track and were killed by a passing engine, which was going very slowly on account of existing conditions in regard to smoke and recent burning.

As to the origin of the fire which destroyed the plaintiffs' property, there was evidence tending to show that, about 9 o'clock on the morning of the 20th of May, 1893, a fire was started in some way by a passing engine, in

Lumber Co. (Minn.) 23 L. R. A. 513; *Anderson v. Miller* (Tenn.) 31 L. R. A. 604.

combustible material on the defendant's right of way near Boom Hill, a mile and quarter southwest of Corliss, where plaintiff's property was located; that the wind at that time was blowing from the south and southwest; that the fire spread for a time in a northerly and northeasterly direction, carried by the wind blowing from the south and southwest; that towards noon the wind changed to the west; that between twelve and one o'clock the wind changed so as to blow from a northwesterly direction, and increased to a gale; that at the time the fire was spreading north from Boom Hill as stated, there was a fire some distance northwest of plaintiff's property, which, as the wind changed to the west and northwest and increased to a gale, was carried southeasterly and easterly to the vicinity of such property, so as to meet the line of fire from the southwest before that reached said property; thereafter and about 1 o'clock, carried by the strong gale of wind aforesaid, fire swept down from the west and northwest, to and into said property, and caused the destruction complained of.

The court instructed the jury in substance, among other things, that if they found that the fire set by the defendant's engine was attributable to its negligence, and was the sole cause of the destruction of plaintiff's property, they were entitled to recover the entire damage they thereby sustained; that if the jury found that the negligence of the defendant contributed to produce the fire which caused the damage, and that there were other fires which also contributed to the loss, and they could figure out what amount of such damage resulted from the fire originated from such negligence, they might do so.

The jury rendered a special verdict in substance as follows:

- (1) The defendant's engine No. 403 set fire on its right of way at a place called Boom Hill, on the morning of May 20, 1893.
- (2) The fire spread to plaintiff's cedar yard and camp at Corliss, and set fire to the same.
- (3) There was another fire which came from the northwest at the same time and was driven into the plaintiff's yard and camps and set fire to the same.
- (4) The fire which came from the northwest united with the fire set by defendant's engine before reaching the cedar yard.
- (5) Defendant's engine was properly constructed and equipped to prevent the escape of sparks and cinders, and it was in good condition and properly managed.
- (6) Defendant was guilty of negligence on account of the condition of its right of way where the fire started, which caused, or contributed to, the starting of the fire.
- (7) There was a want of ordinary care on the part of the defendant, which caused the fire to start on its right of way.
- (8) Such want of ordinary care consisted in not keeping the right of way reasonably clear of combustible material.
- (9) Plaintiff's damage, caused by the fire started by defendant's negligence, we assess at 50 per cent of their claim, less the insurance, amounting to \$26,182 93.

Defendant's counsel made several motions to correct the verdict and for judgment thereon; also a motion for judgment on the verdict and

the evidence, dismissing the complaint as to the first cause of action, also as to the second cause of action; also a motion, in effect, for such judgment in its favor as the court might decide it was entitled to on the verdict; also for an order setting aside the verdict as contrary to the evidence and for other reasons, and granting a new trial. All of such motions were denied and due exceptions to the denials taken. Plaintiff's counsel moved on the verdict for such judgment as the court might decide they were entitled to. On such motion the court construed the verdict of the jury as apportioning the fire loss equally between the fire originated by the defendant and the fire that came from the northwest, which was of unknown origin, upon the theory that as the fires united and entered the yard together, only half of the loss was attributable to the negligence of the defendant. As a matter of law the court held that as defendant's negligence in starting the Boom Hill fire contributed to produce the loss, it was responsible for the entire damage, measured by the reasonable value of the property destroyed, and legal interest thereon from the date of the fire. Thereupon judgment was ordered for the entire value of the property destroyed, less the insurance received, such value on the verdict, under the charge, being computed by the court at \$55,865.87, and the insurance \$1,750. Judgment was also ordered for the value of the two horses mentioned in the second cause of action as found by the jury, with interest from the time they were killed, and for the undisputed value of the horse and cow mentioned in the third and fourth causes of action, with interest from the time they were killed, amounting in all to the sum of \$59,584.86. Due exception was taken to the order. Judgment was entered in accordance with such order, from which this appeal was taken.

Messrs. Alfred H. Bright and Greene, Vroman, Fairchild, North, & Parker for appellant.

Messrs. Webster & Classon, for respondents:

An injury, caused by negligence, can only be recovered for when the facts are such that it can be inferred from them that the injury was the natural and probable consequence of the negligent act, and might or ought to have been foreseen under all the circumstances. This inference is for the jury or the court, according to the case made.* If the facts presented have so uncertain a tendency as to leave the mind in doubt as to what should be inferred in respect to these particulars, the court can make no deductions; they must be made by the jury; but when the facts, found or undisputed, are of such a nature that clear conclusions can be drawn from them, it is no objection to the verdict that the jurors themselves have not drawn such conclusions and stated them as facts, for they may and should, in such cases, be made by the court.

Maitland v. Gilbert Paper Co. (Wis.) 73 N. W. 1124; *Deisenrieter v. Kraus-Merkel Malt-ing Co.* (Wis.) 72 N. W. 875; *Atkinson v. Goodrich Tranap. Co.* 60 Wis. 141, 50 Am. Rep. 352; *Morrison v. Madison* (Wis.) 71 N. W. 882.

It was unnecessary for the plaintiffs to put in proof as to or ask the court to submit questions to the jurors to have them determine the likelihood of the wind to blow, change its course and velocity, and spread fire over such a surface.

Donovan v. Chicago & N. W. R. Co. 98 Wis. 378; *Marrin v. Chicago, M. & St. P. R. Co.* 79 Wis. 140, 11 L. R. A. 506.

Negligence of defendant in respect of its right of way at the point where its engine set the fire, being found, if it further appears by findings supported by sufficient evidence or by undisputed evidence, always equivalent to a special finding (*Murphy v. Weil*, 89 Wis. 150; *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.* 91 Wis. 447), (1) that the season was a dry one, (2) that the fire so set spread through the agency of the wind, a distance of 140 rods, in an unbroken course over the intervening ground—which presupposes the presence there of material to feed upon—to the barns and grain stacks of an adjoining owner,—such owner being guilty of no negligence,—all of the requirements of the doctrine of “proximate cause,” so far as facts are concerned, are satisfied; nothing remains but to make the proper inferences.

Kellogg v. Chicago & N. W. R. Co. 26 Wis. 228, 7 Am. Rep. 69; *Austin v. Chicago, M. & St. P. R. Co.* 93 Wis. 496; *Deisenrieter v. Kraus-Merkel Malting Co.* (Wis.) 72 N. W. 735.

It was for the court to infer that the injury done to the plaintiffs by defendant's negligence was the natural and probable consequence of such negligence, and might or ought to have been foreseen under the circumstances.

Austin v. Chicago, M. & St. P. R. Co. 93 Wis. 496; *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229, 9 L. R. A. 750; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 28 L. ed. 856; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 228, 7 Am. Rep. 69; *Spaulding v. Chicago & N. W. R. Co.* 30 Wis. 110, 11 Am. Rep. 550; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 259; *Eachert v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 172; *Gibbons v. Wisconsin Valley R. Co.* 68 Wis. 885; *Gram v. Northern P. R. Co.* 1 N. D. 252; *Grissell v. Housatonic R. Co.* 54 Conn. 447; *McClellan v. St. Paul, M. & M. R. Co.* 58 Minn. 104; *Chicago & E. R. Co. v. Luddington*, 10 Ind. App. 636.

Where a fire has been negligently set, the party responsible for it could not excuse himself for it by showing that at the time it was set it had the appearance of rain.

Needham v. King, 95 Mich. 808; *Union P. R. Co. v. McCullom*, 2 Kan. App. 819.

See, for a full review of the question and citation of authorities—

Chicago, R. I. & P. R. Co. v. McBride, 54 Kan. 172. See also *Chicago & E. R. Co. v. Luddington*, 10 Ind. App. 636; *Northern P. R. Co. v. Lewis*, 7 U. S. App. 254, 51 Fed. Rep. 658, 2 C. C. A. 446; *Chicago, St. L. & P. R. Co. v. Williams*, 131 Ind. 30; *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229, 9 L. R. A. 750; *Brummit v. Furness*, 1 Ind. App. 401; *Solisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354.

Having found an efficient producing cause for the destruction of the yard, set in motion

by the defendant and continued in unbroken progress until the injury was accomplished, it was enough to charge the defendant.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 489, 475, 24 L. ed. 256, 259; *Kalckhoff v. Zoehreaut*, 43 Wis. 374; *Hepler v. State*, 58 Wis. 46; *Murphy v. Martin*, 58 Wis. 276; *Stewart v. Ripon*, 38 Wis. 584; *Chicago & E. R. Co. v. Luddington*, 10 Ind. 636; *Chicago & E. R. Co. v. Bailey* (Ind. App.) 46 N. E. 688.

The verdict establishes that the northwest fire, and the fire due to defendant's negligence, joined, entered, and together destroyed the plaintiffs' yard and camps. Defendant's liability is the same as though the fire due to its negligence was the sole cause of the destruction of the property, whether the northwest fire was tortious or not, the reason of the rule that makes the tortfeasor, in such a case, liable, as though his wrongful act caused the entire damage being that the damages cannot be apportioned and the innocent loser shall not, because he cannot apportion them, be deprived of his remedy and the wrongdoer go free.

Slater v. Mersereau, 64 N. Y. 138; *Westfield Gas & Mill. Co. v. Abernathy*, 8 Ind. App. 78; *Boston & A. R. Co. v. Shanty*, 107 Mass. 568; *Churchill v. Holt*, 181 Mass. 67, 41 Am. Rep. 191; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727, 7 Allen, 26; *Matthevs v. Delaware, L. & W. R. Co.* 56 N. J. L. 34, 22 L. R. A. 261; *Ellis v. Howard*, 17 Vt. 380; *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185; *Valparaiso v. Moffitt*, 12 Ind. App. 250; *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 10 U. S. App. 209, 51 Fed. Rep. 649, 2 C. C. A. 487; *Phoenix Ins. Co. v. The Atlas*, 98 U. S. 802, 23 L. ed. 885; *Sturgis v. Boyer*, 24 How. 122, 16 L. ed. 594; *The Beaconsfield*, 158 U. S. 308, 39 L. ed. 993; *Folsom v. Apple River Log-Driving Co.* 41 Wis. 602; *State, Reynolds v. Babcock*, 42 Wis. 138; *Washington & G. R. Co. v. Hickey*, 166 U. S. 521, 41 L. ed. 1101; *Bishop, Non-Contr. Law*, §§ 39, 518; 16 Am. & Eng. Enc. Law. p. 440; *Chicago, R. I. & P. R. Co. v. Sutton*, 27 U. S. App. 810, 63 Fed. Rep. 894, 11 C. C. A. 251; *Sellick v. Lake Shore & M. S. R. Co.* 98 Mich. 375, 18 L. R. A. 154; *Dreher v. Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91, and cases cited; *Jones v. United States*, 43 Wis. 385; *Arimond v. Green Bay & M. Canal Co.* 35 Wis. 41.

No wrongdoer ought to be allowed to apportion his own wrong; and as a loss has actually happened while his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss. To entitle such a party to exemption, he must show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done.

Selleck v. Lake Shore & M. S. R. Co. 98 Mich. 375, 18 L. R. A. 154; *Cooley, Torts*, p. 76, and note to p. 78; *Davis v. Garrett*, 6 Bing. 716; *Baltimore & P. R. Co. v. Renney*, 42 Md. 117; *Beauchamp v. Suginaw Min. Co.* 50 Mich. 172.

The proposition that the plaintiffs, injured by the two concurring fires, cannot have a recovery against the tortious author of one of them, where he fails to show that the destruction of the property, by the independent cause

found by the jury, the northwest fire, was not, or where the defendant shows it was, inevitable, if the fire had never been started on the right of way at all,—is clearly unsound.

Boston & A. R. Co. v. Shanty, 107 Mass. 568; *Churchill v. Holt*, 181 Mass. 67, 41 Am. Rep. 191; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727, 7 Allen, 28; *Ellis v. Howard*, 17 Vt. 330; *Westfield Gas & Mill Co. v. Abernathy*, 8 Ind. App. 73; and *Slater v. Mersereau*, 64 N. Y. 138.

Defendant's contention is directly opposed by the doctrine that determines the liability of joint tortfeasors, acting independently.

McClellan v. St. Paul, M. & M. R. Co. 58 Minn. 104; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266; *Stetter v. Chicago & N. W. R. Co.* 46 Wis. 497, 49 Wis. 609; *Haley v. Jump River Lumber Co.* 81 Wis. 412; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352; *Folsom v. Apple River Log-Driving Co.* 41 Wis. 602, and *State, Reynolds v. Babcock*, 42 Wis. 138.

Neither the main track nor spur track ever having been fenced, the liability of defendant for killing the horses was absolute.

Sanborn & Berryman, Anno. Stat. § 1810; *Quackenbush v. Wisconsin & M. R. Co.* 62 Wis. 411, 71 Wis. 473; *St. Louis & S. F. R. Co. v. Matheus*, 165 U. S. 1, 41 L. ed. 611.

Marshall, J., delivered the opinion of the court:

The foregoing brief statement is believed to present clearly the only questions necessary to be considered in determining this appeal. Numerous questions were suggested and errors assigned and exhaustively and ably discussed in the numerous briefs of eminent counsel who represent the parties in this court, most of which questions and alleged errors, in what is deemed to be an orderly consideration of the cause, are not necessarily reached in arriving at a final conclusion as to the rights of the parties. That will appear from what follows, and is the reason why such questions have not been considered or decided. No further proceedings in this case will involve them, and they are not of such a character that a decision of them would be important to trial courts in the future. This is said as to the greater part of the field covered by the case and briefs of counsel, not by way of criticism, for it is reasonable and commendable that, at least where so large a sum of money as the judgment here calls for is involved, all questions deemed by counsel in any way liable to affect the final result in any view of the case be suggested to the court; yet, where no trial follows the result here, the questions necessary to a determination of the appeal are all that it is profitable to discuss, unless others are of special importance as future guides.

The controlling question on the record, as we view it, is, What was the proper judgment on the first cause of action according to the undisputed facts and the facts found by the jury? The respondents stand on the findings of the jury as verities, and must prevail, if at all, on the case as thus determined. On the various motions made by the parties the court was called upon, if the verdict stood the test of the

motion to set it aside as contrary to the evidence and for other reasons, to order judgment for appellant or respondents, according to the determination reached on the questions of law which it presented. Such questions were determined in respondents' favor. The principles they involved will clearly appear to be of far-reaching importance by a brief reference to the facts.

The jury found that the southwest fire, alleged to have been caused by defendant's negligence, and to have originated about one mile and a quarter southwest of the property destroyed, did not reach such property so as to affect it as an independent agency; that another fire came from the northwest, and so united with the other that the identity of both as independent agencies was lost before any fire reached such property; that when the northwest fire reached the line of the southwest fire, so there was in fact but one fire, it swept on into the yard, and set plaintiff's property on fire and destroyed it. While the jury found that both fires caused the burning, as they said that but one fire entered the yard and that swept into it from the northwest, the direction from which the independent fire of unknown origin came, it is hard to perceive how the fact can be that the southwest fire, as an efficient agent, ever reached the scene of the destruction. But, looking at the verdict in the most favorable view for the respondents, and giving it the most favorable construction it will reasonably bear, it is to the effect that the damage was done solely by one fire; that such fire was made up of two independent fires which united before the property was reached, one for which defendant was responsible, and the other having no known responsible origin, so that if the responsible agent had not existed at all, the loss would have been the same in all respects, as to time, manner, and extent. We are strongly persuaded from the evidence, that the finding of the jury that the southwest fire, as an efficient agent, reached the plaintiff's property, either by union with the northwest fire or otherwise, is contrary to undisputed facts and all reasonable probabilities; but that is one of the questions not necessary to decide, if, taking the verdict as it stands, defendant is not liable.

That we correctly construe the verdict of the jury cannot be reasonably questioned. The trial judge, in a very elaborate opinion, delivered in disposing of the motion for judgment, gave it the same construction. He said: "Each fire reached the yard only as part of one common fire, and either in the absence of the other would have reached and fired the yard the same as the joint fire did. In that sense both reached the yard at the same time, although they united some distance away from it. Under the law governing the case it is immaterial how far away they united." And again: "We reach the conclusion that neither was the proximate cause of the injury, because the event would have occurred without either cause,—the other cause existed,—each was concededly a cause sufficient to produce the injury. The injury was produced by the concurrent action of both, but neither was the proximate cause, because the other,

without it, would have produced the same result." The logic of the learned circuit judge, as to the proximate cause, would hardly bear the test of careful analysis. It may be to take his language literally would not convey the real meaning intended. Where two causes concur in producing a certain result, either of which would produce the same result regardless of the other, it is not an accurate statement of the situation to say that neither is the proximate cause of such result, using the term as we apprehend the learned judge did, as descriptive of the antecedent or producing cause and not in the strict legal sense of a cause referable to human agency on a line of responsible causation. In the mere physical sense of producing antecedent, it is more proper to say that, in the circumstances suggested, neither fire was the sole proximate cause of the loss.

From what has preceded it is apparent that the legal question presented to the trial court and decided in plaintiff's favor, in granting their motion for judgment and denying that of the defendant, is the following: Where two independent efficient causes unite and produce an injury to another, one of which is traceable to a responsible person whose negligence set it in motion, under such circumstances that he is chargeable with knowledge that it might cause an injury to another as a natural and probable result of his conduct, and the other cause is not traceable to any known responsible agent, each of which causes, however, without the concurrence of the other would produce the same injury, that is, so that the injury would happen at the same time and to the same extent regardless of the responsible agency, does a cause of action against such agency accrue to the injured person for his loss? It is believed that the solution of that question is governed by principles as old as the common law,—principles so long and firmly established, and universally recognized by all text-writers and courts, that were it not for the learned discussion of the subject by the trial court, leading up to the conclusion which eventuated in the judgment appealed from, and the later learned discussion by counsel in this court to support the conclusion thus reached, the decision here would be supported by a mere statement of the law without extended discussion or citation of authorities; but such circumstances seem to furnish excuse, at least, for a somewhat different course.

It seems to have been conceded on the trial below, at one stage of the proceedings, that unless the alleged negligent fire was the sole cause of the loss complained of, there could be no recovery therefor. Later, in the submission of the case to the jury, it appears to have been uncertain in the judicial mind, whether, if the defendant was liable at all, the liability extended to the entire loss, or only to a portion of it, on the theory that there might be an apportionment of the loss between the concurring causes. But it was finally determined that the person charged, known to have negligently originated one of the causes, was, as a matter of law, liable for the entire loss, though it would have happened just the same from the other efficient cause of unknown origin. To support that theory numerous cases are

cited to the effect that when two or more concurring causes produce a loss, each having a responsible source, there is a joint and several liability for the entire loss. That is a doctrine too familiar to require more than to be stated. When the facts are such as to invoke its application, it extends to where each of the concurring causes contributes to produce the result and is necessary to it, and where each is sufficient of itself to produce the result, and would, in the given case, have that effect regardless of the other, and whether the concurrence of the causes be intentional or accidental. In *Hayley v. Jump River Lumber Co.* 81 Wis. 412, a person, on one theory of the case, was injured by negligence of a coemployee in loading a car, concurring with negligence of the defendant in leaving an obstruction in dangerous proximity to its track. Under such circumstances the court said that each was liable for the injury. In the same line is *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352, where negligence of a mill owner in allowing shavings and sawdust to accumulate between his mill and a dock, concurred with negligence of the defendant in allowing sparks to be emitted from the smokestack of its boat, whereby a fire was set which spread to plaintiff's property and destroyed it. The court held the defendant liable, and Mr. Justice Taylor, who wrote the opinion, cited in support of it, among numerous authorities, the elementary rule laid down in Wharton on Negligence at § 144, in substance as follows: The fact that one responsible person contributes, either before the interposition of another or concurrently with such interposition, in producing the danger, is no defense as to either. If A negligently leaves certain articles in a particular place, and B negligently meddles with them, supposing B's negligence to be made out and he is a responsible party under the limitation expressed, he cannot set up A's prior negligence as a defense. Another example is *Johnson v. Northwestern Teleph. Exch. Co.* 48 Minn 433, where a weak telephone pole was negligently left in place by the company. For a limited time an adjoining lotowner allowed the company to reinforce the ability of the pole to stand by guying it to his building with a wire. After a reasonable time had elapsed in which to replace the defective pole with a suitable one, the property owner cut the guy wire and the result was that the pole fell and injured the plaintiff. On one theory of the case the property owner and the telephone company were both negligent and without the concurring negligence the injury would not have happened. Under these circumstances the court said that each was liable for the whole loss. On another branch of the rule mentioned, as an example of numerous authorities that might be cited, is *Gould v. Schermer*, 101 Iowa, 582, where, on one theory of the case, defendant's negligence concurred with some other cause, not attributable to any responsible human agency, to produce the injury, and the court said, in effect, that the defendant's wrong, concurring with the other cause, and both operating proximately at the same time in producing the injury, makes the wrongdoer liable therefor. That was on the

theory that the accident would not have occurred but for the negligent act. On another branch of the rule stated may be cited *Slater v. Mersereau*, 64 N. Y. 138, where there were two efficient proximate causes, each traceable to the negligence of a responsible party, either of which would have caused the entire injury regardless of the existence of the other, and the court, by Miller, J., said in substance: It is no defense for a person against whom negligence which causes damages is established, to prove that without fault on his part the same damage would have resulted from the negligent act of the other, but each is responsible for the entire damage. Further citation of authority along this line is deemed unnecessary. It will be easily observed that they refer, first, to cases where there was a concurrence of responsible human agencies, both of which were essential to the result; second, to cases where there was a concurrence of responsible human agencies, either of which would have effected the result regardless of the other; third, to cases where there was a concurrence of a responsible human agency and some other cause, and the former was an efficient and contributing cause and essential to the result. All the numerous cases cited by respondents' counsel, and those cited by the learned circuit judge, fall within one or the other of the situations mentioned, as, for example, *McClellan v. St. Paul, M. & M. R. Co.* 58 Minn. 104, much relied on to support the judgment, where the recovery was solely on the ground that, though there was proof of two fires, the finding of the jury was that the fire negligently originated by defendant was the one that reached the plaintiff's property and the sole cause of its destruction. In discussing an assignment of error on the charge given by the trial court, the judge who delivered the opinion said: "If two fires have been set, the origin of one or both of which can be traced to the negligence of a party or parties, either or both of these parties can be held responsible for resulting damages in case the fires mingle." That language was wholly unnecessary to a decision of the case, as no such situation was presented, and unless read in the light of well-understood legal principles and the circumstances which were evidently in the judicial mind, it would be very liable to mislead. In the view that the judge was speaking of the existence and concurrence of two fires, both attributable to the negligence of responsible agencies, so as to bring the case within the rule of joint wrongdoers, the language ceases to have any significance in support of the theory upon which this judgment was rendered and must stand, if at all. That the rule of joint tortfeasors was what the court referred to is plain from what was subsequently said by way of illustration, to the effect that, where the injury is the result of two concurrent causes, one party is not exempt from full liability although another is equally culpable. To say that the learned court intended to extend that rule to cases where the act of the wrongdoer concurs with some unknown cause not attributable to any responsible human agency, and causes damage, thereby rendering the legal consequences to the wrongdoer, the same as in the case of

joint wrongdoers, whether this act was essential to the result or not would be a conclusion not warranted by a careful reading of the whole opinion, and inconsistent with the settled rule of law on the subject, recognized by that court and all others, as we shall see later.

What has been said above applies to *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727, 7 Allen, 26; *Stetler v. Chicago & N. W. R. Co.* 46 Wis. 497, and the numerous other cases cited by respondents. All are cases of joint tortfeasors, or cases where the injury would not have happened but for the negligence complained of. They do not touch the real question we are called upon to decide. What is the situation of the wrongdoer where the injury would have taken place, necessarily, from another cause, at the same time and to the same extent, regardless of his conduct? That is the question presented. The discussion thus far has proceeded on a line merely to clearly bring out and recognize the well-known principles of law for which respondents contend and which ruled the trial court, and show their inapplicability to the facts found by the jury.

The law of negligence is laid on reasonable lines the same as any other branch of jurisprudence. The theory upon which compensation goes to an injured person from another whose negligence proximately caused the injury, is not that of punishment for the wrong, but that, in justice to such person, compensation is due for the damages caused to him by such negligence, so far as the same can be reasonably ascertained. Where the wrong of one person concurs with that of another under such circumstances that the injury would not result without the concurrence, it is reasonable to hold each liable for the entire loss, because the same would not have occurred if the negligence of either were absent. Notwithstanding the concurrence of the two causes, each, in a sense, under such circumstances, is the proximate cause of the loss, because there was responsible human causation back of it, without which the injury would not have happened. Again, where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, it is reasonable to say there is a joint and several liability, because, whether the concurrence be intentional, actual or constructive, each wrongdoer, in effect, adopts the conduct of the coactor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety. But where a cause set in motion by negligence, reaches to the result complained of in a line of responsible causation, and another cause, having no responsible origin, reaches it at the same time, so that what then takes place would happen as the effect of either cause, entirely regardless of the other, then the consequence cannot be said, with any degree of certainty, to relate to negligence as its antecedent; requisite intelligent causation necessary to legal liability is want-

ing, leaving no ground, in reason or in law, for it to rest upon. To further illustrate: If an injury accrues to a person from inability to control his team, where that is more than momentary, concurring with a defect in the highway, and the injury would not otherwise happen, the mere concurrence of negligence of the municipality responsible for the defect will not render the corporation liable, because the condition of the team is deemed to be the real producing cause. *Jackson v. Bellevue*, 80 Wis. 250; *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Schillinger v. Verona*, 88 Wis. 317; *Loberg v. Amherst*, 87 Wis. 634; *McFarlane v. Sullivan* (decided at this term, and not yet officially reported) (Wis.) 74 N. W. 559; *Scannal v. Cambridge*, 163 Mass. 91; *Babson v. Rockport*, 101 Mass. 98; *Palmer v. Andover*, 2 Cush. 600. Applying the same doctrine in *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, the court held that where several acts or conditions of things concur, one of them a wrongful act or omission of some person, under such circumstances that such person might reasonably have anticipated such an injury as the natural and probable result of his act or omission, he is liable, provided the injury would not have occurred without it. The general rule, so recognized and applied by that court, was stated by the judge who wrote the opinion, thus: In cases of tort, the rule as to the proximate cause is, that where several acts or conditions of things produce an injury, if one is the wrongful act or omission of the defendant and it would not have occurred without his act, and he might reasonably have anticipated the result as the natural consequence of such act, that is the proximate cause of the result. That is quite inconsistent with the construction of the opinion of the same court in *McClellan v. St. Paul, M. & M. R. Co.* 58 Minn. 104, confidently pressed upon our attention, but accords with the construction which we have given to it and which was clearly what the court intended, though, as before indicated, language was used that might lead to a different conclusion unless viewed in the light of settled legal principles. It may safely be said that the rule stated in *McClellan v. St. Paul, M. & M. R. Co.* applies in all cases where negligence of a party concurs with some other cause not traceable to a responsible source. 16 Am. & Eng. Enc. Law, p. 441, and notes; 2 Thomp. Neg. 1085; Shearm. & Redf. Neg. § 33; Whitaker's Smith, Neg. § 44; *Ring v. Cohoes*, 77 N. Y. 83, 38 Am. Rep. 574; *Ayres v. Hammondsport*, 130 N. Y. 665; *Ilfrey v. Sabine & E. T. R. Co.* 76 Tex. 63; *Union Street R. Co. v. Stone*, 54 Kan. 83; *Carterville v. Cook*, 129 Ill. 153, 4 L. R. A. 721.

The logical deduction from the foregoing is that where an injury accrues to a person; by the concurrence of two causes, one traceable to another person under such circumstances as to render him liable as a wrongdoer, and the other not traceable to any responsible origin, but is of such efficient or superior force that it would produce the injury regardless of the responsible cause, there is no legal liability. No damage in such circumstances can be traced, with reasonable certainty, to the wrongdoing as a producing cause. The one

traceable to the wrongdoer is superseded by the other cause or condition, which takes the place of it and becomes, in a physical sense, the proximate antecedent of what follows.

From the foregoing the conclusion is easily reached that the defendant in this case is not liable for the fire loss from the facts found by the jury. Its negligence, even if operating up to about the instant the fire entered the plaintiff's property, was there superseded by the independent northwest fire. Whether it can be said that after the two fires became one, the element attributable to the defendant continued, though its identity was lost in the combination and it was superseded by the fire that swept down upon the property from the northwest, it cannot be said that the result which followed would not have occurred but for such responsible element. On the contrary, it stands as a verity in the case that it would have occurred just the same, regardless of the negligent fire. It is proper to say that the learned counsel for the plaintiffs tried the case and asked its submission to the jury with a very clear conception of the legal principles governing it, in perfect accord with the conclusion which we have reached. They did not seek or expect to recover upon any other theory than that the destruction of plaintiffs' property was caused by the southwest fire, and that it would not otherwise have occurred at that time. One of the counsel said, in substance, during a colloquy between him and the court, when the questions for submission to the jury were being settled: We must stand or fall on the theory that the southwest fire spread to plaintiffs' property and destroyed it, and that no fire came from the northwest and reached the property; that if the whole loss can as well be attributed to the northwest fire as to the southwest fire, no assessment of damages can be made against the defendant. The whole difficulty arose when, after the verdict was rendered, the doctrine of the liability of joint wrongdoers, or of a wrongdoer when his act, concurring with some other cause or condition having no responsible origin, produces an injury which would not otherwise occur, was applied to the verdict unmindful, apparently, that such verdict did not present facts warranting such application, but on the contrary presented facts which brought the case within a different rule in the law of negligence.

There is left the claim for the two horses, killed on the day of the fire, by straying upon the right of way and being run down by one of defendant's engines. It is not claimed that there was any negligence of the employees in charge of the train that killed the horses. The right of recovery is based solely upon the fact that defendant failed to perform its duty in respect to fencing the right of way. The statute on the subject (Rev. Stat. § 1810) requires railroad corporations to fence their tracks, and provides that until such duty is performed, every such corporation, and every railroad corporation owning any such road, shall be liable for all damage done to cattle, horses, or other domestic animals, occasioned in any manner, in whole or in part, by the want of such fence. If the horses, therefore, entered upon the right of way because of the

failure of the defendant to comply with the statute, then the rule of absolute liability attached. *Quackenbush v. Wisconsin & M. R. Co.* 62 Wis. 411. There is no finding on the question of whether the entry of the horses on the right of way is attributable in whole or in part to the failure to fence it. It must be conceded that, had there been a fence, it would necessarily have been destroyed by the fire that occurred two or three hours before the horses were killed. The evidence all points that way. They were turned out of their stable and left to run at large to preserve them from the fire that destroyed substantially everything of a combustible character on both sides of the railway track in the vicinity of the place where they entered upon the right of way.

The statute is in derogation of the common law. It is a penal statute. The validity of it rests wholly upon the police powers of the government and it should be construed with reasonable strictness so as not to go beyond its plain letter and spirit. That is a general rule of construction applicable to all statutes of its class. *Stone v. Lannon*, 6 Wis. 497; *Coleman v. Hart*, 37 Wis. 180; *State v. Huck*, 29 Wis. 202; *Crumbly v. Bardon*, 70 Wis. 385. Looking at the language in the light of such rule, it must be held that the circumstances of the horses going upon the track must have some causal connection with the failure to fence, not the mere nonexistence of a fence at the time of the entry, or there is no liability because of the failure to fence. If the failure to fence did not reach to such entry because of the intervention of some other cause or condition, the statutory rule of absolute liability does not apply. That has been held in cases where horses were abandoned under such circumstances that it was certain they would go upon the right of way where they would be liable to be killed. *Corwin v. New York & E. R. Co.* 18 N. Y. 42; *Missouri P. R. Co. v. Roade*, 33 Kan. 640; *Welty v. Indianapolis & V. R. Co.* 105 Ind. 55. In such circumstances it was held that the owner of the horses consented to their destruction; that his conduct was not mere contributory negligence, which would not be a defense under the statute, but was the sole proximate cause. That the lawmakers intended that the failure to fence should be at least a contributing cause to the entry of domestic animals upon the railway right of way in order to make the rule of absolute liability applicable, is quite clear, not only from their language, but from its being followed by a provision to the effect that in case of a failure to maintain a fence after once constructed, the liability for the killing of domestic animals shall not extend to losses accruing in part from contributory negligence of the persons claiming compensation therefor, or losses accruing from defects in the fence existing without negligence on the part of the railway corporation. Here there was a superseding overpowering cause that intervened between the failure of duty to fence and the entry of the horses upon the right of way, which took the place of the defendant's negligence, so that it cannot reasonably be said that such negligence, either in whole or in part, produced the loss complained of. In following the chain of causation from

the death of the horses back, we find it tied at the antecedent end to the condition created by the fire. Over that we cannot pass to reach the neglect to fence, which, under the circumstances, became a remote cause. Our duty ends when we trace the chain back to what must stand as the real producing cause, *causa proxima, et non remota spectatur*. The rule clearly applies that if, between an injury and prior negligence, which might have produced it had the effect reached that far, there were a superseding cause, though not traceable to a responsible source, which, without the operation of the negligence contributing, produced the result complained of, the wrongdoer is not liable.

It follows necessarily from the preceding, that the trial court erred in holding that the defendant was liable for the loss of the two horses killed on the day of the fire. There was no contest as to the right to recover \$360.94 under the third and fourth causes of action. Judgment in plaintiff's favor should have been limited to that, and costs taxed according to law. The judgment should have been otherwise in favor of the defendant. There is a statement in the motion papers indicating that there was an offer of judgment in the case made September 21, 1894. We are unable to find anything in the record indicating the nature of that offer, so as to determine how it legally affects the question of costs in the lower court; therefore no directions in regard to it can be made. The question of costs will therefore be left for such court to determine when the case again reaches it.

A careful examination of the printed case and briefs satisfies us that a strict compliance with the rules calls for much less printing than they contain. The case consists of 547 pages, much of which could have been omitted entirely, and the balance have been much condensed. There are four briefs, including a reply, consisting in the aggregate of a little less than 200 pages. The rules require but one brief, and permit, in addition, a reply. Where there are several counsel on the same side and they deem the interests of their client to require a division of labor, and separate briefs to be filed, that is permissible; but the fact remains that only one brief on a side is called for by the rules, though disbursements for others, permitted in proper cases, may be allowed. The allowance ordinarily, as a matter of right, however, goes only for one brief on a side and the permitted reply, as it is only necessary printing that is taxable against the losing party. *Paine v. Trumbull*, 83 Wis. 164. It is considered that 300 pages would have covered all printing that was reasonably necessary on this appeal, on the part of the appellant; therefore disbursements in this court on that account must be limited to that amount of printing.

The judgment of the Circuit Court is reversed, and the cause remanded with directions to enter judgment in favor of the plaintiffs for \$360.94, and in favor of the defendant as to the first and second causes of action in the complaint, costs in the lower court to be taxed and allowed according to law; costs for printing on this appeal to be taxed as indicated in the opinion.

IOWA SUPREME COURT.

City of WAVERLY
v.
S. H. PAGE *et al.*, *Appts.*

(.....Iowa.....)

The owner of a city lot will not be permitted to fill up a natural depression which has carried off the surface water from a large section of the city, although it is not technically a watercourse, if the city has undertaken to keep the outlet open, and its obstruction would be followed by serious injury to the city and the people interested in the territory drained.

(April 9, 1898.)

A PPEAL by defendants from a decree of the District Court for Bremer County enjoining defendants from obstructing an alleged watercourse. *Affirmed.*

The facts are stated in the opinion.

NOTE.—*Injunctions by municipalities against nuisances in waters and watercourses.*

I. In general.

II. Pollution and other matters affecting health.

Upon the question of municipal control over nuisances affecting waters and watercourses as highways in general, see *note to Hagerstown v. Witmer* (Md.) 89 L. R. A. 649, 681.

As to the general power of municipalities over nuisances in waters and watercourses in matters of health, safety, and personal comfort, see *note to Harrington v. Providence* (R. I.) 38 L. R. A. 306, 324.

As to nuisances by the obstruction of navigation, and the jurisdiction of equity thereon, see *note to South Carolina S. B. Co. v. South Carolina R. Co.* (S. C.) 4 L. R. A. 209.

The main case, *WAVERLY v. PAGE*, was decided under § 726 of McClain's Code of Iowa, which gives the city council power over "all public highways, bridges, streets, alleys, public squares, and commons within the city," and to "cause the same to be kept open, and in repair, and free from nuisances." It was shown that the defendant's acts would dam up the water so as to cause an overflow of the city streets to the great injury of the numerous inhabitants. In this respect it would seem that the defendant's actions would constitute a nuisance restrainable in equity by injunction.

I. In general.

Without attempting to exhaust the authorities upon the question it may be stated that as a general rule obstructions to navigation are public nuisances, remedied at common law by indictment, or in equity by an information filed by the attorney general. *Allen v. Monmouth County Chosen Freeholders*, 13 N. J. Eq. 68, 73.

In a case where the commissioners at the instance of the attorney general sought to restrain the building of a dam across a river so as to obstruct the same, it was said that structures that interfere with the common right of navigation are a nuisance at common law, and the legislature has a right to make reasonable restraints for the protection of the public, and enforce them by reasonable penalties. *Att'y. Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 380.

So, in *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9 L. ed. 1012, wherein equitable relief by way of injunction at the instance of the city was denied upon the ground of want of authority in the town, it was held that the Potomac river was a

Mr. G. W. Ruddick, for appellants:

The power of the city to divert surface water from its usual course and take it through streets and alleys is much greater than in case of watercourses.

2 Dill. Mun. Corp. 4th ed. §§ 1088-1048.

The city by proper and reasonable grading of streets and alleys can generally with but moderate cost conduct surface water that comes into its limits to the natural outlet for it, so as to protect the public interest and private rights alike from injury. The case at bar is one especially strong, calling for the exercise of its powers as to surface water, by the city.

No legal right of any kind can be claimed *jure natura* in the flow of surface water; so that neither its retention, diversion, or repulsion is an actionable injury.

Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 475.

It would be highly unreasonable and mis-

navigable stream, or part of the *jus publicum*, and any obstruction to its navigation would, upon the most established principles, be a public nuisance.

If the rights of the plaintiff are doubtful, equity will not grant an injunction before the case is settled at law, although where the right is clear and the injury irreparable, it will grant the relief sought before the right is established at law. *Att'y. Gen. v. Hunter*, 16 N. C. (1 Dev. Eq.) 12. In this case injunction was sought by the attorney general upon the relation of the citizens of Raleigh to restrain the defendant from so using his mill dam as to be injurious to the health of the town, and the injunction was made perpetual, although the defendant was prosecuted for the same offense. The facts showed that there had been a mistrial, and the indictment was still pending.

So, the extension of a wharf so as to occupy 3 feet out of a breadth of about 60 feet of a river valuable for navigation purposes, and the throwing of tiles into the bed of the same, is an obstruction thereof, and a nuisance restrainable by the municipal authorities under the powers vested in them by statute. *Att'y. Gen. v. Terry*, L. R. 9 Ch. 423, 30 L. T. N. S. 215, 22 Week. Rep. 336.

In *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, 56 Am. Rep. 80, wherein it was sought to restrain a nuisance dangerous to habitation and the cultivation of land in cities, towns, and villages, and impairing navigation, it is stated that the remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is by injunction at the suit of the people by their attorney general, for the reason that the people of the state are interested in the question, and have the right to use all bays and navigable rivers within the state, and the attorney general may therefore maintain an action in the name of the people to prevent the obstruction of a public highway, which all the people have a right to travel, because all of them have an interest in such highway.

So, the fact that a power exists to compel the removal of an obstruction in a navigable stream after it has been created, does not prevent an application to the court to prohibit the erection of such obstruction before it is completed. *People v. Vanderbilt*, 38 Barb. 232, 236. In this case action was brought in the name of the people to restrain the defendant from erecting a pier in New York harbor, so as to obstruct or interfere with the use and enjoyment thereof for the purposes of commerce and navigation, thereby creating an encroachment and a nuisance, but it does not show

chievous to attach the legal qualities of watercourses to ravines and hollows thus serving as conduits for mere occasional accumulations of surface water; and especially would it be so within the limits of large towns, cities, and villages, where the population is dense and the quantity of land owned or occupied by each individual or family very small. In such cases the universal understanding and practice are that owners of lots may fill them up or change their natural surface to suit their own tastes or convenience, and so as to obstruct or repel the surface water coming from the lots of others, without liability for injury.

Bentz v. Armstrong, 8 Watts & S. 40. 42 Am. Dec. 265; *Livingston v. McDonald*, 21 Iowa, 171, 89 Am. Dec. 563; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241.

Suppose the plaintiff constructed ditches along the streets and alleys north of defendant's lots, so as to carry this surface water to

the river along those streets. Could the defendants enjoin such diversion of the water from their lots? That will hardly be claimed to be the law. If this is a watercourse, then defendants have property right in the flow of the water that cannot be taken away.

In the case at bar, nearly all of the indications of a watercourse are lacking.

Howard v. Ingersoll, 13 How. 427, 14 L. ed. 209; *Hinkle v. Avery*, 88 Iowa, 52; *Gibbs v. Williams*, 25 Kan. 314, 37 Am. Rep. 241. See *Bowlsby v. Speer*, 31 N. J. L. 351; *Barnes v. Sabron*, 10 Nev. 217; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Bates v. Smith*, 100 Mass. 181; *Borchsenius v. Chicago, St. P. M. & O. R. Co.* 96 Wis. 448.

Messrs. A. M. Potter and Gibson & Dawson, for appellee:

A well-defined and natural course, through which surface water flows, is a watercourse.

28 Am. & Eng. Enc. Law, p. 946, and note;

that it was at the instance of the city of New York, although the defendant sought to justify his acts under authority derived from the city authorities.

In case of a grant or license to erect a dam, pier, dock, or wharf, or other obstruction in a navigable stream, the erection cannot be held a nuisance, without proof of the fact that the public damage and injury resulting from the obstruction greatly exceed the public benefits of the erection, and perhaps not even upon proof of an entire destruction of the *jus publicum*; but any obstruction placed in a public highway without right, a navigable river standing upon the same footing, will be a nuisance, and the courts will not inquire whether the advantage arising from the act complained of will compensate for all the injury and inconvenience which the public will suffer from it. *People v. Vanderbilt*, 38 Barb. 268, 287.

In that case the court upheld the general rule that, among other remedies for nuisances in the obstruction of public navigation, courts of equity will grant an injunction to prevent a threatened or attempted obstruction.

Equity has jurisdiction to restrain any purpresture, or unauthorized appropriation of the public property to private uses, which may amount to a public nuisance, or may injuriously affect or endanger the public interests; and where public officers, intrusted with the protection of such public interests, acting under the sanction of their official oaths, believe the intended encroachment will prove injurious to the navigation of canals, private persons should not be permitted to interfere with the waters or embankments of the canals contrary to law, upon a mere opinion, although under the sanction of an oath, that the intended trespass upon the public rights would not be an injury to the public. *Atty. Gen. v. Cohoes Co.* 6 Paige, 133, 135, 29 Am. Dec. 755. In this case the suit was brought upon information sworn to by the canal superintendent in the town or city intrusted with the protection of the public interest therein.

As showing the extent of the jurisdiction of the court in this kind of nuisance, it was said in *People v. St. Louis*, 10 Ill. 351, 374, 375, 48 Am. Dec. 339, wherein the people sought to restrain the obstruction of the Mississippi river as a public nuisance, that the chancellor has no discretion to refuse the injunction, but was bound to grant it, as a nuisance could never be abated, and the public rights to that channel could never afterwards be enjoyed, as the nuisance there threatened was of a permanent character, and the court acting upon the principle that any act of the character indicated in that action, by which the public might be put to great expense and exposed to much injury, was re-

strainable by injunction. While the above case does not expressly decide the question of municipal power in such cases, yet it cites and relies upon cases wherein the courts have upheld the power of a municipality to abate nuisances.

Yet a wharf is not of itself necessarily such a nuisance that equity will enjoin its erection, and it does not import, *per se*, irreparable mischief. *Laughlin v. Lamasco City*, 6 Ind. 223, 227, wherein the court refused the city relief as the wharf was not a nuisance *per se*, and damages would afford just compensation.

So, the injury to flow from a wharf does not readily appear, at least it is not of that permanent injurious character contemplated by the authorities, and may, in many cases, be compensated by damages which will check its continuance in an injurious form. *Laughlin v. Lamasco City*, 6 Ind. 223, 227.

In *Fresno v. Fresno Canal Irrig. Co.* 98 Cal. 173, 184, the city brought action to obtain a decree abating as a nuisance the defendant's ditch or canal which ran through certain parts of the city. The court held that, if the nuisance consisted merely in the manner and form in which the canal was conducted and managed, it was a nuisance which could be remedied without a total destruction of the property, and that therefore the company should be enjoined from conducting the canal in such a manner as to make it a nuisance, but that a total destruction of the property could not be decreed.

In *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361, 363, the defendant had sunk wells for the purpose of obtaining a supply of water, and its acts in so doing were *ultra vires* and illegal, and not only impaired the rights of the public in the use of one of the great ponds of the commonwealth, which belonged to the public for the purpose of fishing and boating, but also created a nuisance by lowering the pond and exposing upon its shores slime, mud, and offensive vegetation, very detrimental to the public health, and the court restrained such action. In this case the court looked upon the information filed by the attorney general as the appropriate remedy, although it does not appear that the same was taken on behalf of the city, yet the public health of the same was affected by the nuisance.

Mass. Stat. 1866, chap. 149, creates a board of harbor commissioners, and confers upon them the general care and supervision of the harbors and tide waters, and the flats and lands flowed by such waters. By § 5 all erections and works made without authority from the legislature, or in any manner not sanctioned by the commissioners, when

Washb. Easem. p. 309; Angell, Watercourses, § 4; *Wharton v. Stevens*, 84 Iowa, 107, 15 L. R. A. 630.

Where surface water habitually flows off over a fixed and determinate course having reasonable limits as to width so as to be uniformly discharged at a definite point, though without having worn out a channel having definite and well-marked banks, the line of flow is a watercourse.

Lambert v. Alcorn, 144 Ill. 313, 21 L. R. A. 611.

Where surface water has a fixed and certain course as a swale, though it may be narrow or broad, its flow cannot be interrupted to the injury of an adjoining proprietor.

Wharton v. Stevens, 84 Iowa, 107, 15 L. R. A. 630.

Where a stream flowing between well-defined banks reaches level ground and spreads itself out over a wide space without cutting

their direction is required, within tide waters flowing into or through any harbor, are considered public nuisances, and liable to indictment as such. Power is also given to the commissioners to order suits on behalf of the commonwealth to prevent, or stop, by injunction or otherwise, any such erection or other nuisance in such waters, and the attorney general and district attorney are directed to commence such suits.

In *Atty. Gen. v. Woods*, 108 Mass. 436, information was filed at the instance of the harbor commissioners to restrain the building of a dam across a river, and it was contended by the defendant that no remedy in equity existed, as there was a full, adequate, and complete remedy at law, and that the injunction should not therefore issue unless it appeared that irreparable injury was to be prevented. The court held that the statute gave special remedies, and designated the cases to which they should be applied, and that the remedy by injunction was cumulative, and the purpose of the statute was not only to punish all encroachments upon that portion of the public domain, but also to furnish means for their prevention and removal, and therefore the obstruction in the navigation of the river by means of the dam, being such as to create a nuisance of a serious character within the tidal waters, the court directed the injunction.

So, relief was granted in *Thompson v. Paterson & H. R. Co.* 9 N. J. Eq. 526, on behalf of certain named parties and other inhabitants of a township, and it was contended that the position in which the defendants intended to erect the piers and draw of a proposed permanent railroad bridge on a line of increasing travel was not one which would do the least possible injury to navigation. The evidence showed that the defendant's draws were to be placed in an unusual and unnatural position, and that witnesses, who were best able to form an opinion, had testified as to the effect of such proposed erection. The court granted a temporary injunction restraining the defendants from erecting such piers and draws in the proposed position, until such time as the proper position for their erection could be determined.

Where the affidavit showed that the deposits of mash impeded the free use of the river for purposes of navigation by diminishing the depth of the water so that vessels of a size that were accustomed to navigate that portion of the river could no longer do so, and a continuance of such deposit diminished the depth of the water and also the size of the vessels capable of navigating, so much so that in time not even a row boat could navigate it,—it was held that such a deposit made without authority was a public nuisance restrainable by—
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for itself a channel, and then narrows and flows again in a defined channel which conveys the water into a river, it does not cease at any point of its course to be a watercourse.

24 Am. & Eng. Enc. Law, p. 899; Washb. Easem. p. 308.

The rule of either the common law or the civil law does not control in this state as to surface water.

Willitts v. Chicago, B. & K. C. R. Co. 88 Iowa, 284, 21 L. R. A. 608; *Earl v. De Hart*, 12 N. J. Eq. 283, 72 Am. Dec. 895; *Lambert v. Alcorn*, 144 Ill. 313, 21 L. R. A. 611.

Robinson, J., delivered the opinion of the court:

The plaintiff is a city of the second class, organized and existing under the laws of this state. It includes territory on both sides of the Cedar river, and is intersected from east to west by an important street, known as "Bre-

junction at the instance of the municipal authorities. *New York v. Baumberger*, 7 Robt. 219, 220.

And where a pier in course of erection extended far outside of the bulk-head line as established, and at its southeasterly corner and on a line with the end of the pier an arm was constructed and extended some distance for greater convenience in securing boats running to and from the landing, and this pier subsequently became the property of a railroad company, and later the defendant company acquired a title to more land covered by the original grant and commenced the erection of a pier immediately adjoining the pier of the railroad company without leaving any intervening water space, and extended the same far beyond into the waters of the bay and outside of the bulk-head line established by N. Y. act 1857, and at the end of such structure, and outside of the bulk-head line and the line of the original grant, they erected a club house which was connected with the pier proper by a trestle bridge, which structure was nearly completed,—it was held that an action was properly brought to enjoin the completion of the structure, and compel its removal, as such erection was a clear violation of the act of 1857, which prohibited the erection of piers without leaving an intervening space of 100 feet. *People v. New York & S. I. Ferry Co.* 68 N. Y. 71, 80, Affirming, 7 Hun, 106. In this case, as in *People v. Vanderbilt*, 38 Barb. 236, 237, the attorney general sued in the name of the people.

In *New York v. Cunard S. S. Co.* 61 Hun, 346, action was brought by the city to secure the removal of a shed erected upon piles and used as a warehouse for goods shipped upon steamers upon the side of a new pier extending some distance from a certain street into the Hudson river, with one end upon a new bulk-head line forming a westerly line of the street, 250 feet west of the easterly line of the street, the shed extending 50 feet westerly from the bulk-head along the pier, and in a northerly direction about 90 feet, occupying one half of a certain space between certain piers. The right to maintain the shed was derived under the resolution of the dock department of the city of New York. The court upheld the action of the municipal authorities, restrained the maintenance of such shed, and ordered it to be removed, the resolution of the dock commissioners giving no power to erect the shed, which was unauthorized and contrary to the New York Laws of 1871, chap. 574, § 6.

So, in *Dayton v. Roberts*, 1 Ohio Dec. 386, the court granted an injunction at the instance of the corporate authorities to prevent the making of a fill in a certain river, thereby injuring levees owned

mer Avenue." Through the central portion of that part of the territory west of the river extends a watercourse known as "Dry Run." It crosses Bremer avenue near, and east of, Aspen street, which extends from north to south, intersecting the avenue. The run has two branches, which drain about 1,500 acres of land, and unite within the city limits at a considerable distance northwest of the crossing at the avenue. Penn street is parallel to, and about 140 rods north of, it; and between the two, extending from east to west, are five other streets. The run crosses Penn street, and the distance from that crossing along the run to the river into which it empties is 366 rods, and the fall is about 24 feet. The general course of the run from Penn street to the river, although irregular, is southward near Aspen street to the avenue; thence in a southeasterly direction to the river. From Penn street southward for a distance of 43 rods the watercourse is discernible, but does not have well-defined banks. The banks are more prominent further south, and from a point 42

rods north of the avenue to the avenue are reasonably well defined, although not sufficiently abrupt to prevent the cultivation of the ground by ordinary methods, and the running of a mowing machine over it. One half of the bed of the run from the avenue to Penn street has been cultivated, and the larger part of that which has not been cultivated is covered with sod. The banks south of the avenue are well defined, and gradually increase in height towards the river. The watercourse for a distance of 50 rods from the river is from 8 to 10 rods wide, and its banks are from 10 to 15 feet in height. The defendants own several lots at the intersection of the avenue and Aspen street, which are bounded on the south by the avenue, and on the west by Aspen street, and over which the watercourse extends. The lots are 110 feet wide from the east to west, and 132 feet long; and the defendants have commenced to raise their surface about 2½ feet, in order to erect thereon a dwelling house, and, if permitted to do so, will fill the watercourse. The effect of that would be to dam

by such corporation, and interfering with the natural flow of water in the stream.

Again, in *Frankford v. Lennig*, 2 Phila. 408, 408, 409, an injunction was granted, at the instance of the borough authorities, to enjoin the defendants from erecting a wharf encroaching upon the channel of a certain creek as a nuisance, although the defendants had a license from the port wardens, as the wharf in question extended into the bed of the river below low-water mark, and was clearly a purpresture, an encroachment, and intrusion on the soil belonging to the state; or an effort to appropriate to defendant's individual advantage a benefit common to the entire community, which, as a nuisance, the wardens had no power to license.

And in *Havenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485, an injunction was granted, at the instance of the city authorities, enjoining the defendant from erecting a wharf opposite to his lot without the consent of the corporate authorities, as the only remedy which would give full and adequate relief in such case.

Where the bill seeking to restrain the construction of a runway as a public nuisance shows a prima facie case, not only of the right of the city to bring the suit, but also for granting the relief sought, a demurrer to such bill should be overruled, and the defendant should answer the bill distinctly averring what he proposes to do, especially when the averment is accompanied by a general charge or statement that the driving of the piles in the bed of the river, and the construction of the runway, will not only cause a diversion of the river from its natural course, but will throw it off its natural location from along the river bank to the proposed runway, and create in front of the city's wharf a deposit of mud and sediment sufficient to render it impossible for boats and vessels engaged in navigation to approach or land at such wharf, as such allegation is sufficiently certain, though a general statement of the essential ultimate facts upon which the complainant city rests its right; and in such a case it is not necessary to aver all the minute circumstances which may be proved in support of such general statement. *St. Louis v. Knapp Co.* 104 U. S. 658, 660, 28 L. ed. 888.

In the following cases, however, the court refused the relief sought:

Where the city authorities sought to restrain the use of property for any other purpose than a wharf, by the erection of buildings extending into

a navigable stream, upon the ground that the space so covered might be needed in the construction, operation, and maintenance of a bridge, that without such space it would become necessary, in order to afford proper means of communication, to impede and interfere with the navigation of the river, it was held that, as there was no specific prayer that the encroachment upon the street might be abated as a nuisance, or any argument showing that, under the general prayer, such abatement might be decreed, the court dismissed the bill and refused to consider that question. *Chicago v. Reed*, 27 Ill. App. 482, 485, 486.

So, where a wharf encroached in some measure upon the public thoroughfare and river, although it was not very probable that it would interfere with or incommode the public, but such wharf was not a nuisance in itself, or likely to become so, and the injuries feared as impending were according to the affidavits in support more fanciful than real, it was held to be a case in which equity would refuse to act without an adjudication at law. *Laughlin v. Lamasco City*, 6 Ind. 228, 227.

In *Atty. Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136, information was filed by the attorney general, at the relation of certain named parties, for and on behalf of themselves and the rest of the property owners in the town, to compel the abatement of the erection of a railroad bridge across a river as a public nuisance. The court denied the injunction, upon the ground that the relator's proper course was to proceed by indictment at common law, as the fact whether it was a nuisance or not was proper to be tried by a jury whether the proceedings were in that court or elsewhere, the court of law being a more appropriate tribunal for all matters of that character.

So, the court refused an injunction in *State, Board of Health, v. Bergen County Chosen Freeholders*, 46 N. J. Eq. 173, upon the ground that the nuisance was not sufficiently shown to be a public, as distinguished from a private, one, the mere fact that such nuisance had a tendency in that direction not being sufficient to justify the court in granting such relief. In this case the nuisance complained of was the use of the river as a sewer, thereby rendering its water foul, noxious, and hazardous to public health.

Again, relief was refused in *People v. Horton*, 64 N. Y. 610, affirming 5 Hun, 518, where the injunction was sought at the instance of the state to restrain the defendants floating an elevator upon the ship canal for the purpose of transferring grain from

water which, if unobstructed, would flow over the bed of the run, and turn it onto lots and streets in the vicinity; and, if the street and other lots were so graded as to prevent that effect, a dam would be formed, which in times of high water would cause the overflow of a large portion of the city north of the avenue, to the great injury of the numerous inhabitants of that territory.

The plaintiff contends that Dry run is a watercourse, of which it has control, and which it has controlled for many years; that the watercourse should have been kept open, for the purpose of draining the territory through which it extends; and that, should it be obstructed permanently, great and irreparable injury would result to the city, as well as to its inhabitants. The defendants admit that there is a slight depression in that part of the city designated as "Dry Run," but deny that it ever had any defined channel or banks as a watercourse, or that any water ever flows through it, excepting the surface water from unusual rainfalls, or other extraordinary causes,

and that in such cases the flow is for but a few hours at a time; and they insist that they have a right to fill the depression in their lots in the manner described. They contend that the water which would flow north of the avenue could readily be turned along the streets and alleys eastward into the river, and that it is the right and the duty of the plaintiff to make provision for disposing of water from the territory specified in that manner. There is not a constant flow of water through the watercourse in question. On the contrary, it is dry, except in case of melting snow or of unusually heavy rainfall; and on such occasions water flows into it but a few days at a time. It sometimes happens that when an exceptionally large quantity of water has fallen the watercourse is not sufficiently large to carry off to the river the water as fast as it accumulates, and that lots and streets in its vicinity are overflowed. The plaintiff has for many years assumed control of the run. It has provided artificial channels at some places and has erected numerous bridges over it, at

vessels upon the lakes to the canal boats. In this case, however, it does not appear that the municipalities in any way participated in the proceedings.

Again, a mill dam, which, if a nuisance at all, has become so by the gradual growth of a city around it, will not be abated in equity at the instance of the public authorities as a nuisance, where the fact that it is a nuisance has not been established at law. *New Castle v. Raney*, 180 Pa. 546, 561, 6 L. R. A. 737.

In that case the city sought by bill to enjoin and restrain and abate as a nuisance the defendant's dam across a certain creek within the limits of the city which had been in existence for over fifty years, and had been used for milling and manufacturing purposes, but the dam in question was not proved to be a nuisance *per se*. The court refused the relief as, if it was a nuisance at all, it had become so only by the gradual growth of the city around it, and by the emptying of the cesspools into it.

In *Scranton City v. Scranton Steel Co.* 154 Pa. 171, the city filed a bill in equity to restrain encroachments on, and to remove material deposited in, the channel of the river, thereby partially filling up the channel, greatly narrowing it, causing the water, even in the case of an ordinary rise of the river, to back up and overflow its banks and flood the streets of the city, thereby greatly damaging and injuring public and private property, and endangering the safety of the people residing near the river for a considerable distance above the works. It was alleged that if such encroachments were allowed, the channel would not be sufficient to carry off the water naturally flowing therein, and great and irreparable injury would be done to public and private property. The court refused the injunction as the evidence that the filling in done by the defendant caused injury to the streets was very slight and unsatisfactory, the preponderance of testimony showing that, instead of tending to throw the water upon the streets, it tended to keep it off, and that the real damage was caused, with a reasonable degree of certainty, by the erection of piers by a railroad company.

In *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 99, 9 L. ed. 1012, 1015, a bill was filed on behalf of the city and the citizens at large, to restrain the defendants from constructing an aqueduct over the Potomac river within the corporate limits immediately above and west of the principal public and private wharves of the town. It was alleged 40 L. R. A.

that the river was a public navigable highway, the free use of which was secured to the people residing on its borders, or interested in its navigation; that the town derived its chief support and prosperity from the trade of the river, and that large sums of money had been expended at the wharf of the town, deepening the water, etc.; that the defendants had constructed a massive stone pier, and were about to construct others; that by the use of clay and earth thrown in to close up certain dams, used by the defendant in the construction of the piers, the harbor was injured and the depth of the water diminished, and serious future injury was apprehended from the causes. The court denied the relief upon the ground that it was not shown that the city had any power or authority given to them by their charter to take care of, protect, and vindicate the rights of the citizens of the town in the enjoyment of their property, or in removing or preventing any annoyance to it, and that such power did not attach to them in their corporate character, upon any principle of the law in relation to corporations, and that the complainants must show that they were the owners of property liable to be affected by the nuisance, and so affected as to suffer special damage, that the right to proceed in equity as a corporate authority, vested in them by reason of their duty to take care and protect the interests of the citizens, was not of itself sufficient, and the difficulty was not overcome by associating with them the citizens as persons on whose behalf they sued, and, that the nuisance being of a public character, the ordinary and regular proceeding was by way of indictment or information at law or by proceedings in equity by an information filed in the name of the attorney general.

By the English public health act, passed in the reign of Henry VIII., the corporation of the city of Exeter were empowered to remove obstructions to the navigation of the river, paying compensation to the owners of the soil where the obstructions were situated. It was held that such act did not confer the conservancy of the river on the corporation, neither did it entitle the corporation to file a bill in equity to restrain the erection of a pier in a river, nor did it confer any right or privilege on the corporation within the meaning of § 41 of the general pier and harbor act of 1861, so as to prevent the erection of a pier in the river without their consent being obtained. *Exeter v. Earl Devon*, L. R. 10 Eq. 232, 18 Week. Rep. 879.

a great expense. In the avenue south of the lots of the defendant are two foot bridges and one wagon bridge. A walled channel has been made, which commences at the avenue, and extends southward. It is 16 feet wide, and 4 feet deep, and is of about sufficient capacity to carry off the water which flows from north of the avenue in times of ordinary high water.

There are authorities which hold that depressions in the surface of the earth, through which water flows only in times of high water, are not watercourses, within the meaning of the law which forbids the obstruction of watercourses, and within the rule of such authorities, Dry run, north of Bremer avenue, is not a watercourse, and any proprietor might lawfully obstruct the flow of water therein over his premises. See *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241.

As to nuisances injurious to health arising from waters and watercourses, see *note to Harrington v. Providence* (R. I.) 38 L. R. A. 305, 324.

Upon the question of nuisances affecting waters and watercourses as highways, see *note to Hagerstown v. Witmer* (Md.) 39 L. R. A. 649, 681.

II. Pollution and other matters affecting health.

In *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* (Utah) 52 Pac. 188, an injunction was granted to restrain defendants from discharging befouled water into a certain canal. The Compiled Laws of the territory, § 4566, Laws of 1888, made the fouling of the waters of a canal, from which a number of persons, more than three, obtained water for irrigation, culinary, and other domestic purposes, a public nuisance, as the fouling of such water made it unfit for use.

In *Brookline v. Mackintosh*, 133 Mass. 215, the city sought an injunction to restrain defendant from corrupting and polluting the waters of a river from which plaintiff took water for the domestic purposes of its inhabitants, but the court refused to enjoin the defendant's business, as it was not shown that the alleged pollution made any perceptible difference in the water, and no trace of poison was found in it.

Where a pond, and the waters of a stream running into it, were taken by the city for purposes of supplying its inhabitants with pure water, and the city sought by petition to restrain the pollution of such stream under the Massachusetts Statutes of 1884, chap. 154, it was held that the fact that the city had, by means of a dike, prevented the waters of the stream from running into and polluting the waters of the pond, was no defense. The court therefore granted the injunction as the city had the right to be protected against the necessity of maintaining works for the preservation of the purity of the water from such a cause, the fact that the city had been bound to resort to, and was able by means of, special works to prevent the natural result of the defendant's act being no justification for the continuance of such illegal fouling. *Martin v. Gleason*, 139 Mass. 183, 190.

In *Atty. Gen. v. Hunter*, 16 N. C. (1 Dev. Eq.) 12, the excavations from the defendant's pond and mill dam had rendered the inhabitants unhealthy, and the bill filed at the instance of the citizens prayed a perpetual injunction. The court granted the relief sought as the rights infringed were of a character not in the least doubtful, the health and comfort of the relations themselves and others for whom they acted being injured by the nuisance.

So, in *Atty. Gen. v. Steward*, 20 N. J. Eq. 415, 417, 40 L. R. A.

The appellant also cites the cases of *Cedar Falls v. Hansen* (Iowa) 73 N. W. 585, and *Knostman & P. Furniture Co. v. Davenport* 99 Iowa, 589, in support of the same doctrine. In the former of these two cases it appeared that the defendant owned three lots, in which there was a depression which furnished an outlet for surface water from a pond. The pond was filled, but surface water at times flowed from the same territory through the depression. The city improved the street near the lots, and in so doing made a ditch along one side of two of the lots, and turned it onto the third lot, so that water from the ditch passed into the depression on that lot. The defendant had placed a house over the depression, and was about to fill the lot to the level of the street, and thus make a permanent obstacle to the flow of water in the depression; and we held that he had the right to do so. That conclusion was based upon the rule that a city

wherein the attorney general joined with the inhabitants in restraining a trade or business as a public nuisance, the court enjoined the defendants from permitting the blood of the boys slaughtered upon the premises to flow into, and pollute the waters of, a creek as a nuisance detrimental to health.

The injunction granted in the above case was made perpetual as the defendants avowed their intention to permit the blood to be discharged into a stream, thereby necessarily polluting the waters thereof, and rendering them unfit for use. *Atty. Gen. v. Steward*, 21 N. J. Eq. 340.

In *Atty. Gen. v. Blount*, 10 N. C. (4 Hawks) 364, 15 Am. Dec. 526, an injunction was sought to restrain defendant from erecting a mill and dam on a stream in the vicinity of the town, upon the ground that, if such act were permitted, great and irreparable mischief would ensue, as the noxious vapors arising from the pond would materially affect the salubrity of the town. The court held that as it was shown that, not merely interference with the inhabitants to a moral certainty existed, but that if the work was suffered to proceed the health of the community would be put in jeopardy, the relief would be granted, as in such a case it was bound in duty to interpose, the climate being such that a collection of stagnant water would render the inhabitants unhealthy. The injunction was therefore made perpetual.

But in *Baltimore v. Warren Mfg. Co.* 59 Md. 96, 108, the court refused an injunction, at the instance of the public authorities, to restrain the defendants from polluting a certain river, which was the source of supply for water to the city for drinking and other purposes, where the allegations were not sufficiently definite without evidence in support, the facts not showing how such water became impregnated, and to what extent.

In the above case it is stated that, if the defendants, being upper riparian proprietors, and as such entitled to the ordinary use of the water including the right to apply it in a reasonable way to the purposes of trade and manufacture, by using the water of the stream in an unreasonable manner, had defiled the same in such manner and to such an extent as to operate as an actual invasion of the rights of the complainants, the latter were clearly entitled to redress by action at law, and, in case the nuisance was continued, to summary relief by injunction.

As to the municipal control over nuisances relating to health caused by the fouling and pollution of waters and watercourses, see *note to Harrington v. Providence* (R. I.) 38 L. R. A. 305. E. W.

may bring its streets to grade; that by doing so, it may turn surface water from its natural course, and owners of lots below grade cannot complain, because of their right to protect themselves by bringing their lots to grade. The fact was also mentioned that the city had changed the course through which water naturally flowed over two of the lots of the defendant. It was said, in effect, that, in view of the power of the city to make the changes it did without liability, the defendant should be permitted to bring his lot to grade, even though by so doing he obstructed the natural waterway. In the *Davenport Case* the plaintiff sought to hold the city liable for alleged negligence in failing to provide adequate means for carrying off surface water. What was said in the two cases respecting the right of a lotowner to bring his lot to grade must be considered with the facts to which the statements made were applied. The characteristics of the depression considered in the *Cedar Falls Case* were somewhat like those of that part of Dry run north of Bremer avenue; but, so far as we are advised, the course which the city had pursued towards it, and the effect of obstructing it, were wholly unlike the course pursued by the city, and the effect to be apprehended from the proposed obstruction, in this case. The plaintiff had for many years followed the plan of keeping Dry run open for the discharge of surface water which should be gathered from the territory it drained north of Bremer avenue. An outlet for that water was a great and pressing necessity, and to maintain such an outlet the plaintiff made substantial and expensive improvements, of a permanent character, to keep open the natural outlet. What it did in that respect was authorized in § 3 of chapter 89 of the Acts of the 19th General Assembly,

which gave to cities the power "to deepen, widen, cover, wall, alter, or change the channel of watercourses within their corporate limits," and by § 527 of the Code of 1873, which provided that "the city council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair. . . ." In the case of *Wharton v. Stevens*, 84 Iowa, 107, 15 L. R. A. 680, the proprietor of a farm claimed the right to obstruct the flow of surface water from an adjoining farm through a natural depression in the surface of the land; but we held that the right did not exist, and, in speaking of surface water, said, "When such water flows, by a well-defined and natural course, upon lower lands, that flow cannot be interfered with by either the upper or lower proprietor. But when such water has no defined course, but spreads out over the land without a well defined course, it may be turned by the landowner in any direction. But where surface water has a fixed and certain course, as a swale, though it may be narrow or broad, its flow cannot be interrupted, to the injury of an adjoining proprietor." See also *Willits v. Chicago, B. & N. W. Ry. Co.* 88 Iowa, 281, 21 L. R. A. 608; *Earl v. De Hart*, 12 N. J. Eq. 283, 72 Am. Dec. 395; *Lambert v. Alcorn*, 144 Ill. 313, 21 L. R. A. 611.

The rule announced in the case of *Wharton v. Stevens* is applicable in this case. The obstruction of Dry run in the manner proposed by the defendants is unauthorized, and would be followed by consequences too serious to the plaintiff and the people interested in the territory drained by the run to be permitted.

The decree of the District Court appears to be right, and it is affirmed.

ARIZONA SUPREME COURT.

A. BARRY, *Appt.*,

v.

R. F. KIRKLAND *et al.*

(.....Ariz.....)

1. **Promises do not lay a foundation for an estoppel**, if the promisee is not in any way prejudiced by them, or induced thereby to do, or omit to do, anything to his disadvantage, or in any way to change his status.
2. **Mere promises to pay a forged note** do not lay a foundation for liability, in the absence of circumstances to create an estoppel, and when the promises were made after maturity, without consideration, and without full knowledge of the material facts in relation to the note.

(April 16, 1898).

APPEAL by plaintiff from a judgment of the District Court for Maricopa County in favor of defendants in an action brought to

NOTE.—As to the liability of a person whose signature is forged on commercial paper, see note to *Trader's Nat. Bank v. Rogers* (Mass.) 38 L. R. A. 539.

40 L. R. A.

enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. L. H. Chalmers for appellant.

Mr. Joseph Campbell, for appellees:

When the term "ratify" is used in connection with a contract, it is only applicable to a contract made by a party acting, or assuming to act, for another. There must be some relation, actual or assumed, of principal and agent.

Ellison v. Jackson Water Co. 12 Cal. 542; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237; *Mitchell v. Minnesota Fire Assn.* 48 Minn. 278.

Before it can be contended that a principal has ratified the unauthorized act of his agent, it must be shown that he was made acquainted with all the material facts.

Puget Sound Lumber Co. v. Krug, 89 Cal. 237; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470.

The principal is under no obligation to accept the assumed agent's act. The law imposes on him no duties to make inquiries about it.

Smyth v. Lynch, 7 Colo. App. 383.

Appellees' names were forged to the note. Even if they did promise to pay the note they are not bound, and appellant cannot recover.

2 Dan. Neg. Inst. p. 364; *Owsley v. Philips*, 78 Ky. 517, 39 Am. Rep. 258; *Shisler v. Vandike*, 92 Pa. 447, 37 Am. Rep. 702; *McHugh v. Schuykill County*, 67 Pa. 891, 5 Am. Rep. 445; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Garrott v. Ratliff*, 83 Ky. 384; *Smith v. Tramel*, 68 Iowa, 488; *Ferry v. Taylor*, 33 Mo. 828; *Henry v. Heeb*, 114 Ind. 275; *First Nat. Bank v. Holan*, 63 Minn. 525; *Wilson v. Hayes*, 40 Minn. 581, 4 L. R. A. 196.

A contract which assumes the civil responsibility for an act done by another in such a manner that it amounted to a crime against the state is void.

Greenhood, Pub. Pol. p. 210; 2 Dan. Neg. Inst. p. 364.

Davis, J., delivered the opinion of the court:

This was an action brought by the plaintiff to recover against the defendants, E. B. Kirkland, R. F. Kirkland, and George E. Loring, upon a promissory note. The defendant E. B. Kirkland made default, and the defendants R. F. Kirkland and George E. Loring answered under oath, denying the execution of the note. The cause was tried without a jury, and the findings of the court were that the defendants R. F. Kirkland and George E. Loring did not sign the note; that the placing of their names thereon was not done by their authority, knowledge, or consent, but that their names were forged thereto. The court further found that the oral promises of R. F. Kirkland and George E. Loring to pay said note were made under the misapprehension that they had originally signed said note; that at the times when said promises were made said note was not exhibited to either of them by the plaintiff, and that they were made without knowledge of the material facts in relation to said note; that said promises were made without any consideration whatever, and after the maturity of the note; that by reason of said promises the plaintiff was in no way affected or injured, or induced to change his relations regarding said note; and that, as a conclusion of law, neither of said answering defendants were liable for the payment thereof. Judgment was entered accordingly in their favor. From the judgment and the order overruling his motion for a new trial, the plaintiff has appealed.

Under the pleadings and findings of the court below, it may be assumed that the names of R. F. Kirkland and George E. Loring, appearing upon said note, were forgeries, as there is abundant evidence, we think, to support this conclusion. But it is claimed by the appellant that the two defendants, by their acts subsequent to the forgery, if forgery it was, are estopped from denying the genuineness of their signatures, and that they are liable as having adopted the forgery. The evidence in the case shows that the defendants E. B. Kirkland and R. F. Kirkland were brothers, and that the defendant George E. Loring was their acquaintance and associate of eighteen or twenty years; that R. F. Kirkland and Loring had each previously been jointly obligated with E. B. Kirkland; that on May 1, 1891, the latter was

indebted to the appellant in the sum of \$800 on a certain former note given by him, upon which Loring was liable as surety; that appellant delivered to E. B. Kirkland a new note, in blank, for the renewal of the former obligation, and on the following day the latter returned the new note to the appellant, with his own and the names of George E. Loring and R. F. Kirkland signed thereto, and this is the note which was sued on. The appellant claimed to have had various conversations with R. F. Kirkland and Loring about the note, and that they had promised to pay it, but he did not testify that he had ever exhibited the instrument to either of them. The defendant R. F. Kirkland admitted in his testimony that he had on several occasions promised to pay the note, but claimed that he had done so under the mistaken assumption that he had really signed it. It plainly appears, too, that whatever promises were made by either R. F. Kirkland or Loring were made after the maturity of the note, and without any consideration. It is not shown that the appellant was in any way prejudiced by them, or that they induced him to do, or omit to do, anything whatever to his disadvantage, or that his status by reason thereof was in any respect changed. Under these circumstances, no foundation for an estoppel exists. 1 Dan. Neg. Inst. § 859; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Moore v. Robinson*, 62 Ala. 537; *Crossan v. May*, 68 Ind. 242. If it be contended that, without regard to the principle of estoppel, the defendants are liable as having adopted the forgery, the authorities cited by appellant will not sustain his contention, under the facts in this case, as a short review of the former will readily disclose. In *Woodruff v. Munroe*, 33 Md. 147, it was held: "If, in an action against an indorser of a promissory note by the bona fide holders thereof, it be shown that the indorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note, and its transfer to plaintiffs, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a bona fide holder. But any admissions by the defendant made subsequently to the maturity of the note would not be evidence that he had authorized the indorsement of his name thereon." *Casco Bank v. Keene*, 53 Me. 108, is a case where, on account of the defendant's admission of the genuineness of the signature, the bank refrained from proceeding against the person from whom it received the note, and the court held the defendant thereby estopped from denying his signature. In *Greenfield Bank v. Crafts*, 4 Allen, 447, the court was considering the case of a party acting with full knowledge of the manner in which the note was signed, and the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopted the signature, and assumed the note as his own. *Dono v. Spenny*, 29 Mo. 890, went on the proposition that the lower court erred in charging the jury that the plaintiff must prove that the signatures of the defendants on the note were their genuine signatures. In *Crout v. De Wolf*, 1 R. I. 393,

the third clause of the syllabus is, "Where the person, whose signature is forged, promises the forger to pay the note, this amounts to ratification of the signature, and binds him." But an examination of the case shows that evidence was offered to prove that the plaintiff had bought the paper in consequence of what the defendant said to him, and the court charged that if, before purchasing the note, plaintiff asked defendant if he should buy, and was told he might, defendant could not excuse himself on the ground of forgery. So that the case may be put upon the ground of estoppel. In *Shisler v. Vandike* [92 Pa. 447], 37 Am. Rep. 704, it was held that a promise, by one whose indorsement on a note is forged, to pay the same, is void as against public policy. This is the entire line of authorities cited by counsel for appellant, and it will be seen that, in so far as they are applicable to the case at bar, they support, rather than impugn, the holding of the lower court. There are numerous authorities which hold that a forgery cannot be ratified. *Brooke v. Hook* is an English case [L. R. 6 Exch. 89], reprinted in 3 Alb. L. J. 255. This was a case where the defendant's name was forged, and he had given a written memorandum that he would be responsible for the bill. Chief Baron Kelly places his opinion upon the grounds (1) that the defendant's agreement to treat the note as his own was in consideration that plaintiff would not prosecute the forger; and (2) that there was no ratification as to the act done, the signature to the note being illegal and void, and, though a voidable act may be ratified, it is otherwise when the act is originally, and in its inception, void. The opinion fully recog-

nizes the proposition that when acts or admissions alter the condition of the holder of the paper the party is estopped, but it is necessary that such a case be made. In *McHugh v. Schuylkill County*, 67 Pa. 391, 5 Am. Rep. 445, the defense to a bond was forgery. The court below charged that if the obligor subsequently approved and acquiesced in the forgery, or ratified it, the bond was binding on him. It was held that, there being no new consideration, the instruction was error; also, that a contract infected with fraud was void, not voidable, and confirmation, without a new consideration, was *nudum pactum*. This proposition is recognized in 2 Dan. Neg. Inst. § 1852: "When no principle of estoppel applies, and when, through mistake, a party states that his signature is genuine, and afterward discovering his error speedily corrects it,—that is to say, before the holder has changed his relations to the paper or anyone has dealt with it upon the faith of his admissions, we know of no principle of law which prevents the forgery from being pleaded." Upon the principles laid down in these authorities, we cannot see how any mere promises to pay a forged note can lay the foundation for liability of the appellees, when there appear no circumstances to create an estoppel, and the promises were made after maturity, without consideration, and without full knowledge of the material facts in relation to said note.

Finding no error in the record, *the judgment is affirmed.*

Street, Ch. J., and Doan and Sloan, JJ., concur.

ARKANSAS SUPREME COURT.

LITTLE ROCK TRACTION & ELECTRIC COMPANY, Appt.,

v.

Albert WALKER.

(.....Ark.....)

The arrest of a street-car passenger by a policeman called by the conductor of the car to arrest and take him off, on the charge of riding without payment of fare, does not render the carrier liable for false imprisonment, when the conductor had been authorized only to put delinquent passengers off the car.

(Wood, J., dissents.)

(March 19, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiff in an action brought to recover damages for malicious prosecution. *Reversed.*

NOTE.—As to carrier's liability for false imprisonment of passenger, see *Mulligan v. New York & R. B. R. Co.* (N. Y.) 14 L. R. A. 791, and *note*; *Gillingham v. Ohio River R. Co.* (W. Va.) 14 L. R. A. 40 L. R. A.

The facts are stated in the opinion.

Messrs. Rose, Hemingway, & Rose, for appellant:

In order to maintain an action of malicious prosecution both malice and want of probable cause must be shown.

Chrisman v. Carney, 33 Ark. 316.

The agent can bind his principal only within the scope of his real or apparent authority. By employing a man for the humble duties of conductor, with nothing to do except to collect fares and help ladies on and off the cars, does the company clothe him with the power to arrest and prosecute citizens at his pleasure?

Central R. Co. v. Brewer, 78 Md. 394, 27 L. R. A. 63; *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311; *Pressley v. Mobile & G. R. Co.* 15 Fed. Rep. 200; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Roe v. Birkenhead L. & C. Junction R. Co.* 7 Exch. 36; *Poulton v. London & S. W. R. Co.* L. R. 2 Q. B. 584; *Edwards v. London & N. W. R. Co.* L. R.

A. 796; *Palmeri v. Manhattan R. Co.* (N. Y.) 16 L. R. A. 136; *Central R. Co. v. Brewer* (Md.) 27 L. R. A. 63.

5 C. P. 445; *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65; 1 Biddle, Ins. § 118.

Mr. J. H. Harrod for appellee.

Bunn, Ch. J., delivered the opinion of the court:

This is a suit for malicious prosecution by Albert Walker, the appellee, against the street car company of Little Rock. Judgment for plaintiff, and the defendant appeals.

Walker was a passenger on one of defendant's cars, known as the "West Ninth car," running from the west, on Ninth street, to the junction of the several car lines at the crossing of Ninth and Main streets, having paid his fare. When his car arrived at the junction, and was stopped, as usual, on the east track on Main street, and just north of Ninth street, plaintiff alighted from the same; and he took his seat at the nearby corner of the sidewalk to await the arrival of the Fifteenth street car, coming from the south along the east track on Main, and going to the Union Depot. While at this corner plaintiff was engaged in conversation with a woman, subsequently a witness in the case; and the Fifteenth street car came up, and stopped the usual distance—15 or 20 feet—in rear of the Ninth street car on the same track as aforesaid. Then the Ninth street car moved off down Main street, and in the usual interval of time the Fifteenth street car followed. The plaintiff neglected to board the latter as he intended, until, as he testifies, it had started and was moving off slightly; as his companion testifies, until the car had gone 15 or 20 feet; and as the conductor on the car testifies, after it had gone half way to Eighth street. Elsewhere plaintiff also stated that he boarded the Fifteenth street car at Ninth and Main, and that then the transfer man said, "Transfer one." When the conductor passed through the car, collecting fares, he accosted plaintiff, sitting in the rear end, and demanded his fare, which he refused to pay, saying that he was a "transfer;" meaning that he was entitled to be transferred, having come to the junction as a paid passenger from West Ninth, and that he was entitled to continue to his destination without paying additional fare. There arose a controversy between him and the conductor, who contended that he had not gotten on the car before it left the junction, and that, therefore, he had not been transferred. The conductor, being a new man in the business, consulted with the motorman, who was an experienced man, as to what to do in the premises and was informed that the rule was to put the passenger off if he refused to pay his fare; and this in fact seems to have been the rule. So at Fourth street the conductor called to his aid Rainwater, a policeman, and directed him to put Walker off, as he testified, but, as the policeman testified, directed him to arrest him and take him off. The policeman arrested plaintiff accordingly, and, on arriving at Markham street, took him to the office of the police judge at the city hall, which is near by; and on the following day the plaintiff was tried, on a charge preferred by the policeman, for violating a city ordinance which made it a misdemeanor for any person to ride on a street car without paying his fare. And the conductor and the transfer agent, whose post was at the

junction aforesaid, were summoned and testified; and the plaintiff was discharged, and then brought this suit against the street-car company for malicious prosecution, as stated.

The proof of the rules of the defendant company is very indefinite and unsatisfactory, but we gather this much from the testimony: That transfers of passengers from the cars of one line to another were allowed to be made only at the junction named; that a passenger alighting from an incoming car remained in the vicinity until the arrival of the car to which he asked to be transferred, and, having been within the view of the transfer agent from the time he alighted from the other car, on his boarding the latter car the transfer agent signalled or called to the conductor thereon that one was transferred, or whatever the number might be, and the conductor in this way was directed to demand no additional fares from these transferred passengers. Whether it was allowable for a passenger to board his second car after it had been put in motion, the witnesses do not inform us, except inferentially. From one of the questions put to the transfer agent and answered by him, one would infer that when a passenger alighted from an incoming car the transfer agent called out, "Transfer the party." Such a direction would be nonsensical, until the car to which he wished to be transferred should arrive, and we presume that is what was meant. However this may be, we will assume, for the sake of the argument, at least, that the police judgment was based upon a proper construction of the testimony, and that the plaintiff was entitled to ride on the Fifteenth street car to his destination without paying the additional fare, and that his ejection from the car was wrongful, and that his subsequent prosecution was also wrongful; and even, for the sake of the argument, we will say that the arrest and prosecution were at the instance of the conductor, and that from his conduct in relation thereto malice may be inferred. This brings us squarely to the only strictly legal proposition in this case, and that is, Was the defendant company liable for the acts of its employee, the conductor, in this regard? The defendant's contention is, in effect, that it is not liable unless there is proof of its express authority to its employee to arrest and prosecute delinquent passengers for violation of the law on the subject. In determining what may be regarded as express authority, we may include, for the purposes of this discussion, not only authority given in express words, but such authority as necessarily follows by implication from the express language conferring the authority. *Central R. Co. v. Brewer*, 73 Md. 394, 27 L. R. A. 63, was a case wherein "a person, on entering a street railway car, deposited in the fare box a coin resembling a five cent piece or nickel, and shortly thereafter was informed by the driver that he had dropped a lead nickel into the box [pointing it out to him], and was requested to redeem it, and he refused to do so, and he [after leaving the car] was subsequently arrested and held to bail at the instance of officers of the railway company on the charge of passing counterfeit money." Upon the evidence the United States Commissioner before whom the preliminary trial was had discharged him,

and he then brought the suit for malicious prosecution and false arrest. The trial court having given four several instructions at the instance of the plaintiff, the defendant asked the following instruction, which was not covered by any of those given, and the same was refused, to wit: "(2) That there is no evidence in the case legally sufficient to prove that any of the officers or agents of the defendant corporation was authorized by the company to have the arrest made which is complained of in the declaration or that the company subsequently adopted and ratified the acts of said officers or agents, and the verdict must be for the defendant." After disposing of the various other questions involved, the supreme court of Maryland held that the company was not liable for the acts of the superintendent in causing the arrest and prosecution of the plaintiff: there being shown no express authority from the company to him to do so, nor ratification by it afterwards, as was assumed in the instruction asked and refused. To the same effect are *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311; *Presley v. Mobile & G. R. Co.* 15 Fed. Rep. 199; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; 1 Biddle, Ins. § 118; and the following English cases, to wit: *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Roe v. Birkenhead, L. & C. Junction R. Co.* 7 Exch. 36; *Poulton v. London & S. W. R. Co.* L. R. 2 Q. B. 534; *Edwards v. London & N. W. R. Co.* L. R. 5 C. P. 445; and *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65,—all cited in appellant's brief. There is in the case at bar no proof of an express authority from the company to the street-car conductor to prosecute a passenger for refusing to pay his fare. Moreover, there is no connection whatever between his authority to put a delinquent passenger off his car (given expressly under the rules of the company), and thus prevent a further imposition on the part of the passenger, and the authority to arrest him and prosecute him for a violation of the criminal laws in attempting to ride on the car without paying his fare. Nor can the limited authority of a car conductor from the company to put a delinquent passenger off be enlarged by his calling to his aid a policeman, whose general powers as such are to make arrests and prosecute for violation of the municipal law. Nothing else being said, in such a case the policeman is called in to aid the conductor in the execution of the conductor's powers, and not those belonging to his office generally. Of course, the conductor could have independently, and on his own responsibility, caused the arrest to be made, and could have prosecuted; but could he do so as conductor of the street car?—is the question here, and the authorities cited are to the effect that he could not do so, and bind his company, without express authority being shown. As a matter of fact, the conductor, in this instance, in all probability, never intended to do more than act upon the advice of the experienced motorman (that is, put the plaintiff off the car), and never had the idea of prosecution, maliciously or otherwise; and all the play between himself and the policeman as to their use and understanding of the words "put off" and "arrest" amounts to nothing more

than an illustration of the fact that we give meaning to words according to the lingo of our several callings, and as habit and association have determined. But we express no fixed opinion as to the facts. The plaintiff's counsel cite many authorities which they contend are in contradiction to the doctrines of the Maryland and other decisions cited. But, after a careful examination of all of them, we find no real conflict between the principles they announce and the principles of the cases cited by appellant. The difference is always between the state of facts or the state of pleadings. In concluding their argument and citation of authorities, they say that "every phase of the question, and every principle invoked in this case, has been passed upon by the court of appeals of New York, and decided against the contention of appellant's counsel," in the case of *Lynch v. Metropolitan Rlev. R. Co.* 90 N. Y. 77, 43 Am. Rep. 141. In that case Lynch purchased a ticket for a passage upon defendant's railway, and entered one of its cars. Before reaching his destination he lost his ticket, and when, after getting off at the end of his journey on the train, he attempted to pass through the gate of the inclosure of the depot, he was stopped by the gate keeper, and informed that he could not pass out until he showed his ticket or paid his fare, which appears to have been the rule of the company. He explained the purchase and subsequent loss of his ticket to the gate keeper, and insisted on passing out, but was pushed back by the gate keeper, who then sent for a police officer, and directed him to arrest the plaintiff, which he then and there did, and took him to the police station, where the gate keeper lodged a complaint against him, and he was locked up overnight; and on the hearing the next morning the gate keeper appeared in the prosecution, but the plaintiff was discharged. Defendant [the railway company] had given orders to its gate keepers not to let passengers out until they either paid their fares or showed tickets." In an action for false imprisonment by the plaintiff against the company, the court held "that the detention was unlawful, that defendant [the railway company] was responsible for the acts of the gate keeper, and that plaintiff [Lynch] was entitled to recover." There was no doubt in that case but that the detention was not only unauthorized by any law, but was in violation of all law; and the first proposition, that the imprisonment was false, followed as a matter of course. The court had found that the gate keeper did exactly what the company had expressly ordered him to do under such circumstances, and, of course, could but hold that the company was liable. The gate keeper was simply acting in the plain line of his authority and duty to his master, and that made the latter liable. The circumstance of the prosecution seems not to have been commented upon, except as an incident of the false imprisonment, probably given only as a part of the whole transaction. Whether the gate keeper had express authority to prosecute or not is not shown in evidence, and that fact was not necessary to a judicial determination of the case, as it was one of false imprisonment, and not of malicious prosecution. The

most that could have been made of the defense by the company was a plea of *ultra vires*, which is no defense in such cases. There is error in the second instruction given on part of the plaintiff, in which it is assumed, in effect, that the authority to arrest and prosecute for the criminal offense grows out of the authority to put off the cars for refusing to pay fare, there being want of proof of express authority to prosecute.

Reversed and remanded.

Wood, J., dissents, holding that, in order to maintain a suit of this kind against the corporation, it is not necessary to show that its agent, who instigated the malicious prosecution, or at whose instance it was brought about, had any express authority from the corporation to do the act complained of, but that such authority may be and will be implied if the agent in doing the act is acting within the scope of his real or apparent authority.

CALIFORNIA SUPREME COURT.

Emily KENNEDY, *Appt.*,

v.

Silas BURNAP *et al.*, *Respts.*

(.....Cal.....)

1. **An easement of light or air does not pass by implication** on a conveyance of a building with windows looking out over vacant lots the title to which remains in the grantor, although the enjoyment and value of the building will be greatly impaired by erecting a structure in close proximity to it on the vacant lots.

2. **An architect supervising the construction of a building** and giving notice of an intention to build may be joined with the owner of the premises as a defendant in a suit for an injunction against the building.

(April 1, 1896.)

APPPEAL by plaintiff from a judgment of the Superior Court for San Diego County in favor of defendants in an action brought to enjoin defendants from cutting off the light and air from plaintiff's window. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. A. C. Mouser and Haines & Ward, for appellant:

The following provisions of the Civil Code relate to the subject:

§ 801. "The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements. . . . The right of receiving air, light, or heat from or over, or discharging the same upon or over, land."

§ 802. "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another."

§ 1084. "The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself."

§ 1104. "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use the other real property of the person whose estate is trans-

ferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

§ 1107. "Every grant of an estate in real property is conclusive against the grantor, also against everyone subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded."

The transfer of the property created in favor thereof easements to use the other adjoining real property of Hanbury in the same manner and to the same extent as such property was obviously and permanently used by Hanbury, who transferred his estate in the Tremont property at the time such transfer of the Tremont was made.

Sparks v. Hess, 15 Cal. 186; *Cave v. Crafts*, 53 Cal. 135; *Farmer v. Ukiah Water Co.* 56 Cal. 11; *Cross v. Kittle*, 69 Cal. 217, 58 Am. Rep. 558; *Quinlan v. Noble*, 75 Cal. 250; *Standart v. Round Valley Water Co.* 77 Cal. 399; *Coonradt v. Hill*, 79 Cal. 587; *Clyne v. Benicia Water Co.* 100 Cal. 310; *Lampman v. Milks*, 21 N. Y. 505; *Heartt v. Kruger*, 131 N. Y. 386, 9 L. R. A. 185.

The transfer of a thing transfers all of its incidents and appurtenances.

McShane v. Carter, 80 Cal. 310; 2 Washb. Real Prop. ed. 1894, **29, 30; *Lampman v. Milks*, 21 N. Y. 505; *Robinson v. Clapp*, 65 Conn. 365, 29 L. R. A. 582.

An implied easement of light and air will be sustained in case of real necessity.

Turner v. Thompson, 58 Ga. 268, 36 Am. Rep. 297; *Rennyson's Appeal*, 94 Pa. 147, 39 Am. Rep. 777.

Mr. N. H. Conklin, for respondents:

The grantee cannot extend the right granted beyond the terms of the grant, and it would seem as if the grantor had expressly sought to protect his unsold premises from the unjust claim that has been put forward.

Re Vance, 100 Cal. 425; *Faire v. Daley*, 93 Cal. 664; *Montgomery v. Sturdivant*, 41 Cal. 290; *Barnett v. Burnett*, 104 Cal. 298.

By the deed everything outside of the land covered by the Tremont house was excepted.

Sparks v. Hess, 15 Cal. 196; 2 Washb. Real Prop. 5th ed. p. 361.

NOTE.—For easement of light and air, see note to *Case v. Minot* (Mass.) 22 L. R. A. 536, and *Jones v. Millsape* (Miss.) 23 L. R. A. 158.

40 L. R. A.

Lampman v. Milks, 21 N. Y. 505, has been overruled by the New York courts.

Myers v. Gemmel, 10 Barb. 537; *Doyle v. Lord*, 64 N. Y. 432, and cases cited.

An easement uncertain in its extent and duration, without any written or record evidence of its existence, fettering estates and laying an embargo upon the hand of improvement which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts, and not demanded by any consideration of public policy—surely should not be held to exist by mere implication.

Morrison v. Marquardt, 24 Iowa. 35, 92 Am. Dec. 444. See also *Collier v. Pierce*, 7 Gray, 18, 66 Am. Dec. 453; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Keiper v. Klein*, 51 Ind. 316; *Haverstick v. Sipe*, 33 Pa. 368; *Rennyson's Appeal*, 94 Pa. 147, 89 Am. Rep. 777; *Mullen v. Stricker*, 19 Ohio St. 138, 2 Am. Rep. 379.

There is no necessity for such an easement as claimed by appellant. The plans of the building show broad halls, and 50 feet of front and rear exposed for light and air.

Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629; *Rennyson's Appeal*, 94 Pa. 147, 89 Am. Rep. 777.

The rights claimed by appellant should be free from reasonable doubt to justify an injunction.

Snowden v. Noah, Hopk. Ch. 347, 14 Am. Dec. 547; *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 75, 86 Am. Dec. 252; 1 High, Inj. § 8.

Chipman, C., filed the following opinion: Action for an injunction. The defendant Burnap had judgment, from which plaintiff appeals on the judgment roll, including bill of exceptions presenting motion to strike out certain allegations in the amended complaint, and the ruling of the court thereon. But two questions are involved: (1) That the court erred in sustaining the demurrer made on the ground of misjoinder of parties defendant; and (2) that the court erred in sustaining the demurrer as to that portion of the amended complaint relating to light and air, and for like reasons the court erred in striking from the amended complaint "all matters relating to light and air." The motion to strike out having been granted, the result was to leave the complaint shorn of facts sufficient to constitute a cause of action. It appeared from the complaint: That in 1887 one Hanbury owned certain lots and parts of lots in the city of San Diego, fronting 145 feet on Third street and 100 feet on D. street. He built a lodging house on the north 50 feet of the tract in 1881, fronting on Third street, and running back 90 feet. The lower story was finished for stores, and above this story, and in each of the three upper stories, windows opened out upon the vacant lots, admitting light and air to the south part of the building, which were alleged to be necessary for the use of, and to render habitable, this part of the house. That Hanbury used the house in this condition until May 2, 1890, when he sold it, and the land on which it rested, to plaintiff's testator. That Hanbury retained ownership of the remaining lots until September 18, 1892, when he sold

them to the Savings Bank of San Diego county, and on January 20, 1896, the bank sold the lots to defendant Burnap. That on May 9, 1896, Burnap began the erection of a three-story building on his lots, and close to and against plaintiff's building, so as to entirely close up and darken the said windows in her building, and shut off all light and air. That these windows had been used as formerly, and up to the time of defendant's purchase. It was alleged that the proposed building would destroy one third the value of plaintiff's property, and render the south part of the house uninhabitable and unfit for use, and cause irreparable damage.

1. The principal contention of appellant is that the court erred in sustaining the demurrer and granting the motion, because from the facts pleaded it clearly appeared that there were appurtenant to the premises, as a dominant estate, easements of light and air through the door and windows in the south wall, over the land adjoining it on the south, as the servient estate. It is claimed that under the provisions of §§ 862, 801, 1084, 1104, and 1107 of the Civil Code, and the decisions of this court, the complaint showed the existence of such easements of light and air, with which defendants threatened to interfere. The conveyance from Hanbury to Kennedy was a grant deed. Appellant disclaims any right by prescription or by user, and so denies the authority of *Western Granite & M. Co. v. Knickerbocker*, 103 Cal. 111, where it was said: "The doctrine that a proprietor of land may by user acquire an easement over adjoining land for the passage of light and air does not prevail in this country." The claim broadly made is that the easement of light and air passes by implied grant under our statute. It would seem to us that the reasons for supporting a right by prescription are even stronger than can be advanced in support of an implied grant. The questions are closely allied, and are often found discussed together, and as depending on like reasons. But three states of the American Union retain the common law upon this subject, to wit, Illinois, New Jersey, and Louisiana. The first American case,—*Story v. Odin* (1815) 12 Mass. 157, 7 Am. Dec. 46,—which has been so often referred to as authority for the prescriptive right, was long ago overruled in that state. As recently as 1874, in *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80, the cases were re-examined, and the doctrine very ably considered, by Gray, Ch. J.: and he there shows that even in *Story v. Odin* the right by prescription was not necessarily involved. This case in 115 Mass. is valuable, however, for its discussion of the precise question now before us. It was there said: "The reasons upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country

like ours, in which changes are taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed." The leading case in New York state is *Parker v. Foote*, 19 Wend. 309. Bronson, J., in the opinion for the court, said: "There is, I think, no principle upon which the modern English doctrine on the subject of light can be supported. It is an anomaly in the law. It may do well enough in England, . . . but it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences." In *Morrison v. Marquardt*, 24 Iowa, 85, 92 Am. Dec. 444, Dillon, J., presents the subject in a still different light, reaching the same result. He said: "Surely such an easement uncertain in its extent and duration, without any written or record evidence of its existence, fettering estates, and laying an embargo upon the hand of improvement, which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts, and not demanded by any consideration of public policy,—surely such an easement should not be held to exist by mere implication." The question will be found more or less fully treated in *Keiper v. Klein*, 51 Ind. 316; also in *Mullen v. Stricker*, 19 Ohio St. 138, 2 Am. Rep. 379; *Rennyson's Appeal*, 94 Pa. 147, 39 Am. Rep. 777. We have no hesitation in adopting the prevailing rule in this country, and are content with the reasons upon which it rests. Nor do we think there is anything in our statutes restraining us from so holding.

Appellant insists that our Code provisions as to easements are "substantially the same . . . as . . . the common law," and therefore "must be construed as continuations thereof." Civil Code, § 5. Counsel presents with much force and ability the proposition that § 1104, Id., has converted what at common law were implied easements of light and air by severance of estate into statutory easements by such severance; and he urges that the rejection of this easement created by prescription does not necessarily justify the judicial repeal of the statutory easement created by severance. The provisions of § 1104, so much relied upon by appellant as creating by severance the very easement in question, we do not think have the effect claimed. The easement created is in favor of the land transferred, and is the right to use other real property of the transferor "in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred." If the easement claimed was the right to use a ditch or pipe through which water was conveyed to the property sold, and on which it was used as beneficial and necessary, there would be no difficulty in holding that the property retained by the transferor was "obviously and permanently used by him . . . at the time when the transfer . . . was completed." There would exist such relationship of the two properties—the part sold and the part retained—as to justify what was said in *Cave v. Crafts*, 53 Cal. 135, that "when the owner of lands divides his property into two parts, granting away one of them, he is taken

by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it." Where a town or city lot has a frontage on a street and on an alley in the rear, by means of which light and air may be obtained, and a building is erected thereon, we cannot say, as matter of law, that windows on the side overlooking another lot are necessary to the beneficial use or reasonable enjoyment of the building; nor can we say that, if the owner of two lots so constructs his house on one of them as to obtain light and air in part through windows overlooking the vacant lot, he thereby makes such "obvious" and "permanent" use of these openings and of the lot as to be held by implication to transfer an easement over the vacant lot when he sells the lot built upon. Indeed, it cannot be said there was any use made of the vacant land, as in the case of a way or a pipe as a conduit for water to the granted premises; nor would it be reasonable to presume that by the mere use of openings to admit light and air the transferor of the property intended that the use of these openings made by him was to be permanent, and to imply a grant to the use of his land retained by him for such permanent use. The statute was not, in our opinion, intended to create any such right by severance of the estate. That light and air may be the subject of an easement cannot be doubted. The statute says so plainly. § 801. That light and air may also become appurtenant to land is equally clear. *Ibid.*, and § 662. And we must concede that the transfer of a thing transfers all its incidents, unless expressly excepted. § 1084. And we must also concede (for the statute says so) that the transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use the other real property of the grantor in the manner such property was obviously and permanently used by the person whose estate is transferred. § 1104. All this is true, but it always remains to be determined in a given case whether an easement in fact exists, or may be presumed. Section 662, it is true, says that a thing is deemed appurtenant to land when it is by right used with the land for its benefit, but the "thing" referred to must have a legal, recognized existence. Not every "thing" is deemed to be appurtenant, even when by semblance of right used with the land for its benefit. The use of light and air through the windows overlooking defendant's lots was by right, in the sense that it did not harm the owner or his property; but it would not follow necessarily that this air or light is to be deemed appurtenant to plaintiff's land, or that the enjoyment was by strict right. Mr. Washburn says: While "many of the rules in reference to easements of ways apply to those of light and air, . . . it must be obvious that in the original acquisition of the right a different rule must prevail." 2 Washb. Real Prop. 5th ed. 361. And it was held in *Mullen v. Stricker*, 19 Ohio St. 138, 2 Am. Rep. 379: "Where the owner of two adjacent lots conveys one of them, no grant or reservation of an easement for light and air will be implied merely from the nature or use of the

structure upon the lots at or prior to the time of the conveyance." Nor do we think that § 5 of the Civil Code, relied upon, restrains us from following the generally accepted doctrine in this country. Where our Code provisions are substantially the same as the common law, they are to be construed as continuations thereof, and not as new enactments. *Ibid.* It is a part of the common law itself, however, that the colonists took with them only such parts thereof as were adapted to their new conditions and surroundings. 1 Hambl. (original page) 107, and notes of editor, p. 280. See cases cited in 2 Wait, Act. & Def. p. 282. The common law referred to in our statute is such only as conforms to our institutions and form of government, and is applicable to the habits and conditions of society. *Ibid.*; Cooley, Const. Lim. p. 52.

Before we should feel bound to hold that light and air are easements as they were regarded in England, to be governed in their acquisition, enjoyment, and disposition under common-law rules, we should require it clearly to appear that our statute is substantially the same in all these respects as the common law. But the statute does no more than to declare that they may be the subject of an easement. We think our court is left free to say that, while an easement of light or air such as is here claimed may be created, no such easement will be held to pass by implication. Conceding, therefore, that plaintiff enjoyed what would be an easement at common law in England,

and that by the transfer of title to the land there would have been an implied grant of this easement in that country, we are still of the opinion that no such easement was created under our law, nor did any such easement pass by implied grant. When Hanbury sold, without any grant of the passage for air and light over his retained lots, the privilege ceased; and he could have immediately built upon the vacant lots, as his successors in estate now propose to and may do.

2. Sanderson, one of the defendants, was the owner's architect, and it was alleged that he was personally supervising the work, and gave the notices of intention to build. He was but the servant and employee, as were the workmen on the building, and had no interest in the suit. The general prayer of the bill would have reached him, without being made a party. We think, however, while not a necessary party defendant, it was competent for plaintiff to make him one, and his remedy to relieve himself was not by demurrer. At the same time, we do not see that the ruling of the court was such injury as to warrant us in remanding the case, especially as the action cannot be maintained against any defendant. The judgment and order should be affirmed.

We concur: **Britt, C.; Belcher, C.**

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment and order are affirmed.*

CONNECTICUT SUPREME COURT OF ERRORS.

Town of BRISTOL, *Appt.*,
v.

NEW ENGLAND RAILROAD COMPANY.

(70 Conn. 305.)

1. **A map of a proposed abutment in a highway** to support an overhead railroad is sufficient if it contains such reference to monuments in the vicinity of its site that a competent surveyor can ascertain the points at which to set stakes.
2. **An order of the railroad commission directing the separation of a grade crossing** sufficiently describes the abutments to be erected in the highway if it refers to a map upon which they are delineated.
3. **The board of railroad commissioners**, one of whom is required by law to be a civil engineer, will be presumed to have made no order for the construction of a public work which cannot be precisely executed.
4. **Land covered by a highway may be occupied** by the railroad commissioners for the construction of a bridge to separate a grade crossing if necessary to abate a nuisance.
5. **A town cannot enjoin the erection of abutments in one of its highways** in pursuance of an order by the railroad commission to separate a grade crossing; but if it regards its rights encroached upon it must appeal from the order.

6. **A sufficient appropriation of a portion of a highway** for the abutment of a bridge for the separation of a grade crossing is made by an order of the railroad commissioners directing it to be made and referring to a map showing the abutment in the highway without formally condemning or discontinuing the portion of the highway covered.

7. **An order by the state railroad commission requiring the separation of a grade crossing**, which refers to a plan of the work showing abutments in the highway, is a defense to a suit by the municipality to enjoin the railroad company from placing the abutments in the highway.

8. **A railroad company defending a suit to enjoin it from placing abutments in a highway** on the ground that it is acting under order of the state railroad commission has the burden of proving the existence of the order and of the identity of the structure which it has threatened to build with that designated in the order.

9. **A judgment will not be reversed** for failure to sustain a demurrer for reasons not specified therein.

10. **Directing abutments to be placed on the street lines** in an order of the state

NOTE.—As to the liability for cost of changing grade of street to avoid grade crossing, see note to *Kelly v. Minneapolis* (Minn.) 26 L. R. A. 92.
40 L. R. A.

railroad commission for the separation of a grade crossing does not preclude the placing of other abutments in the street by reference to a map showing them so located.

(January 21, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County in favor of defendant in a suit brought to enjoin the erection of an abutment in a public highway. *Affirmed.*

The state railroad commission passed an order for the separation of a grade crossing in the town of Bristol. The defendant railroad company was attempting to comply with the order when this bill was filed to enjoin it from doing so on the ground that it would result in an unlawful encroachment on the highway.

The material part of the order is as follows:

"We, being of opinion that the financial condition of the said New York & New England Railroad Company will warrant such order, and that public safety requires the same, do hereby order such crossing removed, and do determine and order that the following alterations, changes, and removals be made and done, to wit: That the method of crossing be altered so that said highway, instead of crossing said tracks at grade, as at present, be carried under said tracks, and, for that purpose, that the location of the said crossing be changed by the removal of said tracks from their present location to a point about 80 feet southerly therefrom; the same being carried over said highway on a double track iron bridge, with not less than 12 feet clear head room, with stone abutments located upon the street lines upon each side, and with supporting columns upon the latter lines of the street (said street being excavated so much as may be necessary to give said head room), with approaches not exceeding 9 feet in a hundred on the north side of said crossing, and level upon the south side, and not exceeding 5 feet in a hundred on North Main street, and 4 feet in a hundred on Prospect street; said alterations and changes being also delineated and shown on two maps on file in this office, one marked: 'N. Y. & N. E. R. R. Proposed Undercrossing of Main street, Bristol, Conn. Scale 50 feet to one inch. Chief Engineer's Office. Boston, February 10th, 1891. L. B. Bidwell, Chief Engineer.' And the other marked: 'Proposed Change of Main Street Crossing, Bristol, Conn. Scale, 40 feet to one inch. Boston, February 10th, 1891. L. B. Bidwell, Chief Engineer.' All of said alterations, changes, and removals to be made and done by said railroad company, and the expense thereof, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highways shall sustain by reason of any change in the grade of such highways in consequence of any change, alteration, or removal above ordered, to be paid by said railroad company: George M. Woodruff, W. H. Hayward, Wm. O. Seymour, Railroad Commissioners."

Messrs. Hungerford, Hyde, Joslyn, & Gilman and Epaphroditus Peck, for appellant:

Unless such an encroachment is justified by the facts pleaded, the second defense is in-
40 L. R. A.

sufficient, and the demurrer to it should have been sustained.

Hotchkiss v. Plunkett, 60 Conn. 230; *Usher v. Waddingham*, 62 Conn. 412; *Stephen*, Pl. 9th Am. ed. 200.

The act regulates the procedure, and provides for a full statement of the scope of the action proposed.

If the railroad commissioners proceed on their own initiative, they "shall proceed in all respects as to method of procedure and assessment of expense as if the said directors had voluntarily applied therefor."

Acts of 1889, chap. 220, § 1; *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527.

That is, they must, in their preliminary order, define the scope of the action proposed to be taken, and notify the parties in interest thereof.

The railroad commissioners defined the subject-matter of the action to be "the removal of the grade crossing of their road and the highway known as Main street," the question to be heard "as to what alterations, changes, or removals, if any, shall be made at said crossing, and by whom done," and they cited in as land-owners to be affected "the owners of the land adjoining said crossing, and adjoining that portion of said highway to be changed in grade."

Only one highway, Main street, is thought of as to be affected; North Main street is nowhere mentioned, no alteration of it is proposed, and no notice is given to the owners of land adjoining it.

The only reference to any other street than Main street is purely incidental; is not made with any reference to the bridge or its abutments, but for the purpose only of determining the grade of the approaches.

Is it possible to construe this order as ordering the taking for railroad purposes of a large section of a highway, when such taking is nowhere mentioned, nor such highway mentioned except with reference to its grade?

There is no denial that the abutment is within North Main street, nor that it is correctly described in the complaint; but an allegation that the abutment so described will be "in exact accordance with the said order . . . and with said maps."

The assertion or the denial of a legal conclusion, without showing the facts which support or forbid such conclusion, means nothing. A demurrer to such a pleading must always be sustained.

Woodruff v. New York & N. E. R. Co. 59 Conn. 63.

The plaintiff could not reply to this by merely reiterating the allegations of the complaint; the only allegation which the plaintiff could deny is that the encroachment described is in accordance with said order and maps.

The issue raised hereby would be merely as to what the order and maps authorize, and this is not an issue of fact, but of law.

Auffmordt v. Stevens, 46 Conn. 413; *Gibbs v. Gilead Ecclesiastical Soc.* 38 Conn. 167; *Jordan v. Patterson*, 67 Conn. 479; *State v. Main*, 69 Conn. 137; *Hotchkiss v. Higgins*, 52 Conn. 213, 52 Am. Rep. 582.

This is particularly so of a judicial record.
Gallup v. Fox, 64 Conn. 491.

Jurisdictional facts must appear upon the face of the record of a special tribunal.

Raymond v. Bell, 18 Conn. 81; *Sears v. Terry*, 26 Conn. 278.

Mr. Edward D. Robbins for appellee.

Hamersley, J., delivered the opinion of the court:

The complaint alleges that the defendant intends to build a bridge for carrying its railroad tracks over Main street at the corner of that street and North Main street (they being highways within the limits of the town of Bristol), and threatens to build a stone abutment in connection with said bridge, so as to encroach upon North Main street, and occupy a strip thereof, as shown by the annexed map, marked "Exhibit A," and claims an injunction restraining the defendant from building any structure within the limits of North Main street. Exhibit A is a map (drawn to a scale) purporting to be a facsimile of the defendant's plan and profiles for the abolition of the Main street grade crossing at Bristol, prepared and signed by its chief engineer. The right of the plaintiff to ask an injunction arises from the duties imposed upon it by law, as the agent of the state in the maintenance and care of these highways; and the defendant, in its second defense, sets up the paramount authority of the state, exercised through an order of the railroad commissioners, appropriating this portion of the highway as necessary for the abolition of a public nuisance endangering the lives of its citizens who use the highways. The answer contains a first defense, in which each allegation of the complaint is either denied or admitted, and a second defense, which purports to allege extrinsic facts sufficient, if proved, to defeat the plaintiff's action, admitting for the purposes of the defense the facts stated in the complaint. The allegations of the defense are: (1) The existence of an order by the railroad commissioners directing the defendant to remove its present grade crossing of Main street, and for that purpose changing the location of said crossing to a point 80 feet southerly, at the corner of Main and North Main streets, and directing the defendant to there build over Main street, and adjoining North Main street, a bridge, with a wing or supporting abutment, whose location is definitely fixed by the maps which are a part of the order. (2) The structure which the defendant threatens to build, as alleged in the complaint, and shown on the maps contained in the complaint, is in exact accordance with the command of the commissioners contained in the order, and the maps, which are a part thereof. If these allegations of fact are denied and proved, a complete defense to the action is established. Instead of replying, by denial or otherwise, to the defense, the plaintiff has demurred; and the action of the court in overruling that demurrer is the only error assigned in this appeal.

Before dealing directly with the demurrer, we consider what seems to be the plaintiff's conception of the fundamental defect claimed to be apparent in the second defense. It is this: An inspection of the record of the proceedings of the commissioners does not clearly indicate what portion, if any, of the land within the

true limits of the highway, is to be covered by the structure authorized. This claim is true, but it must be distinguished from a claim confounded with it,—that the record does not precisely indicate that portion of the surface of the land which the structure authorized is to occupy. The latter claim is not true. A map (drawn to a scale) locating the structure in accordance with distances from permanent and known monuments describes its actual location as precisely as is possible. Such is the character of the map now in question. It purports to denote corners of permanent buildings, and the center line of the appellee's present location, fixed by public authority, and made a matter of public record. It is unnecessary that a map of a projected structure, of the nature of that which was the subject of the orders of the railroad commissioners, should be so drawn as to describe every possible monument in the vicinity of its site. It is enough if it describes such, and so many, that, when received upon the ground, and in relation to the ground, a competent surveyor can ascertain the points at which to set his stakes. The presumption is that the board of railroad commissioners, one of whose members the law requires to be a civil engineer, has made no order for the construction of a public work which cannot be precisely executed. On demurrer, the answers which set forth such an order were entitled to the support of that presumption. The exact position of the land to be occupied being thus sufficiently shown, any statement in the order of the precise point where the actual line of North Main street crosses this land is immaterial to the sufficiency of the defense. The commissioners are dealing with the abatement of a nuisance. Their authority to order such construction of a bridge as is necessary to most thoroughly abate that nuisance is complete, including the power to occupy land covered by a highway. They have no authority to determine the disputed lines of a highway, and were not bound to do so in making the order. The defense set up is complete, whether the land the defendant is ordered to occupy is covered to the extent of 1 foot or of 20 feet by the easement of a highway. If the plaintiff, as guardian of that highway, thought its limits were unnecessarily encroached upon, it was its duty to appeal from the order. The legal exercise of discretion by the commissioners cannot be challenged in any other way.

But in this connection the plaintiff claims that the record does not clearly show that the commissioners intended that any portion of the highway should be occupied. We think the record does clearly show that the commissioners made this location with full understanding that the land occupied might be, and probably was, within the limits of this highway. Assuming that there must be an intention to appropriate the portion of the highway within the limits of the land designated, we think that intention sufficiently appears on the face of the record, which includes the order expressed in writing and in maps. The commissioners apparently decided that the structure described, covering the land defined, was necessary to the abatement of the nuisance, notwithstanding a portion of the land defined

might be covered by the adjoining highway, and ordered the defendant to build that structure. This they had the power to do, and were not bound to first adjudicate the legal limits of that highway, and then, in addition to the limitation of the use of the highway necessarily involved in the location of the structure ordered, to formally condemn or discontinue as a highway a precise number of square feet. The decision made, and the structure ordered, were a sufficient appropriation for that purpose of such portion of the highway as actually covered land designated. It follows that when the defendant alleges the existence of this order, and that the structure it threatens to build as alleged in the complaint is in exact accordance with the order, it sets up a complete and valid defense, consistent with the truth of the essential allegations of the complaint; it alleges facts, and not conclusions of law; it assumes the whole burden of proof properly belonging to it (*i. e.*, the burden of proving the existence of the order, and the identity of the structure it has threatened to build, as alleged in the complaint, with the structure it has been ordered to build); and it does not, as claimed by the plaintiff, allege facts that in any event can be held equivalent to a general denial, for it admits the allegation material to the plaintiff's case, that the threatened structure is within the limits of the highway. And if the defendant fails to establish by proof the existence of the order, and the identity of the structures, the admission of this fact entitles the plaintiff to judgment. If, on the other hand, the defendant does prove the facts it has alleged, then the fact admitted, material to the plaintiff's case, becomes immaterial to the case the defendant had established, and whether the fact so admitted is in reality a fact or not cannot affect the defendant's right to a judgment. "All demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient." Gen. Stat. § 873. Reasons for claiming the insufficiency of the second defense, not specified in the demurrer, do not demand discussion. The plaintiff is not entitled to a reversal of the judgment because the trial court did not sustain the demurrer for reasons not specified. The first reason stated in the demurrer is too general to have any force. It is claimed under the fourth reason that the clause in the written portion of the order directing the building of a bridge over Main street, "with not less than 12 feet clear head room, with stone abutments located upon the street lines upon each side, and with supporting columns upon the gutter lines of the street," controls the subsequent clause, directing changes in North Main street, and contradicts and renders invalid that portion of the order contained in the maps which directs in detail the changes to be made in North Main street, and fixes the exact location upon the surface of the land of the supporting wall or abutment to be there built. We do not so read the order. The description of the bridge over Main street as one with abutments on the street lines, and supporting columns on the gutter lines, of that street, exhausts its force in describing the abutments and supporting columns mentioned, and that description cannot be construed as applicable to the portions

of the order dealing with changes in other streets, nor as compelling a wing or supporting abutment on North Main street to be located upon the street line, notwithstanding the portion of the order directing these changes locates with certainty the abutment in a different place. Giving the widest allowable scope to the language of the two other reasons, they present, in addition to the points already considered, only this claim: That the railroad commissioners had no power, in their order for the elimination of the grade crossing at Main street, to direct the abutment in question to be built within the lines of North Main street; and, if they had such power, they have not given such directions. If the commissioners had the power to order the erection of the abutment as described, covering a portion of the highway, it is immaterial to the sufficiency of the second defense, for reasons already stated, whether or not the abutment ordered actually extends within the legal lines of North Main street. That they had the power, under chapter 220 of the Public Acts of 1889, to order any changes or alterations in highways, including their partial discontinuance, necessary to the elimination of a dangerous grade crossing (of which necessity the commissioners are the judges), subject to a review of their proceedings on appeal to the superior court, and that the law conferring this power is constitutional, is too well settled to be now questioned. *Suffield v. New Haven & N. Co.* 53 Conn. 363, 370; *Fairfield's Appeal*, 57 Conn. 167, 171; *Doolittle v. Branford*, 59 Conn. 402, 407; *Cullen v. New York, N. H. & H. R. Co.* 66 Conn. 211, 222; *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527. An appeal was taken from the order in question to the superior court, and the order was affirmed by that court, and the judgment of the superior court was affirmed by this court, in the case last cited. To all these proceedings the plaintiff was a party. So far as concerns this plaintiff, the question of public safety, and that of necessity of occupying any portion of North Main street for the elimination of the grade crossing as ordered, is *res judicata*. *Doolittle v. Branford*, 59 Conn. 411. The plaintiff suggests in argument that the course of proceedings by the commissioners, as recited in the order, lays no valid foundation for an order directing changes in North Main street. The record of the commissioners' proceedings, on its face, seems sufficient to justify any necessary change in that highway; and, being sufficient on its face, the question of some possible latent defect cannot be raised by this demurrer, even if the plaintiff could raise it in any other way than by appeal.

The brief and argument of the plaintiff suggest that its real grievance is based on the assumption that the second defense in some way cuts off or abridges its right to establish upon trial the claim that, whatever this order may apparently say, the commissioners did not in fact intend to authorize the occupation of any part of North Main street, and therefore did not authorize an abutment extending over the line of that street. We fail to see how this right, if the plaintiff has such a right, is in any way affected by the mode of pleading the second defense, or how the demurrer can

be construed as specifying such a reason for the insufficiency of the pleading. If the plaintiff can in this action, or in any other action, attack the validity of the order, or establish a meaning not apparent on its face, because the order was made under a misapprehension of essential conditions, it certainly cannot do so by means of this demurrer. We think the question raised by the demurrers to the second defenses to the first and second counts do not materially differ. No claim was made in argument that the same considerations did not apply to both demurrers.

There may be doubt whether the true theory of the practice act would not, in a case like

this, require the defendant to allege the facts set up in the second defense in connection with those set up in the first as a single defense, rather than to make such facts the basis of a separate and distinct defense. The practical results of following either form may be substantially the same, and any error in such a matter is waived, if not specified in a demurrer. As the question is not material to our decision, we merely mention the doubt, in order to avoid any implied approval of the form followed.

There is no error in the judgment of the Superior Court.

The other Judges concur.

GEORGIA SUPREME COURT.

SAVANNAH, FLORIDA, & WESTERN RAILWAY COMPANY, *Plff. in Err.*,

v.
Lula QUO.

(..... Ga.....)

***1. A railroad company is liable in damages to a female for an assault with intent to commit rape upon her person by one employed by such railroad company as a baggage master upon a train on which such female is at the time being conveyed as a passenger.**

2. A member of a jury impaneled to try a case is not by this fact debarred from testifying in such case as a witness, if otherwise competent.

3. The verdict is supported by the evidence, and the errors complained of are not sufficient to require the granting of a new trial.

(November 27, 1897.)

ERROR to the Superior Court for Ware County to review a judgment in favor of plaintiff in an action brought to recover damages for an assault made upon her by one of defendant's employees while she was a passenger on its train. *Affirmed.*

The facts are stated in the opinion.

Messrs. Erwin, Du Bignon, & Chisholm, for plaintiff in error:

A master is liable for the acts of his servant only when the servant is acting in the course of his employment.

Savannah, F. & W. R. Co. v. Wall, 96 Ga. 328; *Georgia R. & Bkg. Co. v. Wood*, 94 Ga. 124; *Wright v. Georgia R. & Bkg. Co.* 84 Ga. 337; *Louisville, N. O. & T. R. Co. v. Douglass*, 69 Miss. 728; *Smith v. New York C. & H. R. R. Co.* 78 Hun. 524; *Candiff v. Louisville, N. O. & T. R. Co.* 42 La. Ann. 477; *International & G. N. R. Co. v. Cooper*, 88 Tex. 607; *Isaacs v. Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418; *Howe v. New-*

march, 12 Allen, 49; *Corcoran v. Concord & M. R. Co.* 5 U. S. App. 453, 56 Fed. Rep. 1014, 6 C. C. A. 231; *Story, Agency*, § 456; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Merchants' Nat. Bank v. Guilmar-*

tin, 88 Ga. 797, 17 L. R. A. 322; *International & G. N. R. Co. v. Anderson*, 82 Tex. 516. The baggage master committed an act "lacking both in the rendition of and in the intent to render any service to the employer. He represents nobody but himself. He throws off all allegiance to his master and takes the part of a common enemy to all concerned."

Howe v. Newmarch, 12 Allen, 57.

There was no evidence proving that the alleged act was within the scope of the authority or employment of Munroe, but, on the contrary, the evidence showed clearly that such an act was not within the scope of his authority, employment, or service.

Shebley v. Hill, 57 Ga. 232; *Wagner v. Robinson*, 56 Ga. 47; *Johnson v. Quin*, 51 Ga. 289; *Kenwick v. La Grange Bank*, 29 Ga. 200; *Daniel v. Johnson*, 29 Ga. 207; *Water Lot Co. v. Jones*, 30 Ga. 944.

The testimony of the person making the charge should be scrutinized with care by the jury, and any testimony as to the lewdness or prostitution of her person should be considered in determining to what extent her testimony is worthy of belief.

Wood v. State, 48 Ga. 293, 15 Am. Rep. 664; *McDaniel v. Walker*, 29 Ga. 266.

Messrs. Toomer & Reynolds, for defendant in error:

Under the Code and two very recent decisions of this court a railroad company is liable for injury and damage, as alleged in the plaintiff's declaration and proved on the trial.

Ga. Code, § 2321; *Brunswick & W. R. Co. v. Bostwick*, 100 Ga. 96; *Smith v. Savannah, F. & W. R. Co.* 100 Ga. 96.

Cobb, J., delivered the opinion of the court:

Lula Quo sued the Savannah, Florida, &

*Headnotes by COBB, J.

NOTE.—As to carrier's liability for assaults on passengers, see note to *Davis v. Houghtelin* (Neb.) 14 L. R. A. 737; also *Baltimore & O. R. Co. v. Bar-*

Western R. Co. (Utah) 30 L. R. A. 297; *Lucy v. Chicago G. W. R. Co. (Minn.)* 31 L. R. A. 551; and *West Memphis Packet Co. v. White* (Tenn.) 88 L. R. A. 427.

Western Railway Company, alleging that on June 18, 1896, while she was a passenger upon the train of the defendant, one Munroe, an employee of the defendant, unlawfully assaulted her and attempted to commit a rape upon her person, and that the defendant was negligent in not protecting her, and in having such employee in its service; it being known to the company that he was notoriously a dissolute and abandoned character. Upon the trial the evidence was conflicting, but there was evidence in behalf of the plaintiff, which, if credible, established the allegations in her petition. It appeared from this evidence that the person committing the assault was a baggage master on the train, and that he came into the part of the coach in which plaintiff was sitting alone, and, having fastened both of the doors of the car, committed the assault upon her which is the subject-matter of her complaint, and did not desist until someone came to one of the doors, and witnessed what was transpiring in the car. The jury returned a verdict in favor of the plaintiff for \$2,000, and, the defendant's motion for a new trial being overruled, it excepted.

When a contract of carriage is entered into between a passenger and a carrier, there arises out of the relation thus created, not only a duty to safely transport the passenger to the destination fixed in the contract, but also to protect him from injury, violence, insult, and ill treatment at the hands of the servants of the carrier who are in charge of, or connected in any way with, the carriage in which the passenger is being transported. 5 Am. & Eng. Enc. Law, 2d ed. p. 541. This seems to be the settled doctrine of this state. *Western & A. R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842; *Atlanta & W. P. R. Co. v. Condor*, 75 Ga. 51; *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 28; *Cole v. Railroad Co.* (last term) 29 S. E. —. While a carrier of passengers owes a duty to all of its passengers to protect them from violence and insult on the part of its servants, it owes an especial duty to female passengers, to protect them from insult and abuse. In the case of *Chamberlain v. Chandler*, 8 Mason, 242, Judge Story, in discussing the question now under consideration, uses the following language: "In respect to passengers, the care of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence on board; but for reasonable food, comforts, necessities, and kindness. It is a stipulation, not for toleration merely, but

for respectful treatment, for that decency of demeanor which constitutes the charm of social life; for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet farther, it includes an implied stipulation against obscenity, that immodesty of approach, which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors by the excitement of terror, and cool malignancy of conduct, to inflict torture upon susceptible minds. What can be more disreputable, and at the same time more distressing, than habitual obscenity, harsh threats, and immodest conduct, to delicate and inoffensive females? What can be more oppressive than to confine them to their cabins by threats of personal insult or injury? What more aggravating than a malicious tyranny, which denies them every reasonable request, and seeks revenge by withholding suitable food and the common means of relief, in cases of seasickness and ill health?" In the case of *Nieto v. Clark*, 1 Cliff. 145, this decision of Judge Story's was cited with approval by Judge Clifford. While it is true that in two cases cited the carrier whose liability was under consideration was a carrier by water, still the doctrine laid down in these cases has been followed in cases where suits were brought for wrongs of a similar nature inflicted upon passengers in a railway carriage. See *Craken v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504; *Louisville & N. R. Co. v. Ballard*, 85 Ky. 807.

2. One of the jurors impaneled to try this case was called from the jury box, and placed upon the stand as a witness. To this proceeding the defendant objected on the ground that a person who had been selected as a juror in a case was, by reason of such relation to the case, disqualified to testify as a witness. It is too well settled to admit of discussion that a juror is not incompetent to testify as a witness solely on account of having been impaneled and sworn in the case, if he is otherwise competent. Civil Code, § 5387; *Chattanooga R. & C. R. Co. v. Owen*, 90 Ga. 266 (9), and cases cited.

3. There was sufficient evidence to authorize the verdict, and none of the alleged errors were such as to require the granting of a new trial.

Judgment affirmed.

All the Justices concur.

IDAHO SUPREME COURT.

ADA COUNTY FARMERS' IRRIGATION COMPANY, *Appt.*,

v.

FARMERS' CANAL COMPANY, Limited,
Resp.

(.....Idaho.....)

- *1. **Possessory rights to rights of way** for irrigating ditches, and the right to the use of water, may each have an existence independent of the other.
2. **A ditch may be conveyed**, reserving the water right, or the water right may be conveyed, reserving the ditch.
3. **Under the provisions of § 2825**, Rev. Stat., possessory rights to ditch and water rights are real property or real estate.
4. **The owner of a ditch on public lands** of the United States does not forfeit the same merely by nonuser.

(January 24, 1898.)

APPEAL by plaintiff from a judgment of the District Court for Ada County in favor of defendants in an action brought to recover possession of a right of way for an irrigating ditch. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hawley & Puckett, J. H. Richards, and Hugh E. McElory, for appellant:

An action to establish a right to the possession of a right of way over which to divert water cannot be maintained exclusively of the right to divert water, especially as against one who has such right to divert.

Smith v. Hawkins, 110 Cal. 122.

There is only one way, so far as this controversy is concerned, to acquire the right to the possession of a right of way over the public domain, and that is as follows: "Whenever by priority of possession, rights to the use of water for . . . agricultural . . . purposes have vested and accrued . . . the right of way for the construction of . . . canals . . . is acknowledged and confirmed."

U. S. Rev. Stat. § 2339.

Not having attempted to sustain the allegations relative to acquiring a right to the use of water, what possible claim of right can respondent have under these provisions to the right of way in controversy herein?

Since the right of way cannot exist without the water right, it follows that the same measure of diligence will be required to maintain lawful possession of the one as of the other.

Messrs. N. M. Ruick and W. E. Borah, for respondent:

Possessory rights to ditches, and possessory rights to water, may each have an existence independent of the other.

A person may convey a water right, reserv-

*Headnotes by SULLIVAN, Ch. J.

NOTE.—As to abandonment of rights of prior appropriators, see *note* to *Hewitt v. Story* (C. C. App. 9th C.) 30 L. R. A. 265.

40 L. R. A.

ing the ditch, or convey a ditch independent of the right to the use of the water accustomed to flow therein.

Kinney, Irrigation, § 224, and cases cited in *note*; *Reed v. Spicer*, 27 Cal. 58.

Interest in a water ditch is real estate, and can only be transferred by deed, prescription, or condemnation.

Burnham v. Freeman, 11 Colo. 601; *Smith v. O'Hara*, 43 Cal. 871.

Clifford v. Larrien (Ariz.) 11 Pac. 397, recognizes ownership of a ditch in one person, and ownership of water running therein in another.

A ditch constructed on unoccupied public lands of the United States is held by grant, and the owner of such ditch does not forfeit his right thereto merely by non-user.

Welch v. Garrett (Idaho) 51 Pac. 405.

There can be no abandonment without some action of the will and an intent to abandon, but such intent may be inferred from the acts and declarations of the party against whom the relinquishment is claimed.

Gassert v. Noyes, 18 Mont. 216; *Wimer v. Simmons*, 27 Or. 1.

Sullivan, Ch. J., delivered the opinion of the court:

This is an action to recover possession of a certain right of way for an irrigating ditch in Ada county, on which is situated an incomplete canal. It is alleged in the complaint that on the 18th day of January, 1896, one Eagleson located a water right, the water appropriated thereby to be used in the irrigation of certain lands therein described, and that a notice thereof was duly posted on the south bank of Bolsé river, about 1 mile above what is known as the "New York Dam Site," and nearly opposite the mouth of Sheep gulch, in Ada county (that being the place of intended diversion), whereby he claimed the waters of said river, to the amount of 300 cubic feet per second; that within the time required by law a copy of said notice was filed for record in the recorder's office of Ada county, and a duplicate copy thereof in the office of the state engineer; that said Eagleson, who is designated "promoter" in trust for the plaintiff corporation thereafter to be formed, began, within sixty days after posting said notice, to construct a canal, by surveying, laying out, and staking off a right of way. Then follows a description of said right of way, which substantially covers the the right of way claimed by the defendant corporation, and commonly known and designated as the "New York Canal Right of Way." It is also alleged that Eagleson, after said 18th day of January, 1896, became and was in the lawful and undisputed possession of said right of way, and proceeded with diligence in the construction of a ditch thereon; that thereafter, on the 10th day of February, 1896, said Eagleson, together with others, organized the corporation plaintiff and appellant, and that on the 29th of February said Eagleson conveyed to said corporation all of the rights he had acquired in and to said water right and right of way; that thereupon the plaintiff corporation took pos-

session of said right of way, and diligently proceeded with the construction of a canal upon said right of way; that, while the plaintiff was such owner and in possession of said right of way, the defendant corporation, on or about the 20th day of April, 1896, wilfully and maliciously, with force and violence, and without right or title, drove the plaintiff, its agents and employees, therefrom, and took possession of said right of way, except that part situated between the point where the said notice of location of water right was posted and the point commonly known as the "New York Dam Site," and ever since has withheld, and still withholds, possession thereof; that defendant has committed waste on said right of way, to plaintiff's damage in the sum of \$1,000. The second cause of action set up in the complaint is equitable in its nature, and under it a temporary injunction was granted. Plaintiff prays judgment for possession of said right of way, and for \$2,000 damages, and for an injunction. The defendant makes an answer, and files a cross complaint. In them are set forth a brief history of the organization of the Idaho Mining & Irrigation Company; its ownership of certain water rights, and the greater portion of the right of way described in the complaint; the operations of said company, and its expenditure of about \$300,000 upon said right of way, in surveying and constructing a very large canal, about 6 miles in length, which resulted in the insolvency of said company, and a large indebtedness to one W. C. Bradbury for constructing said canal; the purchase of said canal, right of way, and water rights of said company by said Bradbury at sheriff's sale,—and alleges the organization of the defendant corporation, and the sale and transfer to it by Bradbury of said canal and right of way, and the work done by said defendant company thereon since its purchase thereof. The trial was by the court without a jury, and judgment was rendered in favor of the plaintiff for the recovery of that part of the right of way situated above the said New York dam site; and it rendered judgment in favor of the defendant for the remainder of said right of way, or that below said dam site. A motion for a new trial was interposed by the appellant, and denied by the court. The appeal is from the judgment and an order overruling the motion for a new trial.

This appeal involves the right to the possession and ownership of that portion of said right of way below said dam site; no appeal having been taken from the judgment awarding that part of said right of way above said dam site to the appellant. It appears from the record that one Eagleson located a water right on Boise river on January 18, 1896, with a view of diverting the water by means of a canal, and surveyed a right of way therefor, which right of way was substantially the same as the right of way hereinafter referred to as the "New York Canal and Right of Way" (the intention being to appropriate said right of way), and the uncompleted canal situated thereon; that thereafter, on the 10th of February, 1896, said Eagleson, with others, organized the corporation plaintiff, and on the 29th day of February, 1896, conveyed whatever title he had

acquired to said right of way and water right to said corporation; that thereupon said corporation began the construction of a canal on said right of way; that on or about April 20, 1896, the defendant corporation, through its agents and employees, drove the agents and employees of the plaintiff corporation therefrom, and took possession thereof for the defendant, except that portion situated above said New York dam site. It further appears that some time prior to the year 1890 the Idaho Mining & Irrigation Company, a corporation, had planned a system of canals for diverting water from Boise river, and designated it the "New York Canal System." That system, aside from necessary laterals, consisted of the Main canal and the Phyllis canal. The latter was taken out of Boise river about 14 miles below Boise City, was about 37 miles in length, and had a capacity of about 300 cubic feet of water per second, and was completed to Snake river in June, 1890. The Main canal was designed to be taken out in the cañon some miles above Boise City, and it was to be constructed 40 feet wide on the bottom, and to carry 12 feet in depth of water. The main canal was known as the "New York Canal," and the record shows that the water from it was to have been distributed by a system of laterals. The Phyllis canal was to be supplied with water partly from Boise river, and partly by taking up the waste water from said main canal. The Phyllis canal has been in use since its completion, in 1890. Work was begun on the New York canal in 1890, and up to April, 1891, the company had expended \$300,000 in its construction, completing a section 6 miles in length, when the company became insolvent, and was owing to the contractor, W. C. Bradbury, who constructed said work, a large sum of money. Thereupon Bradbury filed a lien, under the laws of this state, upon the right of way and canal in controversy, and also upon the Phyllis canal, which lien was foreclosed, and said rights of way and canal sold at sheriff's sale to said Bradbury, who thereafter obtained a sheriff's deed to the same, February 8, 1894; said Bradbury thus became the owner of said canal system, and of all rights, interests, and privileges theretofore held and owned by said Idaho Mining & Irrigation Company. It appears that an association, composed of many farmers, began negotiation in January, 1896, with Bradbury for the purchase of said New York canal. Said association was thereafter merged in the defendant company, the Farmers' Canal Company, Limited, which company was incorporated in March, 1896. About 175 farmers became stockholders in said corporation. As a result of said negotiations, said company took possession of said canal on February 21, 1896, on which day a deed and contract were drawn between Bradbury and said company; but said deed was not delivered until April 10, 1896. It appears that W. W. Lynch, I. N. Hall, and others, located a water right on Boise river, January 24, 1896, at the mouth of the cañon above referred to, which right they thereafter conveyed to the defendant company. After defendant took possession of said canal as aforesaid, it caused the right of way below

the mouth of said cañon to be resurveyed and cross-sectioned, and began work, and expended in cash and labor on said canal about \$2,500, up to February, 1897. It appears that the plaintiff (the appellant company) had procured an injunction on June 6, 1896, against the defendant company, whereby said company was restrained from interfering in any manner with the right of way for said canal in said cañon, above the point where the said Lynch and Hall water location was made. Thereafter the defendant company did no work above that point. It appears that some work had been done in said cañon by the New York Canal Company, which is another name for the Idaho Mining & Irrigation Company. After Bradbury had obtained title to said canal by sheriff's deed, it appears, he procured surveys, plans, and estimates for a dam across Boise river at the lower end of said cañon, some 2 miles below the original head of the New York canal, with the avowed intention of raising water so as to use that portion of the New York canal that was completed, and also for the purpose of developing a water power, and later obtained a report upon the subject, with a view of interesting capital in the undertaking. In conveying said canal and right of way to the defendant corporation, Bradbury reserved the exclusive right to develop said water power, but conveyed to defendants two certain water rights, which are described in the deed from Bradbury to defendant, and will be hereafter referred to as water rights located by Burns and Foote.

Numerous errors are assigned, but the main question for decision is, Did the defendant establish a superior right to the possession of said right of way?

The first contention of appellant is that an action to establish a right to the possession of a right of way on the public domain, over which to divert water, cannot be maintained unless the parties have first acquired a right to divert water; and it cites § 2339, United States Rev. Stat. The respondent alleges in its cross complaint that it procured, by purchase, a water right from Bradbury; and it is contended by appellant that, as the defendant failed to prove that allegation, the right to the possession of said right of way cannot be maintained. It must be remembered that, at the date of the location of the water right and right of way under which appellant claims, Bradbury was the owner of said right of way and partially completed canal; and conceding that, because of the delay in the construction of said canal, the water rights located by Burns and Foote had been forfeited we do not think that worked a forfeiture of said uncompleted canal and right of way. At that time Bradbury was the owner of a water right consisting of 300 feet per second of the waters of said Boise river, and was diverting said water through the Phyllis canal, which was a part of said New York Canal System, and of which system said New York canal was intended, when completed, as the main canal. That being true, had Bradbury retained the ownership of the canal and right of way in dispute, he could, on the completion of said canal, have diverted through it a part or all of the water that had been appropriated for di-

version through said Phyllis canal, and thus had a valid use for such canal, and a water right in connection therewith, or might have utilized said canal by water subsequently located and appropriated or purchased. The record does not show the slightest intention to abandon said right of way and canal, nor is there any proof of forfeiture. We are of the opinion that possessory rights to ditches and to the use of water may each have an existence independent of the other. A ditch may be conveyed, reserving the water right, or the water right may be conveyed, reserving the ditch. *Clifford v. Larrien* (Ariz.) 11 Pac. 397. Ditches and water rights are real estate, under the provisions of § 2825, Rev. Stat. See also *Kinney, Irrigation*, § 224; *Reed v. Spicer*, 27 Cal. 58. In *Welch v. Garrett* (Idaho) 51 Pac. 405, this court held "that a ditch constructed . . . on unoccupied public lands of the United States is held by grant, and the owner of such ditch does not forfeit his right thereto merely by nonuser." The plaintiff seeks to appropriate to its own use said canal and right of way, on the ground that its grantors had acquired a right to divert water, and had located a right of way for an irrigating ditch over and upon the right of way claimed by respondent, and places its claim on the ground that said last-named right of way had been forfeited or abandoned. Forfeiture or abandonment presupposes a prior valid right. Abandonment is a question of intention, and forfeitures are not favored, and must be clearly established. The record does not show abandonment, and we do not think the loss of the right to divert water under a specific location necessarily forfeits the right to an irrigating canal or right of way for one. It is not contended or claimed that appellant acquired title to said right of way and canal through prescription, or otherwise than by locating a right of way over it in January, 1896, at which time Bradbury was the owner and in possession thereof, and shortly thereafter sold the same to the defendant. In fact, negotiations were in progress between Bradbury and the promoters of the defendant corporation for a sale and purchase of said canal and right of way at the time plaintiffs' grantors made the alleged location.

The Lynch and Hall location had been made prior to the purchase of canal and right of way of Bradbury by defendant, and, although the defendant did not plead said Lynch and Hall water right in the trial of the case, the court permitted its proof; and that is assigned as error. Section 4225, Rev. Stat., provides that no variance between the allegations in the pleadings and proof is deemed to be material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon its merits. Had an amendment been offered, setting forth the location and purchase of said water right, we think the court would have been warranted in allowing it; and, besides, we do not think that the variance referred to misled the plaintiff to his prejudice. Section 4231, Rev. Stat., provides that, in every stage of an action, courts must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and that no judg-

ment shall be reversed or affected by reason of such error or defect. However, in our view of this case, it was not absolutely necessary for the defendant to show the purchase of said Lynch and Hall water right, to establish its right to the possession of the uncompleted canal and right of way in dispute. The Idaho Mining & Irrigation Company had expended three or four hundred thousand dollars in attempting to complete said New York Canal System, and became insolvent. The contractor, Bradbury, was a large creditor, and had done much of the work in constructing said system, and had to take the same in payment of such indebtedness. It appears that he was unable to complete said system, and sold said right of way and uncompleted canal to the defendant corporation, composed of a large number of farmers, who own land that may be irrigated from said canal extended.

Under the facts of this case, it would be repugnant to every principle of justice and equity, and would result in confiscation, to hold that plaintiff became the owner of said uncompleted canal and right of way, and was entitled to the possession thereof. We are of the opinion that Bradbury had not forfeited said canal and right of way, that he had a lawful right to sell and convey the same to the respondent, that he did so, and that respondent is the owner of said right of way, and entitled to the possession of the same.

The judgment of the court below must be affirmed, and it is so ordered, with costs in favor of respondent.

Huston and Quarles, JJ., concur.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

Henry WELLENVOSS *et al.*, Appts.,
v.
GRAND LODGE OF KNIGHTS OF PYTHIAS
of Kentucky *et al.*

(.....Ky.....)

1. **A mandatory injunction to compel the secret password of the grand lodge** of a benevolent society to be given to a delegate of a subordinate lodge, and to permit him to participate in the deliberations, is not within the province of a court of equity, where it is not shown that any right of property is endangered, although an irreparable injury may be done to the delegate and to his lodge by excluding him.
2. **An allegation that a person pays dues to a lodge**, and that lodge pays to a grand lodge, and that both bodies are chartered benevolent societies, does not sufficiently allege that they have any rights of property in the grand lodge.

(April 16, 1898.)

APPEAL by complainants from a judgment of the Circuit Court of Pulaski County in favor of defendants in a suit brought to compel defendants to recognize the right of Wellenvoss to admission to defendant's councils.

Affirmed.

The facts are stated in the opinion.

Mr. O. H. Waddle for appellants.

Messrs. W. A. Morrow and James A. Garrison for appellees.

White, J., delivered the opinion of the court:

The appellants, Henry Wellenvoss and Uhland Lodge, No. 4, Knights of Pythias of Louisville, Kentucky, by this proceeding in the circuit court, sought a mandatory injunction against appellees, Thomas B. Mathews,

grand chancellor of the Grand Lodge of the Knights of Pythias of Kentucky, and the Grand Lodge of the Knights of Pythias of Kentucky, commanding Mathews, as grand chancellor, to impart to appellant Wellenvoss the password of the grand lodge, and commanding the grand lodge to receive Wellenvoss into its body, and to permit him to participate in its deliberations as a regular authorized delegate of appellant Uhland lodge, at the regular session of that body at Somerset, Kentucky, in September, 1895. The petition alleges that appellant Wellenvoss is a member of Uhland lodge, in good standing, and has been since 1889, and that Uhland lodge is a member in good standing of appellee grand lodge, and as such member is entitled to representation in the deliberations of said body, as well as to all the rights and privileges pertaining thereto, and, in accordance with its rights, had selected and commissioned appellant Wellenvoss as its representative to the grand lodge, and that appellees had wrongfully, and without right or authority, excluded appellant Wellenvoss from its deliberations. The petition also alleges that both appellant Uhland lodge and appellee grand lodge are benevolent societies, the appellant being subordinate and deriving its charter from appellee. It is alleged that appellant Wellenvoss, by the laws of the order, pays regular dues to appellant Uhland lodge, to be used as the lodge chooses, according to its laws; that Uhland lodge pays regular dues to the grand lodge to defray its legitimate expenses, etc. It is alleged that, unless the court grant a mandatory injunction, great and irreparable injury will be done to both appellants, in that Wellenvoss will be deprived of his rights as representative and Uhland lodge will be denied its right of representation. Appellants, when they filed their petition, gave notice and afterwards entered motion before the judge of the circuit court in chambers for the writ. Appellees appeared, and filed demurrer; and also filed answer; also affidavits denying appellant's right to the relief sought. Appel-

NOTE.—As to rights of members of benefit societies, see also *Lavalle v. Société St. Jean Baptiste De Woonsocket (R. I.)* 16 L. R. A. 332.

lants filed affidavits in support of the motion, and on hearing before the judge in chambers, the writ was refused. Appellants afterwards filed an amended petition, in which the only allegation is that both appellant Uhland lodge and appellee grand lodge are regular incorporated bodies by the laws of Kentucky. On final hearing, the court sustained a demurrer to the petition as amended, and, appellants declining to plead further, the action was dismissed, and from that judgment this appeal is taken.

The question presented by this appeal is, Does the petition as amended present a cause of action? By the allegations of the petition there is no right of property involved. The only right claimed to have been violated is the social right of Wellenvoss to participate in the deliberations of the grand lodge and the right of Uhland lodge to have representation. It is not alleged that appellee grand lodge absolutely refused Uhland lodge representation, but taking the pleading in its usual way, most strongly against the pleader, the only denial by the grand lodge was the right of Wellenvoss to represent Uhland lodge, which was not a property or civil right, but only social. The petition alleges that over the subordinate lodges, of which Uhland lodge is one, there is a grand lodge for the state, appellee; and over the grand lodges of the several states a supreme lodge. It is argued by appellee that, as appellants have informed the court of the existence of a supreme body, the natural presumption would follow that appellants had a right of appeal to that tribunal, and could not be heard to complain in the courts until, at least, they had exhausted all the remedies provided in the order. There is force in this contention, but we are not prepared to say from this record that this right of appeal actually exists. The supervisory powers of the supreme body over the grand lodges, or the powers of the grand lodges over the subordinate lodges, are not disclosed by the pleadings, and we decline to speculate or presume as to these powers. By this action the chancellor is asked to compel the proper officer of a secret benevolent society to impart to a person the secret password that will admit that person to the meetings. This is sought because it is alleged, and for the purposes now will be taken as true, that, if appellant Wellenvoss be not admitted, great and irreparable injury will be done, both to Wellenvoss and Uhland lodge. It is alleged that Wellenvoss pays dues to Uhland lodge, and that Uhland lodge pays dues to appellee, the latter being its *pro rata* of the legitimate expense of appellee. We are of opinion that there is no right of property involved. It is not alleged that, by the denial of appellee to admit Wellenvoss to its councils, appellant Uhland lodge will lose any right of property or be endangered in any right of property. It is not alleged that appellee is possessed of any property in which appellant Uhland lodge has an interest. It is not alleged that, by the failure of Wellenvoss to gain admittance to the appellee as the representative of Uhland lodge, he will lose any right of property either in the grand lodge or in Uhland lodge. The allegation that Wellenvoss pays dues to appellant Uhland lodge, and that lodge to appellee, and that both bod-

ies are chartered benevolent societies, does not, of itself, state such rights of property as would authorize the chancellor to interfere because of the alleged violation of the property rights. There should be some allegation showing that there is property or funds in the hands of the society in which a party is directly interested before he can ask the aid of the court for relief.

We are referred to no case that has ever held that it was within the province of a court of equity to compel by any process that the secret password or secret work of any social benevolent society be imparted to a person. On the contrary, it has been held repeatedly by this court that courts of equity cannot revise or question ordinary acts of church discipline; and in the case of *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490, this court said: "The chancellor will not or cannot restore him to membership, or require that he shall be permitted to attend their stated meetings." We are of opinion that, as no right of property is involved, the chancellor could not interfere with the social relations of this society, and therefore properly denied the mandatory injunction.†

Judgment affirmed.

H. L. McMURTRY, *Appt.*,

v.

PHILLIPS INVESTMENT COMPANY
et al.

(.....Ky.....)

An "apartment house," constructed for residence purposes only, is not a breach of a condition in a deed against using the property except for "residence purposes."

(March 12, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to restrain the erection of an apartment house. *Affirmed.*

The facts are stated in the opinion.

Messrs. Simrall, Bodley, & Doolan, for appellant:

The covenants embodied in the several deeds to lots in St. James Court subdivision, without regard to extraneous circumstances, prohibit the erection of the building proposed by appellees.

Gillis v. Bailey, 21 N. H. 156.

In construing this covenant the court must look to surrounding circumstances in order to ascertain the meaning of the parties.

1 Jones, Real Prop. in Conveyancing, § 748; *Gillis v. Bailey*, 21 N. H. 156; *Hutchinson v. Ulrich*, 145 Ill. 386, 21 L. R. A. 391.

Where the owner of a tract of land divides it up into building lots for sale, pursuant to a building scheme or residential plan, which is published to the world by him, and on the faith of the integrity of that plan purchasers are induced to buy lots in the subdivision,

† NOTE.—For apartment house as a single dwelling, see *Hutchinson v. Ulrich* (Ill.) 21 L. R. A. 391.

they thereby acquire an interest in all the details of that residential plan or building scheme, whether it is established or proved by matter of deed or by matter *in pais*.

1 Jones, Real Prop. in Conveyancing, §§ 735, 737, 744, 745, 748, 769, 771, 772, 780; 2 Pom. Eq. Jur. §§ 688, 689; 3 Pom. Eq. Jur. §§ 1295, 1342, and notes; *Tallmadge v. East River Bank*, 26 N. Y. 105, 2 Duer, 618; *Beals v. Case*, 138 Mass. 138; *Coughlin v. Barker*, 46 Mo. App. 54; *Maricell v. East River Bank*, 3 Bosw. 145; *Sharp v. Ropes*, 110 Mass. 385; *Parker v. Nightingale*, 6 Allen, 347, 83 Am. Dec. 632; *Fisher v. Beard*, 82 Iowa, 353; *Jeffries v. Jeffries*, 117 Mass. 189; *Linzee v. Mixer*, 101 Mass. 529; *Sanborn v. Rice*, 129 Mass. 396; *Hano v. Bigelow*, 155 Mass. 343; *Hopkins v. Smith*, 162 Mass. 444; *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713; *Western v. Macdermott*, L. R. 2 Ch. 72; *Whitman v. Gibson*, 9 Sim. 196; *Spicer v. Martin*, L. R. 14 App. Cas. 20; *Ronan v. Portland*, 8 B. Mon. 232; *Memphis & St. L. Packet Co. v. Grey*, 9 Bush, 145; *Grogan v. Hayward*, 6 Sawy. 498; Washb. Easem. 4th ed. pp. 115, 116; Washb. Easem. 3d ed. pp. 96-106, *62, 64.

The testimony of an architect as an expert witness is competent to show the meaning of the words "residence" and "apartment house" as architectural terms, and prove that they have a peculiar and technical signification in that science or profession.

Greenl. Ev. §§ 277-280, 292; *Eaton v. Smith*, 20 Pick. 156; *The Reeside*, 2 Sumn. 569; *Mead v. Northwestern Ins. Co.* 7 N. Y. 530; *Astor v. Union Ins. Co.* 7 Cow. 202; *Smith v. Wilson*, 3 Barn. & Ad. 728.

Mr. Bennett H. Young, also for appellant:

A purchaser of land under a deed containing no conditions may nevertheless take subject to certain parol restrictions made to others by his grantor, where he had knowledge, or the opportunity to know, of such restrictions before making his purchase.

Knapp v. Hall, 20 N. Y. Supp. 44, 17 N. Y. Supp. 437; *Willis v. Hulbert*, 117 Mass. 151; *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398; *Hall v. Solomon*, 61 Conn. 482.

In the Kentucky mind, "residence purposes" and "a residence" have a fixed and definite meaning. It has never been the habit or custom to use those words in Kentucky, except as expressing a place where a family live in a single house.

The limitation in the deed is notice to purchasers, and puts purchaser on notice.

Tallmadge v. East River Bank, 26 N. Y. 107.

A purchaser of lots takes all appurtenances, natural or acquired.

Ronan v. Portland, 8 B. Mon. 235; *Memphis & St. L. Packet Co. v. Grey*, 9 Bush. 146.

Nobody that bought these lots ever had any idea of any apartment house being erected, and such a restriction on the use of the property is not against the theory of the law, but having once been made, it should be the effort of the courts to protect parties in the exercise and use of their rights.

Hutchinson v. Ulrich, 145 Ill. 336, 21 L. R. A. 391; *Amerman v. Deane*, 132 N. Y. 355, 40 L. R. A.

Mr. E. F. Trabue also for appellant.

Messrs. C. B. Seymour and George B. Eastin, for appellees:

Equity will not lend its aid by injunction in this class of cases when the covenant in question is too vague and uncertain to be specifically enforced, but will leave the party aggrieved in such case to pursue his remedy, if any, at law.

2 High, Inj. § 1135.

A restrictive covenant to the effect that the purchaser is to erect on the premises herein described "a single dwelling" does not forbid the erection of a single apartment house.

Hutchinson v. Ulrich, 145 Ill. 336, 21 L. R. A. 391.

Mr. W. S. Pryor also for appellees.

Hazelrigg, J., delivered the opinion of the court:

This action was brought to restrain the erection of what is known in the record as an "apartment house" on St. James' Court, in the city of Louisville. The language of the restricting clause in the conveyance controlling the matter is as follows: "It is a condition of this deed that the property herein conveyed shall be used for residence purposes only, and that, in erecting a residence therein, it shall be built of brick or stone, and shall cost not less than \$7,000, and that in erecting said residence the front wall thereof shall be not less than 35 feet back from the sidewalk line of St. James' Court." It is also averred that there was a symmetrical plan for improving this court with single and segregated private residences, which would be disturbed, in fact destroyed, by the erection of the house complained of, and notice of which plan was given the public by advertisements, posters, and handbills descriptive of the character of the buildings that were to be erected in the court. The proof shows that the building complained of is to cost some \$40,000, is to be of brick and stone, and its front wall is to be set back the required distance. The controversy is whether this house is to be used for residence purposes only, within the meaning of the deed. The explanation of its character and in answer to the claim that there was to be in it a public or semipublic restaurant, the originator of the scheme to erect this house testifies that "there is to be no restaurant of a public nature. There is to be everything in this house to make housekeeping comfortable. Every apartment in the house is to have a parlor and dining room and one or more bedrooms and a kitchen. Every apartment is to have more than one bedroom. There is only one four-room flat. Provision is made in the house for hot and cold water and all other conveniences. The basement, in which is to be a large dining room, to be used by the occupants of the house, if desired, also contains three sets of laundry tubs, that each apartment may have one or more days to use in laundering their linen, or to be used in any way they choose, as a laundry is used in a private residence. A part of the basement is to be used for storing the trunks of the parties who may choose to put their trunks out of their apartments. There is to be nothing about it of a cheap or nasty kind. There is but one

house in St. James' Court constructed of as fine material, and that is the Conrad residence." It is shown, indeed admitted, that these different apartments or flats are places for persons to reside in; but it is contended that the language of the restriction conveys the idea of a single residence, for a single family, or, at any rate, excludes the idea of a number of residences under the same roof or in the same house. We think, however, that to give the language used this meaning would be to extend its scope beyond the expressed intention of the parties. The purposes for which the houses to be erected on the court were to be used were "residence purposes only;" and as the house in controversy is to be constructed for such purpose only, and is not to be used for any other purpose, we do not think its construction is at all prohibited by this restriction clause. If the intention had been to permit the erection of only segregated private residences, the instrument would doubtless have so provided. In *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L. R. A. 391, the purchaser covenanted to erect "a single dwelling, costing not less than \$7,500, and further, "that only a single dwelling is to be

constructed or placed upon each 50-foot lot." It was held that the intention was to require the property to be used for residence purposes, and, under the restrictive clauses named in the deed, stores, livery stables, warehouses, etc., could not be erected, but that flats or apartment houses could be erected. In *Gillis v. Bailey*, 21 N. H. 156, the language was sufficiently explicit to prohibit the erection of flats or apartment houses. The language was: "In order that the buildings erected thereon may not be crowded together, but may each be surrounded by a space of open ground; and for this purpose it has been agreed that only one single dwelling house, with a shed, barn, or other out-buildings requisite for the use of the same, shall be . . . erected," etc. We do not think the language we have here to deal with, "for residence purposes only," is as restrictive as that in either of the cases cited. The proof as to the general plan of improving this court, as shown by the advertisements of its original promoters, is indefinite, and knowledge of them was not brought home to the appellee.

We think the chancellor properly refused the relief asked, and his judgment is affirmed.

MAINE SUPREME JUDICIAL COURT.

Jacob COHEN

v.

Anthony O. MANUEL.

(91 Me. 274.)

1. The liability of an innkeeper for goods stolen from a peddler's cart while in the innkeeper's custody is not avoided by the fact that the peddler had no license to peddle, as he did not lodge at the inn as a peddler.

2. A cart of a peddler who becomes a guest at an inn is delivered to the innkeeper for safe custody, within the meaning of Rev. Stat. chap. 27, § 7, when by his direction it is placed in a livery stable belonging to him, although it was not connected with the inn.

(January 22, 1898.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Penobscot County made during the trial of an action brought to hold defendant liable as innkeeper for goods of plaintiff lost while in defendant's possession which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Messrs. J. B. Peaks and E. C. Smith, for defendant:

A peddler selling goods in violation of the statute cannot recover from an innkeeper for the loss of such goods.

NOTE.—As to innkeeper's liability for goods of guest, see *Glenn v. Jackson* (Ala.) 12 L. R. A. 322, and note.

40 L. R. A.

Lord v. Chadbourne, 42 Me. 439, 66 Am. Dec. 290; *Robinson v. Howard*, 7 Cush. 611.

If a man who sells goods to a peddler knowing they are to be sold in violation of law cannot recover for the price simply because he knew they were to be sold in violation of law, much less can a man who is selling such goods in violation of law recover for their loss against an innkeeper.

Robinson v. Barrows, 48 Me. 186; *Mohney v. Cook*, 26 Pa. 349, 67 Am. Dec. 419.

A seller cannot recover the price of hay pressed and bailed, and not branded in accordance with the provisions of statute.

Burton v. Hamblen, 32 Me. 448; *Foye v. Southard*, 64 Me. 389.

An action cannot be maintained for the price of lumber which is not surveyed and marked according to the provisions of the statute.

Richmond v. Foss, 77 Me. 590.

No action can be maintained for the price of hops when not culled according to the provisions of the statute.

Durgin v. Dyer, 68 Me. 143.

An action cannot be maintained, either in tort or assumpsit, for a deceit practised in the sale of a horse on the Lord's day.

Plained v. Palmer, 68 Me. 576, 3 Am. Rep. 368; *Way v. Foster*, 1 Allen, 408; *Myers v. Meinrath*, 101 Mass. 366; *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119; *Lyons v. Desotelle*, 124 Mass. 387; *Swett v. Poor*, 11 Mass. 549; *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 95.

This defendant did not assume the relation of innholder towards these goods.

Arcade Hotel Co. v. Wiatt, 44 Ohio St. 33

58 Am. Rep. 788; *Neal v. Wilcox*, 49 N. C. (4 Jones, L.) 146, 67 Am. Dec. 266; *Burgess v. Clements*, 4 Maule & S. 306; 11 Am. & Eng. Enc. Law, p. 28; *Pettigrew v. Barnum*, 11 Md. 484, 69 Am. Dec. 219; *Carter v. Hobbs*, 12 Mich. 52, 88 Am. Dec. 762.

Mr. Peregrine White, for plaintiff:

The relation of landlord and guest being established, the liability of the innkeeper attached, regardless of the business calling of the guest.

Norcross v. Norcross, 53 Me. 163.

Whatever his violation of the license law might have been, it in no way contributed to the loss.

Baker v. Portland, 58 Me. 205, 4 Am. Rep. 274; *Davidson v. Portland*, 69 Me. 116, 31 Am. Rep. 253.

The law presumes that he was engaged in a legitimate business. The law never presumes wrong; he who sets it up must prove it.

Grant v. Ward, 64 Me. 240; *Fayette v. Livermore*, 62 Me. 236.

I have been unable to find any authority for holding that a peddler, going from town to town, in this state, selling goods, in an action to recover for the wrongful conversion of such goods, or in a case like the one at bar, is required to prove that he has a license to sell the goods, in order to maintain his action for their loss or conversion.

It is true that, formerly, it was held by this court that no action could be maintained for intoxicating liquors intended for unlawful sale in this state. But those decisions were under the statutes of 1846, 1851, and 1855,—legislation that was afterwards changed, by the enactment of our present liquor law in 1858.

Hamilton v. Goding, 55 Me. 419; *Adams v. McGlinchy*, 66 Me. 474; *Bliss v. Winslow*, 80 Me. 274; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188.

Savage, J., delivered the opinion of the court:

This is an action on the case, wherein the plaintiff claims to recover of the defendant, an alleged innkeeper, for the loss of his goods while he was a guest at the defendant's inn. The plaintiff was a peddler, and stopped at the defendant's inn; and while his peddle cart was in the defendant's stable it was broken open, and the goods in question were stolen therefrom. By their verdict for the plaintiff, the jury, under instructions to which no exceptions were taken, have settled that the defendant was an innkeeper; that the plaintiff was a traveler, and a guest at the defendant's inn; and that the goods were lost while the plaintiff was defendant's guest.

The defendant contends that the plaintiff, being a peddler, and the goods lost having been merchandise carried by him for the purpose of sale, is not entitled to recover unless he shows affirmatively that he was licensed as a peddler under the provisions of the Public Laws of 1889, chap. 298. The defendant also contends that under the circumstances of the case he is liable, if at all, only as bailee, and not as innkeeper.

1. The defendant's bill of exceptions states that "there was evidence tending to show that at the time of the loss the plaintiff was travel-

ing from town to town, and from place to place in the town of Brownville, selling said goods and chattels, in violation of § 1, chap. 298, of the Public Laws of 1889, unless the plaintiff had a license from the secretary of state so to do. There was no evidence from either plaintiff or defendant as to whether the defendant had a license or not."

The defendant requested the presiding justice to instruct the jury that "an innkeeper is not liable for the loss of merchandise carried by a peddler for the purpose of sale, who stops at said inn, unless such peddler has a license to peddle under the laws of the state." This instruction was refused.

There was no evidence in the case that the plaintiff did have or did not have a license, and the defendant claims that the burden to show a license was on the plaintiff. But we do not consider or decide this question, because, if, as we hold, the want of a license does not preclude the plaintiff from recovering, the matter of the burden of proof is immaterial.

We think that the plaintiff is not debarred from maintaining this action, though he may have had no license as a peddler.

The defendant relies upon the principles stated in *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Mohney v. Cook*, 26 Pa. 342, 67 Am. Dec. 419, and other cases. It is true, in the language of *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290, that "the common law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statutory enactment." It is true, in the language of *Mohney v. Cook*, 26 Pa. 342, 67 Am. Dec. 419, that "there are . . . cases wherein an injured party will be remediless, because of his own fault, even when that fault does not contribute to the accident. A vessel engaged in the slave trade, piracy, or smuggling, and injured by another, or the keeper of a gambling house, injured in his business by a neighboring nuisance, could have no remedy. Not, however, because the persons are out of the protection of the law for their offenses, nor because their illegal business brought them to the place of danger, but because their business itself, with all its instruments, is outlawed. Prohibited contracts, prohibited trades, prohibited things, receive no protection." Among such prohibited contracts is the sale of intoxicating liquor intended for illegal sale in this state (*Wasserboehr v. Boulter*, 84 Me. 165); the sale of hay pressed and baled, and not branded (*Burton v. Hamblen*, 32 Me. 448); the sale of lumber not surveyed and marked (*Richmond v. Foss*, 77 Me. 590); the sale of hoops not culled (*Durgin v. Dyer*, 68 Me. 143).

All such sales are expressly or by implication forbidden by law. So, a party has been held remediless who seeks to enforce a contract made on Sunday. *Toule v. Larrabee*, 28 Me. 464. And he who suffers an injury arising from his violation of the Sunday law, so-called, is equally without remedy. *Wheelden v. Lyford*, 84 Me. 114.

The language in *Lord v. Chadbourne* and in *Mohney v. Cook*, above cited, is a correct statement of a general proposition. How inap-

plicable it is to the case at bar can easily be seen when we look at the questions which were decided in these cases. In the former, the precise question decided was that under the provisions of the statute of 1851, chap. 211, § 16, no action whatever could be maintained for intoxicating liquors or their value. Intoxicating liquors were thus practically outlawed. Trespass against a wrongdoer, even could not be maintained. But when the statute was modified the rule was modified accordingly, and it was thereafter held that trespass would lie for the unauthorized conversion of intoxicating liquors, even though they were intended for illegal sale in this state. *Hamilton v. Goding*, 55 Me. 419; *Bliss v. Winslow*, 80 Me. 274; *Adams v. McGlinchy*, 66 Me. 474. In *Mohney v. Cook*, 26 Pa. 349, 67 Am. Dec. 419, the question actually decided was that a party who erects an obstruction in a navigable stream, and thereby occasions an injury to another, cannot, in an action for such injury, set up as a defense that the plaintiff was unlawfully engaged in worldly employment on Sunday, when the injury occurred.

It will be seen in the illustrations which we have given that a remedy has been refused because the plaintiff's right of action was directly connected with, or grew out of, a violation of law. But it is not unlawful for a peddler, with or without license, to put up at an inn. The plaintiff did not lodge at the defendant's inn as a peddler, but as an individual. As a property owner, merely, he intrusted his property to the defendant's safekeeping. It was not unlawful for him to eat, drink, and be sheltered in an inn, nor to deliver, or offer to deliver, his money and other property to the innkeeper for safe custody. If his property consisted of merchandise carried by him for the purpose of sale without a license, in violation of law, it was none the less property. A peddler may lawfully care for and protect his property. If he exposes it for sale, or sells it, without license, he may be fined. No penalty attaches to the merchandise itself. It cannot be seized or forfeited. It is neither contraband nor outlawed. The rights and liabilities which exist between the innkeeper and his guest, who is a peddler, are created by law, and grow out of the relation between them, and are in no degree dependent upon the purpose of the owner to sell the goods at some future time without license. It is therefore the opinion of the court that, even if the plaintiff had no license to peddle, that fact would not constitute a defense to this action, and that the requested instruction was properly refused.

2. The evidence tended to show that the defendant's stable, where the plaintiff's peddle cart was kept, was a livery stable, unconnected with the inn, and known by the plaintiff to be so. The defendant directed the plaintiff to take his horse and cart to the stable. The plaintiff did so, and there put them into the care of the defendant's hostler. The defendant requested that the jury be instructed that

"an innholder is not liable for the loss of merchandise carried by a peddler who stops with said innholder, which is left by such peddler in a livery stable known by said peddler to be a livery stable, and not connected with said inn." This request was refused, and we think correctly refused.

The defendant does not claim that an innkeeper may not be liable for the loss of the merchandise of his guest, under some circumstances; but he insists that when the plaintiff left his cart in the livery stable, "not connected" with the inn, the defendant's liability, at the most, was that of bailee, and not that of innkeeper. As the stable belonged to the defendant, and was used by him for putting up the team of his guest, we understand the expression "not connected," as applied to the stable, to mean that the stable was not physically attached to the inn,—that it stood in a different place.

By the statute law of this state (Rev. Stat. chap. 27, § 7) an innkeeper is not liable for goods such as it is claimed were lost in this case, except upon delivery, or offer of delivery, by the guest to the innholder, his agents or servants, for safe custody. The plaintiff put up at the defendant's inn. He thereby became a guest. He had a horse and peddle cart. He was directed by the defendant to take them to the stable. He did so. He put them into the care of the defendant's hostler. This constituted a statutory delivery to the defendant. It is clear that the delivery was "for safe custody," and in this respect this case is unlike the cases cited by the defendant, where a peddler took his merchandise to a separate room to show and sell (*Neal v. Wilcox*, 49 N. C. (4 Jones, L.) 146, 67 Am. Dec. 266), or where one procured from the landlord a lot in which to keep his hogs and horses for the purpose of showing and selling them (*Burgess v. Clements*, 4 Maule & S. 806), or where one had a room especially for the purpose of keeping or selling his goods (*Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762).

When the plaintiff's goods were thus delivered to the defendant for safe custody, they were *infra hospitium*. Though the defendant directed them to be placed in a stable "not connected" with his inn, his liability was not modified or discharged. It was his stable. It was the place he selected in which to keep the goods safely. That the place was not connected with the inn does not control. *Hilton v. Adams*, 71 Me. 19. It was a single transaction,—the putting up at the inn, and the delivery of the goods to the defendant. We cannot doubt but that the defendant received the plaintiff's goods as an innkeeper. *Norcross v. Norcross*, 53 Me. 163, and cases cited; *Clute v. Wiggins*, 14 Johns. 175, and note to same case, 7 Am. Dec. 449. The refusal of the presiding justice to give the requested instruction was right.

The defendant waives his other exceptions. *Exceptions overruled.*

MARYLAND COURT OF APPEALS.

MAYOR, etc., OF BALTIMORE, *Appl.*,
v.FAIRFIELD IMPROVEMENT COM-
PANY *et al.*

(.....Md.....)

1. The mere power to erect and maintain hospitals and pest houses does not imply or include the further power to erect and maintain them in such a way or at such a place as will cause injury to others.
2. Serious injury to the value of the property of the residents of a locality by the establishment of a pest house in the vicinity will warrant an injunction against it.
3. Persons who locate near a pest house which was not a nuisance when established because it was a secluded locality are not deprived of redress if they are injured by it, merely because they have voluntarily chosen to reside in close proximity to it, unless the right to maintain has ripened by prescription into an indefeasible right.
4. An abandonment of the use of property for a quarantine station, which will preclude the subsequent resumption of its use for persons with contagious diseases after people have built residences in the vicinity in reliance on such abandonment, is made when the city discontinues such use and establishes a quarantine station elsewhere, and later on, after improvements have progressed in the vicinity, burns up the hospital buildings and pest houses, and, by resolution, directs the sale of the property.
5. A contract for the care of a woman in the advanced stages of leprosy, by a laborer and his wife, who are unskilled people and have no authority to restrain her from wandering away, and who have several small children in their family, is an unreasonable one, the execution of which may be restrained, because of its tendency to cause a dissemination of the disease.
6. A perpetual injunction may be granted against the execution of a contract for the care of a person having leprosy, when its tendency is not to protect the community, but to cause a dissemination of the disease.

(April 1, 1898.)

APPPEAL by defendant from a decree of the Circuit Court of Baltimore City enjoining defendant from using certain property as a hospital for the care of a person afflicted with leprosy. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas I. Elliott for appellant.*Messrs. J. Charles Linthicum and Enoch Harlan*, for appellee, Fairfield Improvement Company:

Equity will restrain certain nuisances by injunction.

The fact that the defendant is a municipal corporation makes no difference.

1 Dill Mun. Corp. p. 448, note; *Haag v. Vanderburgh County Comrs.* 60 Ind. 511, 28

NOTE.—For quarantine regulations by health authorities in general, see *note* to *Hurst v. Warner* (Mich.) 26 L. R. A. 484. See also *Safford v. Detroit Bd. of Health* (Mich.) 33 L. R. A. 300.

40 L. R. A.

Am. Rep. 654; Brantly's Digest, 743, No. 5; 744, No. 11.

The true criterion as to whether a nuisance is sufficient for a court of equity to interfere by injunction is, "whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant."

Dittman v. Repp, 50 Md. 522; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562.

Where the nuisance operates to destroy health, or impair the comfortable enjoyment of property, an action at law furnishes no adequate remedy, and protection by injunction must be given.

Woodyear v. Schaefer, 57 Md. 18; *Gifford v. Babies' Hospital*, 17 N. Y. S. R. 886; *Bendelow v. Wortelous Union*, 36 Week. Rep. 168.

A party injured by a public nuisance may apply to a court of equity to prevent such nuisance, if its existence will cause a substantial prejudice to his property, or the reasonable enjoyment thereof.

Hamilton v. Whitridge, 11 Md. 129, 69 Am. Dec. 184; *Peck v. Elder*, 3 Sandf. 126.

There can be no prescriptive right to a public nuisance.

Philadelphia, W. & B. R. Co. v. State, 20 Md. 157; *Woodyear v. Schaefer*, 57 Md. 8, 40 Am. Rep. 419; *Horner v. State*, 49 Md. 234; *Wood, Nuisances*, 3d ed. § 18.

Equity will review acts done, or in contemplation, and claimed to be done in accordance with power granted; and in that review will see that the reason and spirit of the act are complied with; that the power granted is used in reason.

Wood, Nuisances, 3d ed. § 753; *Vansant v. Harlem Stage Co.* 59 Md. 330; *Metropolitan Asylum Dist. v. Hill*, 44 L. T. N. S. 653; *Bendelow v. Wortelous Union*, 36 Week. Rep. 168; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Atty. Gen. v. Actop Local Board*, L. R. 22 Ch. Div. 221.

The power of the board of health does not extend to the removal of tenants from their houses, and closing up the latter, unless justified by the existence of a pestilential disease. Such action will be restrained by injunction.

Eddy v. Board of Health, 10 Phila. 94.

Messrs. John P. Poe and Robert Moss, for appellees, commissioners of Anne Arundel County:

A court of equity has the same power to enjoin a municipal corporation from establishing or continuing a nuisance as it has to enjoin an individual, and what would be a nuisance, if committed by an individual, will be treated in a court of equity as none the less a nuisance because ordered to be committed by a municipality.

1 Dill. Mun. Corp. 4th ed. p. 448, note, and cases there cited.

If, on the one hand, it be argued that leprosy is a loathsome, dangerous, and contagious

disease, then in sending her to the neighborhood in question, the appellants were unquestionably establishing what in law is a nuisance, dangerous to life and health, irreparably destructive to property and property rights, and plainly within the power of the court to restrain by injunction.

Haag v. Vanderburgh County Comrs. 60 Ind. 511, 28 Am. Rep. 654.

McSherry, Ch. J., delivered the opinion of the court:

This appeal was taken from a decree of the circuit court of Baltimore city. That decree enjoined the mayor and city council of Baltimore from placing and keeping on a 20-acre tract of land owned by the city an unfortunate woman afflicted with leprosy. This land adjoins property belonging to the Fairfield Improvement Company of Baltimore, and the property of the company is divided into building lots. Many lots have been sold, and quite a number of houses have been built in the vicinity of the city's land. This 20-acre tract was acquired by the city perhaps half a century ago. It is situated some 8 miles distant from the city, and lies in Anne Arundel county. Up until the year 1883 it was occupied as a place of quarantine against contagious diseases brought towards the city by water, and there were hospitals upon it that were used for the isolation and treatment of similar diseases originating or found in the city during the prevalence of epidemics. In about the year just named the mayor and city council purchased other property, located near Hawkins Point, some 16 miles distant from the city, and there established a quarantine station, which has ever since been in charge of a resident physician selected by the city. There have been no cases of contagious or infectious diseases treated upon this 20-acre lot or tract since 1882 or 1883, and it was subsequent to that time that the Fairfield Improvement Company's property was developed. A great many persons, chiefly employees of fertilizer and other factories, now reside in Fairfield; and doubtless they located there in the belief that the city had permanently abandoned the hospitals and pest houses formerly used in that locality. The ground upon which the relief by injunction was sought is the apprehended injury to the company's contiguous property by the placing of a person suffering with such a loathsome and horrible disease in close proximity thereto. The statute law of the state confers upon the mayor and city council plenary power to establish, both within and beyond the city's limits, hospitals and pest houses for the isolation and treatment of contagious and infectious diseases. Code Pub. Local Laws, art. 4, §§ 378, 409. The preservation of the public health renders such legislation highly essential, and the authority of the general assembly to enact it, in the exercise of the police power of the estate, is beyond question or controversy. Within the scope of the power thus granted, the whole authority of the state is included and delegated (*Harrison v. Baltimore*, 1 Gill, 264), and, therefore, whatever the state may directly do in furtherance of these objects, the municipality, clothed with a delegated power from the state, may also law-

fully perform, though there may be a difference as to the legal consequences resulting from an exercise of the power by the state directly and those flowing from an exertion of the same power by the municipality. If it be conceded that the state may, in exercising a public power, create a private nuisance with immunity, the immunity grows out of the public necessity, and rests upon the state's sovereignty; but it cannot, or, at all events, will not, in the absence of an explicit legislative declaration, be assumed that the state would, if directly exercising the same power, so exercise it as to produce or cause an injury to the rights of property of an individual, unless, perhaps, the very doing of the act directed to be done will necessarily and unavoidably, under any condition, result in the creation of what would be, but for the authorization, a private nuisance. The delegation of a power to do an act, while conferring full authority to perform the act itself, does not, therefore, without more, essentially and without exception carry the right to so do it as to inflict loss or injury upon an innocent individual. As thus understood, the power of the municipality to erect and maintain hospitals and pest houses may be exerted and applied precisely as the same power, if not delegated, could have been availed of by the state. Acts done under such delegated authority, which without that authority would in themselves be public nuisances, furnish no ground for civil or criminal proceedings at the instance of the state; for the authority to do the acts makes them, when done, perfectly lawful as respects the public, and, being lawful, there is no superior public right which they invade or violate. These are what have been sometimes described as "legalized nuisances" (Wood, Nuisances, chap. 23), since they are strictly necessary and probable results of legislative authorization. They ultimately rest for their sanction upon the paramount power of the legislature, and the importance of the public benefit and convenience involved in their continuance as affecting the greatest good to the greatest number. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036. But, however free from interference by the public acts of this character may be when authorized to be done by a municipality under competent and sufficient legislative grant, the right of an individual to complain of the special injury sustained by him as a consequence of their being done is, ordinarily, in no way impaired or affected. The mere naked grant of power to a municipality to do acts which, if done without the sanction of that power, would be nuisances, does not, in all instances, carry with it a guaranty of immunity from claims for private injuries that result directly from the exercise of the power. And this is necessarily so in the absence of an explicit or implicit legislative declaration to the contrary, because the legislature cannot be presumed from a general grant of authority to have intended to sanction or legalize any acts or any use of property that will create a private nuisance which will injuriously affect the property of another. That the state may, in the exercise of the police power, and for the preservation of the public health, authorize the summary destruction of

private property contaminated with the germs of disease, is thoroughly and definitively settled. *Deema v. Baltimore*, 80 Md. 174, 175, 26 L. R. A. 541; *Boehm v. Baltimore*, 61 Md. 259; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205. But there is a broad distinction between a summary destruction of an offending thing and a direct injury to unoffending property; that is, property itself not liable to destruction because not dangerous to the public health or safety. The immediate and imminent danger to life or health justify, under the police power, the one; while the other is left to be redressed in the due course of law. However broad, therefore, may be the powers of a municipality to erect and maintain hospitals and pest houses for the segregation and treatment of contagious and infectious diseases, and however necessary their exercise may be, they must, generally speaking, be exerted and put into operation subject to the no less well-defined right of the individual to possess and enjoy his unoffending property without the molestation of a nuisance. It cannot be pretended that the city authorities could, even under their comprehensive powers, locate a pest house in the midst of a thickly settled community. The right to locate the pest house does not carry with it or include the right to locate it in a place where other persons would be exposed to the contagion and disease. "Powers given by statute are not to be used to the peril of the lives or limbs of the Queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause dangers to others."—observed Watson, B., as quoted in 2 Addison, Torts, § 1041. Where commissioners of sewers and boards of health have obtained statutory powers of drainage into rivers, streams, and natural watercourses, the power must be exercised so as not to create a nuisance, or interfere with the private rights of individuals. 2 Addison, Torts, § 1085. The mere power to erect and maintain hospitals and pest houses does not imply or include the further power to erect and maintain them in such a way or at such a place as will cause injury to others. And so in *Broer v. New York*, 3 Barb. 254, it was held that statutory authority given to commissioners of emigration to lease or purchase docks where emigrants may be landed will not justify them in leasing for that purpose property situated in a thickly populated part of a city, where the contemplated use of the premises would be a serious menace to the health of the community. See, too, *Harford County Comrs. v. Wise*, 71 Md. 52, 53; *West Orange Twp. v. Field*, 37 N. J. Eq. 600, 45 Am. Rep. 670; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; Wood, Nuisances, § 764.

Whatever immunity a municipality may have in exercising a public, as contradistinguished from a strictly corporate, power, it does not result from some collateral act, or from the negligent doing of a permissible act. The infliction of an injury upon another is neither the natural nor the necessary result of an exercise of the power to build a hospital; but, if injury does ensue, it would result from the collateral circumstance that the place se-

lected was not the appropriate site, or from the negligent method of doing what would otherwise be a lawful act.

Assuming at this point that leprosy is a contagious disease which is a menace to the health of a community, and assuming also that the mayor and city council through its health department were about to utilize this 20-acre tract of land for the first time for the erection of a pest house thereon for the reception of this particular patient, there can, in view of the legal principles just discussed, and in the light of the facts to which allusion has been made, be no doubt as to right of the Fairfield Improvement Company to invoke the restraining aid of a court of equity to prevent the establishment of such a nuisance. Wood, Nuisances, § 796. But it is insisted that the company went to the nuisance, and it is denied that the nuisance went to the company, and therefore it is contended that the relief sought cannot be granted. Though there cannot be a prescriptive right to maintain a public nuisance, there may be such a right as to a private one. The authority given by the legislature to the city to erect such a pest house prevents it, when erected and used, from being a public nuisance. If it be no nuisance at all when erected, because of being erected in a secluded locality, persons who afterwards locate near it are not, if injured, deprived of redress merely because they have voluntarily chosen to reside in close proximity to it, if the right to maintain it has not ripened by prescription into an indefeasible right. This doctrine was settled in *Susquehanna Fertilizer Co. v. Malone*, 78 Md. 280, 281, 9 L. R. A. 787, and is fully supported by the cases therein cited.

This brings us to an examination of the facts, so that we may determine whether they fall within the principles we have been considering. Leprosy is, and has always been, universally regarded with horror and loathing, and it is conceded to be an incurable disease. In past ages its unfortunate victims, shunned and avoided by their fellow men, viewed by all with superstitious dread, wandered about the open country, naked and starving. Hospitals for the relief of those smitten with the terrible malady seem to have been unknown in antiquity. The sufferers were eventually isolated in villages occupied by them exclusively. With the tide of emigration westward during the decline of the Roman empire, leprosy was spread over Europe, and in the Middle Ages it prevailed to an alarming extent; its principal ravages dating from the crusades. The influence of Christianity tempered the rigor of the affliction, and as early as 583 the third council of Lyons directed the bishops of each city to feed and support the lepers at the expense of the church. In the thirteenth and fourteenth centuries, hospitals and asylums were numbered by hundreds in almost every country. But, whether isolated in villages in the East, or segregated in hospitals in the West, the leper was completely and forever an outcast, being considered both legally and politically dead. The advance of civilization, while in a measure ameliorating his condition, and checking the spread of the pestilence, stripped the disease of

none of the dread with which it had always been regarded by the great majority of mankind. The horror of its contagion is as deep-seated to-day as it was more than 2,000 years ago in Palestine. There are modern theories and opinions of medical experts that the contagion is remote, and by no means dangerous; but the popular belief of its perils, founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its ravages and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries, cannot, in this day, be shaken or dispelled by mere scientific asseveration or conjecture. It is not, in this case, so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious, but the question is whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do a serious injury to the property of the plaintiff there located. As to this the record leaves no room for doubt. That the disease is contagious no one seems to deny. Its liability to contaminate others is the element that makes its introduction into a community a nuisance, and when it is conceded that the purpose is to place this woman, having a fully developed and far-advanced attack of leprosy, in charge of a laborer and his wife who have had no experience in such a case, and who have several small children in their family, the danger of spreading the contagion is perfectly obvious. It will not do to say that the children are to be separated from their parents. There would be great hazard of their being brought in contact with the patient. The record abundantly shows that the Fairfield Improvement Company's property will be seriously lessened in value, that residents of the vicinity will abandon their homes, if this unfortunate and afflicted woman should be placed where the city proposes to confine her. On this branch of the case we entertain no doubt that the facts fully warranted the issuing of the injunction. "In all such cases the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant." *Dittman v. Repp*, 50 Md. 521, 523, 83 Am. Rep. 325; *Wood, Nuisances*, § 66, and note 4, and cases therein cited. Inasmuch as the infliction of injury on any individual was not necessarily contemplated in the grant of the power referred to,—that is to say, was not a necessary and inevitable consequence of an exercise of the power to maintain a hospital,—the right to maintain it at this particular place in the existing circumstances cannot be put on the ground of explicit or implicit authorization; and it remains now to inquire whether a prescriptive right is possessed by the city to build or to continue a pest house in the vicinity of Fairfield. Had the city never abandoned this lo-

cality as a place for the confinement and treatment of contagious diseases, it is very doubtful whether its right to place this patient there could now be challenged. It is equally doubtful whether the adjoining property would ever have been improved and peopled as it now is if the old quarantine station, hospitals, and pest houses had not been long ago discontinued. In 1883, when the new quarantine property at Hawkins Point was purchased, this 20-acre tract was in point of fact abandoned by the city as a place for the isolation of contagious diseases. Later on, and after improvements had progressed in the vicinity, the hospital buildings and pest houses were burned by the city health officers; and still later a resolution was adopted by the city council directing the sale of the property, except that portion which had been used as a burying ground for those who died during the epidemics years ago. When persons have acted on the belief, founded on such palpable evidence, indicating that the city had physically abandoned this property for the isolation and treatment of contagious diseases, it is too late, especially when that physical abandonment has been followed by the passage of a resolution actually directing the property to be sold, to assert the right to restore the place to its former uses, if such a restoration would cause injury to those who have in good faith relied on the conduct of the city in actually discontinuing the use of the property for the purposes of quarantine and isolation. The conclusion of fact we draw from the record is that there was an abandonment of this property by the city when it removed its quarantine officers and attendants to Hawkins Point; and the city cannot now, to the detriment of the appellee, resume the occupation of this place for the detention of this patient. She must be placed elsewhere. The evidence shows, as we have indicated, that the health authorities of the city propose to place this woman in the charge of a laborer and his wife. A contract has been made with them, and under it this laborer and his wife agree to care for the patient. They are unskilled people. They possess no authority to restrain the woman from wandering away, and they have no legal right to detain her against her will. They are not officers of the city, nor clothed with any of the powers of the board of health. They are simply employed by the city to care for this woman on the city's property, where no health officer or city official is stationed. The mere fact that the place of her proposed detention belongs to the city adds nothing to the power of the laborer to hold her; and most certainly these facts do not amount to the establishment of a hospital under the power which the city possesses. The contract is, on its face, unreasonable. Its tendency is to cause a dissemination of the disease, and not to protect the community; and for this, if for no other reason, the injunction ought to be made perpetual. There was no error committed in granting the relief prayed, and the decree appealed from must be affirmed.

Decree affirmed, with costs above and below.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Simon John O'HERRON

c.

William GRAY *et al.*, Appls.

Nora L. O'HERRON

c.

SAME.

(168 Mass. 573.)

1. **Certificates of stock, even when indorsed in blank** for the purpose of authorizing the making of an instrument of transfer over the signature, are not negotiable securities.
2. **A signature to a blank transfer of certificates of stock, plainly showing that it is made by a guardian** of infant owners, will not pass a good title to one who takes them before any transfer on the books of the corporation, without inquiry and merely as a pledge for a debt from the cashier of a bank in which they were placed for safe keeping, but from which they were feloniously taken by the cashier.
3. **Negligence which will work an estoppel** against reclaiming property must be a proximate cause of the purchase or advancement of money by the holder of the property, and must enter into the transaction itself.
4. **The negligence of a guardian in leaving certificates of stock** indorsed with her signature in a bank for safe keeping is not the proximate cause of the advance of money upon them to a cashier of the bank who feloniously takes them, since this criminal conduct could not reasonably be anticipated.
5. **The decree of a probate court ordering the sale by a guardian of shares of stock** owned by infants is void, when it was made without any notice to them or to the guardian, upon a petition signed in the guardian's name without any authority.

(June 15, 1897.)

APPEAL by defendants Gray *et al.* from judgments of the Supreme Judicial Court for Suffolk County in favor of plaintiffs in a suit brought to reach certain shares of stock in the Boston & Albany Railroad Company, which belonged to the plaintiffs, who were minors, but which had been wrongfully transferred until they reached the possession of appellants. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry S. Dewey, for appellants:

By the signing in blank of the transfer indorsed upon the certificates, and by the delivery of the certificates so indorsed, a valid transfer of the title to the stock was effected, by which both the guardian and the wards are bound.

Andrews v. Worcester, N. & R. R. Co. 159 Mass. 64; *Central Nat. Bank v. Williston*, 138 Mass. 244; *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239; *Stone v. Hackett*, 12 Gray. 227.

At common law, a guardian may sell the personal property of his ward without obtaining

any special license or authority, and a bona fide purchaser from him of such property is protected and is entitled to the property, even though the guardian misappropriates the proceeds of the sale; and this rule applies to shares of stock.

2 Kent, Com. 18th ed. *228, and note (d); *Ellis v. Proprietors of Essex Merrimack Bridge*, 2 Pick. 243; *Field v. Schieffelin*, 7 Johns. Ch. 150, 11 Am. Dec. 441; *Bank of Virginia v. Craig*, 6 Leigh, 399; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751; *Maclay v. Equitable Life Assur. Soc.* 152 U. S. 499, 38 L. ed. 528.

The statute of this commonwealth relating to the granting by the probate courts of authority for the sale of personal property by guardians does not change the rule of common law as to the power of the guardian to sell; for this statute is permissive, and not restrictive, and the purpose is only to provide a mode by which the guardian may obtain in advance a judicial approval of the sale.

Pub. Stat. chap. 189, § 88; *Wallace v. Holmes*, 9 Blatchf. 65; *May v. Skinner*, 149 Mass. 875; *Maclay v. Equitable Life Assur. Soc.* 152 U. S. 499, 38 L. ed. 528. And see Report of Commissioners on Revision of 1896, notes to chap. 79, § 22, chap. 69, § 11.

It is within the power of an executor or administrator to pledge shares of stock belonging to the estate, and the pledgee is protected, even though he knew that the executor pledged it as an executor.

Cook, Stock & Stockholders, 3d ed. § 474, and cases cited; *Goodwin v. American Nat. Bank*, 48 Conn. 550; *Wood's Appeal*, 92 Pa. 379; *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 398; *Gottberg v. United States Nat. Bank*, 181 N. Y. 595.

A guardian cannot properly, or even legally, take in his own name a certificate of stock belonging to his ward.

The guardian has no title.

Hicks v. Chapman, 10 Allen, 463; *Rollins v. Marsh*, 128 Mass. 116; *Harding v. Weld*, 128 Mass. 587; *Willwerth v. Leonard*, 156 Mass. 277.

Estoppel *in pais* arises "independently of contract, from act or conduct which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is alleged."

Bigelow, Estoppel, 5th ed. 3, 453.

Where a pledgee of certificates of stock indorsed in blank takes the certificates and sells or pledges them to another, who takes such certificates in good faith and for value and without notice that his vendor or pledgeor held them as a pledge, the purchaser or pledgee from the pledgee is as fully protected in his rights as though the person with whom he dealt was the absolute owner of the stock.

The pledgeor of stock has practically no protection as to his stock except the honesty and responsibility of his pledgee. The bona fide purchaser or pledgee from the pledgee is equally protected whether the certificates of stock are indorsed by the pledgeor or vendor, or are indorsed in blank by some previous holder.

NOTE.—As to effect of signature to prevent denial of liability on raised negotiable paper, see note to *Exchange Nat. Bank v. Bank of Little Rock* (C. C. App. 8th C.) 22 L. R. A. 686.

40 L. R. A.

Cook, Stock & Stockholders, 8d ed. § 473, and cases cited; *McNeil v. Tenth Not. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Jarvis v. Rogers*, 13 Mass. 105; *Commercial Bank v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *Wood's Appeal*, 92 Pa. 379; *Fatman v. Lobach*, 1 Duer, 354; *Gass v. Hampton*, 16 Nev. 185; *Mount Holly L. & M. Turnp. Co. v. Ferree*, 17 N. J. Eq. 117; *Otis v. Gardner*, 105 Ill. 436; *Cherry v. Frost*, 7 Lea, 1; *Prall v. Tilt*, 28 N. J. Eq. 479; *Colonial Bank v. Cady*, L. R. 15 App. Cas. 267; *Barstow v. Savage Min. Co.* 64 Cal. 888, 49 Am. Rep. 705; *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 2 L. R. A. 886; *Pennsylvania R. Co.'s Appeal*, 86 Pa. 80.

The assignment of the certificate of stock estops the transferor from claiming any further title in the stock as against subsequent bona fide transferees, although such assignment be not registered.

Cook, Stock & Stockholders, 8d ed. § 378, and cases cited.

The decree of the probate court having jurisdiction over the parties and the subject matter, authorizing the sale of the stock, is conclusive, and cannot be attacked in any collateral proceedings; not even could it be attacked in a court of equity for fraud.

Waters v. Slickney, 12 Allen, 1, 90 Am. Dec. 122; *Pierce v. Prescott*, 128 Mass. 140; *McKim v. Doane*, 187 Mass. 195; *Mooney v. Hinds*, 160 Mass. 469.

Messrs. R. Foster and H. J. Ryan for appellees.

Knowlton, J., delivered the opinion of the court:

Each of the plaintiffs is the owner of stock in the Boston & Albany Railroad Company, represented by certificates in the possession of Gray, Dewey, & Co., the defendants. The plaintiff in the first case owned two certificates, —one for nineteen shares, and one for twelve shares,—both of which passed into the hands of the appellants, and were surrendered by them in exchange for a new certificate for thirty-one shares, issued in their own names. The plaintiff in the second case is the owner of one certificate for twelve shares, which the defendants received, and which has not been surrendered. Both of the plaintiffs are minors, and their respective certificates were made in their own names. These certificates were deposited for safe-keeping by their mother, who was their guardian, in the Pittsfield National Bank. While the certificates were in the bank, the guardian borrowed money from the bank for her personal use, for which she gave her notes, and at the same time signed upon the back of each of her son's certificates a blank form of transfer, with a signature as follows: "Simon John O'Herron, by Mrs. Catherine O'Herron, Guardian." In like manner, on her daughter's certificate, she signed with the signature, "Nora L. O'Herron, by Mrs. Catherine O'Herron, Guardian," and left the certificates as collateral security for the payment of her notes. This transaction occurred on or about December 17, 1889. On or about December 20, 1889, the cashier of the bank, one Francis, who had access to the vault where these certi-

ates were kept, took them, without authority from anybody, and delivered them to the defendants as security for one of his personal debts. In May, 1890, the guardian paid her notes at the bank. Some time in the year 1891, the defendants took the two certificates standing in the name of Simon John O'Herron to the office of the Boston & Albany Railroad Company, and asked to transfer the stock, and have a new certificate issued in their own names. The corporation refused to permit a transfer of the stock or the issue of new certificates, without a decree of the probate court authorizing the sale of the stock. Thereupon the defendants requested Francis to procure such a decree. He then had a petition prepared by the register of the probate court for the county of Berkshire, in the name of the guardian, praying for leave to sell and transfer the certificates, and he signed the petition as follows: "Catherine O'Herron, Guardian, by E. S. Francis." On this petition, on July 21, 1891, the probate court issued a decree in the usual form, authorizing the guardian to sell or transfer the whole or any part of the stock. All this was done without notice of the petition by publication or otherwise, either to the plaintiffs or to their guardian, and without the knowledge of either of them. The transfer of the stock was then made on the books of the Boston & Albany Railroad Company, and a new certificate for thirty-one shares issued to the defendants. Francis continued to act as cashier of the bank until his death, by suicide, on or about July 27, 1893, when his fraudulent conduct was discovered, and his estate was found to be insolvent. He paid the dividends on the stock to the plaintiffs' guardian regularly as long as he lived. At the time of receiving the certificates, the defendants supposed that Francis was rightfully in possession of them, and they had no notice of his want of authority to pledge them, except the form of the certificates and of the transfers. The question is whether the defendants acquired a good title to the stock as against the plaintiffs. It is not necessary to consider the original claim of the bank to the stock as security for the loans to the guardian, as the loans were paid. It is clear that the guardian had no right to pledge the stock, and we do not intimate that the bank acquired a valid title to it.

Francis, under whom the defendants derived their title, had no right to the certificates, but held them feloniously. They were the general property of the plaintiffs, and the special property of the bank, which had the possession of them as bailee. The act of Francis in taking them, and pledging them as his own, if not larceny at common law, was at least embezzlement, which, by our statute, is deemed to be larceny. Pub. Stat. chap. 203, §§ 87, 41. A bona fide purchaser for value, from one who has taken property in such a way, acquires no title to it. The only exception to this rule is when the property consists of negotiable securities. *Heckle v. Lurvey*, 101 Mass. 344, 345, 3 Am. Rep. 366; *Spooner v. Holmes*, 102 Mass. 503, 507, 3 Am. Rep. 491. But certificates of stock, even when indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, are not negotiable securities. This is settled by the

highest authority. *Shaw v. Spencer*, 100 Mass. 382, 388, 1 Am. Rep. 115, 97 Am. Dec. 107; *Shaw v. Merchants Nat. Bank*, 101 U. S. 557, 565, 566, 25 L. ed. 892; *Knor v. Eden Musee American Co.* 148 N. Y. 441, 31 L. R. A. 779; *Bangor Electric Light & P. Co. v. Robinson*, 52 Fed. Rep. 520; *London & C. Bkg. Co. v. London & R. Plate Bank*, L. R. 20 Q. B. Div. 232. It is plain, therefore, that the defendants cannot maintain their claim on the ground that the nature of the property takes it out of the general rule that no title can be acquired from one who has no title.

It is contended that Stat. 1884, chap. 229, is applicable to these cases. If we assume in favor of the defendants that this statute will protect a bona fide purchaser or pledgee for value to whom a certificate of stock has been delivered with a written transfer of it, or a written power of attorney to sell, assign, or transfer it, signed by the owner, it does not help the defendants. The signature on the back of these certificates was not that of the owner, but of a guardian whose trust relation to the property was disclosed on the face of the papers. In their report on the revision of the statutes (1834), the commissioners say, in a note to chapter 79, § 22 (which is § 21 in the final enactment), that they have made the provision as to sales of property by guardians the same as that for trustees appointed under wills. The provision for trustees under wills is found in Rev. Stat. chap. 69, § 11, in Gen. Stat. chap. 100, § 14, and, with certain broader provisions from more recent legislation, in Pub. Stat. chap. 141, § 20. The provision in regard to guardians is found in Gen. Stat. chap. 109, § 22. As a part of the history of the legislation, see also Stat. 1817, chap. 190, § 35, and Stat. 1820, chap. 54, § 3. It is the duty of one purchasing property held by a trustee to ascertain whether the transaction appears to be within the trustee's authority. *Atkinson v. Atkinson*, 8 Allen, 15; *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Loring v. Salisbury Mills*, 125 Mass. 138; *Smith v. Burgess*, 133 Mass. 511; *Loring v. Brodie*, 134 Mass. 453; *Colonial Bank v. Cady*, L. R. 15 App. Cas. 267; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. ed. 142.

The statute does not protect the purchaser in a case like the present.

It is contended, further, that the plaintiffs are estopped from reclaiming their property by the negligence of their guardian in leaving their certificates at the bank, indorsed with her signature. The principle which the defendants invoked is not applicable to the facts. Negligence which will work an estoppel of this kind must be a proximate cause of the purchase or advancement of money by the holder of the property, and must enter into the transaction itself. *Sloan v. North British Australasian Co.* 7 Hurlst. & N. 603, 2 Hurlst. & C. 175; *Colonial Bank v. Cady*, L. R. 15 App. Cas. 268, 282; *Barendale v. Bennett*, L. R. 3 Q. B. Div. 525, 530; *Picker v. London County Bkg. Co.* L. R. 18 Q. B. Div. 515; *Knor v. Eden Musee American Co.* 148 N. Y. 441, 31 L. R. A. 779; *Arnold v. City Bank*, L. R. 1 C. P. Div. 578, 587, 588; *Schofield v. Earl Lonsborough* [1895] 1 Q. B. 586 [1896] A. 40 L. R. A.

C. 514; *Western U. Teleg. Co. v. Davenport*, 97 U. S. 871, 24 L. ed. 1049; *Bangor Electric Light & P. Co. v. Robinson*, 52 Fed. Rep. 520.

If the negligence is such as might be an appropriate foundation for an action at law to recover damages by one who advances his money, it may be availed of by way of estoppel, to avoid circuity of action. But the facts of this case fall short of showing such negligence. The guardian intrusted the certificates to a national bank of good reputation. Neither she nor anybody else had any reason to anticipate the larceny or embezzlement of the property, and a fraudulent use of it, to deceive others, by a trusted officer of the bank. She had no reason to expect that, if the certificates were stolen, anybody would take them without inquiring whether, as trust property, they had been disposed of by the guardian for the benefit of her wards. The conduct of the guardian was not a cause, but a mere condition, of the defendants' advance of money upon the faith of the certificates. A criminal act of Francis intervened as the cause of the defendants' loss; and this the guardian had no reason to anticipate.

When the certificates of stock came into the hands of the defendants they showed on their face that they had not been assigned or transferred by their owners, but only by one who stood in a relation of trust to the owners. The transfer had not been completed, and the stock still stood in the names of the plaintiffs on the books of the corporation. There was only a signature of the guardian upon each certificate, appended to a blank which contained nothing to show the nature of the transaction by which it came into the hands of Francis. There was nothing to indicate that the plaintiffs had received value for the stock. Francis, who presented the certificates, was using them solely for his personal benefit. On the face of the paper there was notice to the defendants that they were trust property while in the hands of the guardian. The defendants were put upon inquiry, and they had no right to receive them as a pledge for Francis's debt, without at least having information of facts which would warrant them in believing that the plaintiffs' interests had been protected in the transaction by which they came into the hands of Francis. Apparently they made no inquiry, but took them as they were, knowing that the plaintiffs were to receive nothing from the disposition which Francis then made of them. We are of opinion that there is no principle of estoppel that can be invoked in favor of the defendants to deprive the plaintiffs of their property.

The decree of the probate court does not give effect to the claim of the defendants. It was not made until long after the transfer to them. It purported to authorize a sale of the stock, and not a pledge of it, much less a pledge of it for the benefit of others than the plaintiffs. But, above all, the probate court acquired no jurisdiction of the case as against the plaintiffs. No case nor any proper party was ever before the court in regard to the sale of the stock. The unauthorized signature and appearance of Francis availed nothing as against the plaintiffs or their guardian.

Jochumsen v. Suffolk Sav. Bank, 3 Allen, 87; *Scott v. McNeal*, 154 U. S. 34, 46, 38 L. ed. 896, 901.

The fact that the Pittsfield National Bank is paying the expenses of the plaintiffs' litigation is immaterial. The plaintiffs are proceeding in their own rights and on their own equities. They may elect to proceed to recover back their stock, even though they might have a different kind of remedy against the bank. There is nothing in law or in eq-

uity to forbid their acceptance of such aid in the litigation as the bank may, for its own interest, choose to render them. There is no privity between the bank and the appellants. The act of Francis by which the appellants obtained their possession was a wrong against the bank and the plaintiffs, as well as against the defendants.

Decree in each case affirmed.

Rehearing denied.

MISSOURI SUPREME COURT (Division 1).

BUSINESS MEN'S LEAGUE et al., Respts., v.

James R. WADDILL, Appt.

(.....Mo.....)

1. **The mere possibility of injury** by an unconstitutional statute, which may prevent insurance companies from making such contracts as persons might otherwise procure them to make, will not authorize injunctive relief in behalf of those who wish such contracts.
2. **An injunction against the approval by the superintendent of the insurance department of a uniform policy** of insurance, under a statute which is alleged to be unconstitutional as an attempt to delegate to him legislative powers, cannot be granted on behalf of individuals in order to protect them in the right to make contracts of insurance to suit their varying needs and circumstances, as the statute, if unconstitutional, cannot stand in the way of any contracts that may be made.

(April 1, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis in favor of plaintiffs in a suit to prevent the superintendent of insurance from approving a form for a uniform insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. Fyke, Yates, & Fyke, for appellant:

The petition does not state facts sufficient to constitute a cause of action.

No facts are alleged which show that any property right of plaintiffs will be in any manner affected by the threatened action of defendant. Moreover, the petition should show a particular injury to plaintiffs distinct from that which they might suffer in common with the public.

10 Am. & Eng. Enc. Law, pp. 783, 796; *Hovelman v. Kansas City Horse R. Co.* 79 Mo. 632; *Seager v. Kankakee County*, 102 Ill. 669.

Courts of equity will not enjoin the acts of executive officers of the government within the

scope of their authority, in a matter resting in their jurisdiction; nor will state officers be restrained from enforcing a law of the state merely upon the ground of its alleged unconstitutionality.

2 High, Inj. 2d ed. § 1826, p. 871; *Gibbs v. Green*, 54 Miss. 593; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437; *Dwelling-House Ins. Co. v. Wilder*, 40 Kan. 561.

The state has the right to prescribe the conditions upon which fire insurance companies may do business in this state; the state can prescribe what their contracts may or may not contain.

Daggs v. Orient Ins. Co. 186 Mo. 382, 35 L. R. A. 227.

Injunction will not lie, because a court of equity will not lend its aid by injunction for the enforcement of right or the prevention of wrong in the abstract and unconnected with any injury or damage to the person seeking the relief.

1 High, Inj. 2d ed. § 1, p. 2.

Messrs. Orr, Christie, Bates, & Bruce, for respondents:

The act of the legislature authorizing the superintendent of the insurance department to approve a form of fire insurance policy for use in the state of Missouri to the exclusion of all other forms was an attempted delegation of legislative power, and was therefore unconstitutional and void.

Mo. Const. art. 4, § 1; *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L. R. A. 715; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L. R. A. 112; *Anderson v. Manchester F. Assur. Co.* 59 Minn. 191, 28 L. R. A. 609; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 88; *Field v. Clark*, 143 U. S. 650, 681-694, 36 L. ed. 294, 308-310.

The respondents, being residents and property owners, had such a property interest in the right to contract freely for fire insurance (as authorized by law) that they were competent to sue, for themselves and for all others similarly situated, to restrain the appellant from so acting in excess of his powers under color of official authority, as to impair, violate, or interfere with such right of contract.

People v. Canal Board, 55 N. Y. 390; *Wood v. Brooklyn*, 14 Barb. 425; 2 High, Inj. 3d ed. §§ 1308, 1309, pp. 1023, 1024, and cases cited; 1 Beach, Pub. Corp. § 631, note 2; *Newmeyer*

NOTE.—For power to prepare standard insurance policy, see *O'Neil v. American F. Ins. Co.* (Pa.) 26 L. R. A. 715; *Anderson v. Manchester F. Assur. Co.* (Minn.) 28 L. R. A. 609; and *Dowling v. Lancashire Ins. Co.* (Wis.) 31 L. R. A. 112.
40 L. R. A.

v. Missouri & M. R. Co. 52 Mo. 81, 14 Am. Rep. 394; *Matthis v. Cameron*, 62 Mo. 506; *Ranney v. Bader*, 67 Mo. 476; *Wagner v. Meety*, 69 Mo. 150; *Dennison v. Kansas*, 95 Mo. 416; *Lilly v. Tobbein*, 103 Mo. 488; *Cummings v. St. Louis*, 90 Mo. 259.

Williams, J., delivered the opinion of the court:

Plaintiffs seek an injunction to prevent the superintendent of the insurance department from approving, under the act of March 18, 1895 (Acts 1895, p. 194) a uniform policy of insurance, to be used, to the exclusion of all other forms, by the fire insurance companies doing business in this state. It is claimed that said act attempts to delegate legislative powers to said superintendent, and is therefore unconstitutional and void. The petition charges that defendant, who was such superintendent at the time this suit was begun, was about to approve and promulgate, by authority of said act, a form of policy to be used to the exclusion of all others by the fire insurance companies doing business in Missouri; that, when so approved, he would forthwith officially advise all such companies, or "indicate to them expressly or by necessary implication, that from and after the 1st day of January, 1896, it would be unlawful for them, and each of them, to issue in this state any fire or lightning policy which did not embrace, and in all respects conform to, the said exclusive form which the said superintendent was so threatening to approve and promulgate." It is alleged that the effect of such action will be to force, induce, or enable such companies to employ said form, to the exclusion of all others, under color of lawful authority or legal requirement, and thus impose upon plaintiffs and all others similarly situated harsh, unfair, and unjust conditions in their contracts of insurance, and cause them serious and substantial damages. Plaintiffs are alleged, in the petition, to be owners of property of great value in the city of St. Louis. Some of them are wholesale merchants, who carry large stocks, and are in the habit of keeping the same insured. It is further stated that plaintiffs had been accustomed to make contracts of insurance containing such terms and conditions as their situation demanded, and that they had the right so to do. It is also alleged that the threatened action of defendant will deprive them of that privilege, and prevent them from making contracts of insurance to suit their varying needs and circumstances, in accordance with the rules and requirements of the insurance companies and the valid laws of the state, and that they will thereby be deprived of a valuable property right. An objection to the introduction of any evidence under this petition was interposed by defendant and overruled. The circuit court granted a perpetual injunction, and from that decree defendant has appealed, 40 L. R. A.

and renews the point here that the petition fails to state a cause of action.

The first question that arises for determination is whether plaintiffs have any standing, in equity, to maintain this suit. They do not charge that defendant was about to interfere directly with any contract which they had made or were intending to make. Their real complaint, stripped of all unnecessary matters, is that the above-recited act of the legislature is unconstitutional; that, nevertheless, defendant is about to approve a form of policy under it. If he does so, they say, the insurance companies will, either under the erroneous belief that such action is binding upon them, or because they prefer to adopt such form, refuse to issue any other kind of policy, and, by such conduct of the companies, under the guise of obedience to said act, plaintiffs may be not able to make contracts of insurance, which they otherwise might make. We know of no principle that will authorize a party to contest the validity of a legislative act, and enjoin an officer from carrying out its provisions, simply in order that another person may thereby have the opportunity to make a more favorable contract with him. *State v. Hathaway*, 106 Mo. 236. Yet this seems to be plaintiff's attitude in this case. "Injury, material and actual, not fanciful, theoretical, or merely possible, must be shown as the necessary or probable results of the action sought to be restrained." *People v. Canal Board*, 55 N. Y. 390. There is no analogy between this case and *Newmeyer v. Missouri & M. R. Co.* 52 Mo. 81, 14 Am. Rep. 94, cited by respondent, and the line of cases similar to that, where it is decided that a taxpayer may restrain the illegal action of county courts, whereby the public burdens, of which he must bear a part, are increased. It will be noted, also, that all cases cited by respondents to show that it is a delegation of legislative power to authorize the superintendent of insurance to prescribe the terms and conditions to be inserted in such policies were suits upon actual contracts of insurance, and were not proceedings to prevent possible future injury. *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L. R. A. 715; *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 28 L. R. A. 609; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L. R. A. 112. If the act is unconstitutional, it cannot stand in the way of any contracts plaintiffs may make. The mere possibility of injury to them because they may be unable to find companies that will contract with them upon satisfactory terms cannot authorize injunctive relief in their behalf. The action of the circuit court in making the injunction perpetual was erroneous.

Judgment reversed, and cause remanded, with directions to dissolve the injunction and dismiss the bill.

All concur.

GEORGIA SUPREME COURT.

Andrew S. GRAHAM, *Plff. in Err.*,
v.
William W. SMITH.

(100 Ga. 434)

"The owner of a dog has such a property in it as will enable him to maintain an action of trover for its recovery in case of its wrongful conversion.

(March 8, 1897.)

ERROR to the Superior Court for Richmond County to review a judgment in favor of plaintiff in an action of trover for the alleged wrongful conversion of a dog. *Affirmed.*

The suit was brought in a magistrate's court, where the property and its value were duly described. Defendant demurred because the dog was not property for civil purposes, and could not be the subject of conversion, and be-

*Headnote by LITTLE, J.

NOTE.—Property rights in dogs.

- I. Generally.
- II. Actions of trover, replevin, and trespass.
- III. Actions against common carriers.
- IV. Actions for injuries to dogs by railroad and street cars.
- V. Right to kill dogs.
 - a. Police power.
 - b. Unlawfully killing dogs.
 - c. Barking and howling dogs.
 - d. Dangerous dogs.
 - e. Trespassing dogs.
 - f. Sheep-killing dogs.
 - g. Dogs chasing other animals.
 - h. Dogs "at large."
 - i. Killing a dog by mistake.
- VI. Criminal actions for injuries to dogs.
- VII. Larceny and obtaining a dog by false pretenses.
- VIII. Value.
- IX. As to license and tax laws.
 - a. Generally.
 - b. Taking property without due process of law.

I. Generally.

It seems that at common law the owner of a dog had the same right of property in it as he had in any other property, except in cases of larceny, and as to this the statute of 10 Geo. III., chap. 18, removed the exception.

The owner of a dog has such a right of property in the animal that he may maintain an action against anyone unlawfully injuring or killing him. Some cases go so far as to hold that, under the police power to kill, the owner cannot be deprived of his dog without a trial of his right of property guaranteed by the Constitution, but there is some conflict of authority on this question. The owner may maintain an action of trover, replevin, or trespass against anyone taking his dog and converting him to his own use, as in *GRAHAM v. SMITH*. The owner may recover the value of his dog lost through the negligence of a common carrier. As to the right to maintain an action for injuries caused by railroad trains to a dog on the track, there is some conflict of authority, due largely to the fact of the propensity of the dog to roam, its instinct and ability to escape from danger, and the inconvenience which would be caused by stopping

cause plaintiff's remedy, if any, was by possessory warrant, and not in trover. The magistrate overruled this demurrer, and his decision was sustained by the superior court.

Further facts appear in the opinion.

Mr. William D. Van Pelt for plaintiff in error.

Mr. Samuel F. Garlington for defendant in error:

Property may exist in all animals, birds, and fishes, and a civil action may be maintained for their recovery.

Ga. Code 1882, § 2240; *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764; 2 Kent, Com. pp. 349, 850; Anderson, Law Dict. Dogs, 73; 1 Am. & Eng. Enc. Law, p. 573.

Trover will lie for the recovery of a dog.

Cummings v. Perham, 1 Met. 555; *Binstead v. Buck*, 2 W. Bl. 1117; 1 Am. & Eng. Enc. Law, p. 573; Anderson, Law Dict. 372; 4 Bl. Com. 238.

In the American courts dogs have been held to be a species of property, and entitled to less

trains. Many of the states by statute have made dog stealing larceny, and some have construed statutes against taking goods or other property to include dogs, but upon this question there is some conflict. At common law a prosecution for malicious mischief could be had for maliciously killing a dog. The license laws of the states are generally held not to be tax laws or a double taxing, but within the police powers of the state, although some states provide for a tax upon dogs as property.

In *Hurley v. State*, 30 Tex. App. 333, the court adopted the language in the dissenting opinion of *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423, and said that "a dog is the subject of ownership. Trespass will lie for an injury to him. Trover is maintainable for his conversion. Replevin will restore him to the possession of his master. He may be bought and sold. An action may be had for his price. The owner has all the remedies for the vindication of his rights of property in this animal as in any other species of personal property he may possess. He is a domestic animal. From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been, there has been his dog. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society, and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. . . . It may be said that he was *ferus naturæ*; but all animals, naturalists say, were originally *ferus naturæ*, but have been reclaimed by man, as horses, sheep, or cattle; but, however tamed, they have never, like the dog, become domesticated in the home, under the roof, and by the fireside of their masters."

"Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service, and, so far as pertains to their ownership as personal property, they possess all the attributes of other personal property." *Mullaly v. People*, 86 N. Y. 365.

In *State v. Sumner*, 2 Ind. 377, it was said: "A man, therefore, at common law may have an absolute property in him."

In *Dodson v. Mock*, 20 N. C. (4 Dev. & B. L.) 146, 32 Am. Dec. 677, it was said that dogs belong to that class of domiciled animals which the law recognizes

legal regard and protection than more harmless and useful animals, although an action for injury may be maintained by their owner.

Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175; *Ten Hopen v. Walker*, 96 Mich. 236; *Heiligmann v. Rose*, 81 Tex. 222, 13 L. R. A. 272; *Wheatley v. Harris*, 4 Sneed, 468, 70 Am. Dec. 258; *Johnson v. McConnell*, 80 Cal. 545; *Brown v. Carpenter*, 26 Vt. 639, 62 Am. Dec. 603; *Parker v. Mize*, 27 Ala. 480, 62 Am. Dec. 776; *Dunlap v. Snyder*, 17 Barb. 561; *Harrington v. Miles*, 11 Kan. 480, 15 Am. Rep. 355; *Aldrich v. Wright*, 58 N. H. 398, 16 Am. Rep. 355; *Findlay v. Bear*, 8 Serg. & R. 571; *Putnam v. Payne*, 13 Johns. 312; *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82; *Perry v. Phipps*, 32 N. C. (10 Ired. L.) 259, 51 Am. Dec. 387.

As a requisite for the maintenance of larceny the state must allege the value of the thing stolen, and prove it.

Davis v. State, 40 Ga. 229; *Roberts v. State*,

as property, and whatever it recognizes as property it will protect from invasion, by civil action on the part of the owner.

In *Harrington v. Miles*, 11 Kan. 481, 15 Am. Rep. 355, it was said: "That a dog was property was conceded at common law, as also that the owner might maintain a civil action for its loss."

In *Mowery v. Salisbury*, 82 N. C. 175, it was said that "property in dogs is recognized by the law and protected against wanton and needless injury, and a civil action for damages may be maintained."

In *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152, it was said: "In some of the states dogs are by statute placed upon the same footing as other personal property."

In *Lavery v. Hogan*, 2 N. Y. City Ct. Rep. 197. Affirmed in 1 N. Y. S. R. 84, it was said that dogs are the subject of ownership, and are sometimes valuable property, and for an injury thereto an action will lie.

In *Ward v. State*, 48 Ala. 161, 17 Am. Rep. 81, it was said that the common law gives the owner of dogs a civil action to recover damages for their destruction and injury.

In *Shaw v. Craft*, 37 Fed. Rep. 317, it was said that dogs upon a farm are regarded as domestic animals.

In *State v. Giles*, 125 Ind. 124, it was said that Elliott's (Ind.) Supp. § 335, defining the word "animal" to include "all brute creatures and all domestic fowls," embraced dogs.

In *Wilcox v. State* (Ga.) 39 L. R. A. 709, it was held that a dog was a domestic animal.

In *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516, it was said that "dogs are domesticated or tame animals, and as much the subject of property or ownership as horses, cattle, or sheep. . . . A dog without a collar is the subject of property."

So it was said: "We can see no reason why the property of its owner in a valuable dog is not quite as deserving of protection against the wilful and malicious injury of the reckless and malignant, as property in fruit, shade, or ornamental trees, whether standing in the garden or yard of their owner, or in a public street or square, or any other species of personal property."

In *Uhlein v. Cronack*, 109 Mass. 273, it was said that by the common law a dog is property, for an injury to which an action may lie.

In *Ten Hopen v. Walker*, 96 Mich. 236, which was an action for unlawfully killing a dog, it was said: "It is settled in this state that dogs have value, and are the property of the owner, as much as any other animal which one may have or keep."

And in *Woolsey v. Haas*, 65 Mo. App. 198, in an ac-
40 L. R. A.

55 Ga. 221; *Edwards v. State*, 69 Ga. 738; *Smith v. State*, 95 Ga. 460.

Where possessory warrant will lie, trover will lie.

6 Wait, Act. & Def. pp. 128, 155.

Little, J., delivered the opinion of the court:

The official report states the facts. It is somewhat difficult to determine the status of the dog as property in this state. It is not difficult to show that the owner has a property right in the animal, but it is difficult to define the nature and extent of it. This right seems to be better defined at common law than it is by the construction which this court has put upon our statutes. Our Constitution (art. 7, § 2, "1) impliedly recognizes dogs as property. It provides that the general assembly may impose a tax upon such domestic animals as, from their nature and habits, are destructive of other property. It is true that this power

tion for shooting and wounding plaintiff's dog, an instruction was properly refused which was to the effect that the law did not recognize a right of property in dogs, as this was not the law in Missouri.

A recovery in an action of trespass was allowed for killing the dog of another person in possession of a third party. The court said that although they were not regarded at common law of such value as that the stealing of them amounted to larceny, yet an action at law would lie for destroying them. "There is no distinction between them and other chattels as to the possession necessary to the maintenance of an action of trespass." *White v. Brantley*, 37 Ala. 430.

So, where the defendant failed to justify the killing of a dog as a nuisance, it was held that a dog was a species of property for an injury, to which an action at law could be sustained, and if the trespass was aggravated smart money could be allowed, even if the property had no pecuniary value. *Parker v. Mize*, 27 Ala. 480, 62 Am. Dec. 776.

In *State v. Mease*, 69 Mo. App. 581, it was said that dogs are property in Missouri, and damages may be recovered civilly for injuries to them.

In *Lynn v. State*, 33 Tex. Crim. Rep. 153, it was said that under Texas Penal Code, §§ 572, 575, providing that homicide is justified in the protection of the person or property against any other and violent attack, homicide may even be justified in the possession or protection of the dog by its owner.

In *Mullaly v. People*, 86 N. Y. 365, it was said: "When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history (2 Motley's Dutch Republic, 398), and the faithful St. Bernards, which, after a storm has swept over the crests and sides of the Alps, start out in search of lost travelers, the claim that the nature of a dog is essentially base, and that he should be left as prey to every vagabond who chooses to steal him, will not now receive ready assent."

In *People v. Maloney*, 1 Park. Crim. Rep. 593, it was said that the New York Revised Statutes are inconsistent with the common-law rule in regard to larceny, and "by them dogs are so far regarded as property as to be, in certain cases, the subject of taxation. The owner is made liable for the acts of his dog; thus recognizing that a dog has an owner, and consequently that the thing owned is property. For every civil purpose, not only by statute, but by the decisions of our courts, a dog is regarded as property."

In *Ireland v. Higgins*, Cro. Eliz. pt. 1, p. 125, it was said that there was a precedent for holding that a dog is property in 13 Hen. VII., Roll 35, where in

to tax partakes of the nature of a police regulation, and is made the exception to our uniform and *ad valorem* system of taxation; but the words giving the power evidently intend to and do denote the dog as a domestic animal, and, by reference, class this animal with other property. Section 2965 of the Code recognizes the ownership of dogs, in that it makes the owners liable to suit for the recovery of damages for injuries inflicted by their dogs under certain circumstances. Section 4402 of the Code makes the dog, *eo nomine*, a subject of simple larceny. This provision, however, does not seem to bring the dog as property to any high degree, because, in speaking of all other domestic animals, it is provided, "and also a dog" may be the subject of simple larceny, implying two things—that he was not, theretofore, a subject of simple larceny, nor was he a domestic animal. To one of us, at least, a possible reason why the dog may not, by common consent, have been

accorded a place among domestic animals not more worthy and even less valuable, is suggested by a learned writer (Grotius) when he says, "The reason why some creatures fly and avoid us is not the want of gentleness and mildness on their part, but on ours." In *Jemison v. Southwestern R. Co.* 75 Ga. 444, 58 Am. Rep. 476, which was an action against a railroad company for the negligent and malicious killing of a dog by the operation of a train of cars, it was held that a dog is property only in a qualified sense, and that such an action would not lie; and in the case of *Patton v. State*, 93 Ga. 111, 24 L. R. A. 732, it was held that the wilful and malicious killing of a dog was not an indictable offense under § 4627 of our Code. In the latter case, however, the ruling was based on the construction that the subjects of that particular statute were inanimate property. In the case, however, of *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764, it was ruled that the

trespass for assault and battery the defendant justified that J. S. was possessed of a dog *de bonis propriis*, and delivered it to him to keep, and that the plaintiff would have taken it from him, in which he resisted him and in defense and custody of his dog he beat him, and the hurt which he had was *de son tort d'emesne*, etc., which proveth a property in the dog when he justifieth the beating of one in defense of it. 2 Edw. II. Avowry.

In *St. Louis S. W. R. Co. v. Stanfield*, 63 Ark. 643, 37 L. R. A. 659, it was said that "the common-law rule, even in cases of larceny, is extremely technical, and has no sound basis to rest upon. . . . Except in cases of larceny, however, the dog was property at the common law, and the owner had his remedy by civil action for the loss or destruction of the same."

In *Haywood v. State*, 41 Ark. 479, it was said that every species of personal property was not the subject of larceny at common law. "For example, dogs were treated as personal property, and on the death of their owner, if not disposed of by will, went to his executor or administrator as such. So the owner of a dog could bring a civil action against one who injured or took the animal."

1 Williams on Executors, 9th Eng. ed. p. 830, *617, says: "Chattels animate may be subdivided into such as are domestic and such as are *feræ nature*. In such as are of a nature tame and domestic (as horses, dogs, kine, sheep, poultry, and the like) a man may have an absolute property, and they are therefore capable of being transmitted, like any other personal chattel, to his executor or administrator."

In *Mullaly v. People*, 86 N. Y. 365, it was said that dogs would pass as assets to the executor or administrator of a deceased owner.

In 4 Burn's Ecclesiastical Law, p. 297, it is said that "also hounds, greyhounds, spaniels, and the like, as they may be valuable, and may serve not only for delight, but for profit, shall go to the executors." Law of Test. 379.

But Noy's Maxims, 166, says: "If a man die seised of any lands, and do not dispose of them by his will, they descend to the heir as aforesaid. And he shall have, not only . . . but any other of . . . the hawks and the hounds."

In 1 Williams on Personal Property, p. 19, it was said: "It appears to have been formerly thought that hawks and hounds were not subjects of personal property, but would descend with the lands to the heir; but this opinion is not now law;" and Wentworth's Office of an Executor says: "Although they be for the most part but things of pleasure, that hindreth not; but they may be valuable as well as instru-

ments of music, both tending to delight and exhilarate the spirits; a cry of hounds hath to my sense more spirit and vivacity than any other music."

In *Com. v. Maclin*, 3 Leigh, 809, it was said the possessor has a base property in dogs, and may maintain a civil action for injury done to them.

In *Wheatley v. Harris*, 4 Sneed, 468, 70 Am. Dec. 258, it was said that upon the question whether the owner of a dog has such a property in him as will entitle him to maintain an action for killing or injuring the dog, there can be no doubt. The court said that in *Ireland v. Higgins*, Cro. Eliz. pt. 1, p. 125, it was laid down that the law takes notice of a greyhound, mastiff, dog, spaniel, and tumbler, and trover will lie for them. See also *Wadhurst v. Damme*, Cro. Jac. 45, justifying the killing of a mastiff.

In *Wright v. Ramscoot*, 1 Wms. Saund. 84, it was argued that "in *Ireland v. Higgins*, Cro. Eliz. pt. 1, p. 125, it was said that the law takes notice of a mastiff, hound, spaniel, and tumbler." (But in *Ireland v. Higgins* this statement was made by the counsel in argument.)

But in *Chunot v. Larson*, 43 Wis. 536, 28 Am. Rep. 567, it was said that "property in a dog is of peculiar character. A man is not, by the common law, considered to have the same valuable property in a dog as in cattle and sheep."

In *Ward v. State*, 48 Ala. 161, 17 Am. Rep. 31, in a larceny case, it was said that it was persuasive to show that dogs in Alabama are not regarded as property in the proper sense of that term, that they are neither administered as such nor taxed as other property.

In *Wilton v. Weston*, 48 Conn. 325, it was said that "if it be assumed that property in dogs stands on the same ground as that of property in other domestic animals, such, for instance, as the horse, we should be compelled to concede that this objection [to making a town liable for damages done by dogs where the owners reside in towns] should prevail, and the law should be declared invalid. But such assumption is unwarranted, as all the authorities agree."

In *Sentell v. New Orleans & C. R. Co.* 168 U. S. 698, 41 L. ed. 1169, it was said: "The very fact that they are without the protection of the criminal law shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals *feræ nature*, in which, until killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete. They are not considered as being upon the same plane with horses, cattle, sheep, and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds, and

law of this state contemplated that, to have property in animals which are wild by nature, the owner must have them within his actual possession, custody, or control, and this may be done by taming, domesticating, or confining them; and it was ruled also in that case that a possessory warrant would lie for the recovery of a bird when so in possession; and animals, by that decision, come under the same class. It is therefore apparent that an owner has property in his dog, and that this property is sufficient to support an action to recover possession of it when such has been lost.

Dogs have been held to be property by the courts in the District of Columbia, in Kansas, Texas, Connecticut, Tennessee, Michigan, Nebraska, Utah, and perhaps in other states. A contrary ruling has been made in several of the other states. His status seems to be more clearly defined by the common law. The compilers of the American & English Encyclopedia of Law (vol. 1, p. 584) lay down the proposition that "at common law the dog is

considered a tame, harmless, and docile animal." If this be true,—and our investigation does not bear it out to its full meaning,—then the owner can have an absolute property in such animals, because animals which are of a tame and domestic nature are the subjects of absolute property. 1 Am. & Eng. Enc. Law, p. 572. The latter proposition is supported by reference to a number of authorities. We, however, think that Chancellor Kent more correctly lays down the common-law rule that "animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property;" and that, "while this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner." 2 Kent, Com. § 348. Thus, it has been held that trover lies for wild geese which have been tamed, but which, without regaining their natural liberty, have strayed away. *Amory v. Flynn*, 10 Johns. 102, 6 Am. Dec. 316. So also for domestic fowls.

similar animals kept for pleasure, curiosity, or caprice." This statement should have been qualified by putting it in the past tense, and by showing that most of the states had placed dogs within the protection of their criminal law the same as other property, thus recognizing the right of property in dogs, and among these some of the states cited by the learned justice to sustain the proposition that in the absence of a statute they are not regarded as the subjects of larceny.

The law gives the owner the right of reclamation, but in all other respects the owner has only that qualified property in him which he may have in wild animals generally. *State v. Harriman*, 75 Me. 562, 48 Am. Rep. 423.

In *Leach v. Elwood*, 3 Ill. App. 453, it was said that while it may be true that owners have a certain right of property in their dogs not recognized at common law, nevertheless they are, even when domesticated, of that wild nature and destructive instinct which renders the animal subject to any reasonable police regulations that have been established by the proper authorities.

In *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152, it was said that "dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals."

In *Carthage v. Rhodes*, 101 Mo. 175, 9 L. R. A. 352, it was said that while in a sense dogs are property, and the owner may invoke the aid of the law for their protection as property by civil action, yet they are a base sort of property having no market or assessable value, do not enter into the estimate of the appreciable wealth of the state, and never have been considered subjects of taxation for revenue.

And in *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82, which was an action for killing a dog, it was held that all rights of property are held subject to such reasonable control and regulation of the mode of keeping and using as the legislature, under the police power vested in them by the Constitution of the commonwealth, may think necessary for the preventing of injuries to the rights of others, and the security of public health and welfare.

In *Milman v. Shockley*, 1 Houst. (Del.) 444, it was held that the legislature had seen proper to place all sheep-killing dogs and sheep-worrying puppies in the category of public nuisances, which anybody might abate and put out of the pale which the law had provided for the protection of the rights of property.

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In *McKenzie v. Campbell*, 1 U. C. Q. B. 241, where a constable was justified in killing a dog that was at large contrary to a proclamation of the mayor under a city ordinance, it was said by Robinson, Ch. J.: "Considering the light in which the common law regards a property in dogs," I am of opinion that the corporation have under the statute power to make such laws as may in their judgment seem best calculated for at once arresting the evil.

By the law of Aquilla if any man injuriously kills the four-footed beast of another which may be reckoned among his cattle, he shall be condemned to pay, etc. "As the law does not speak of four-footed beasts in general, but only of cattle, we may collect that wild beasts and dogs do not come within the intentment, which can be understood to include only those animals which feed in herds." Cooper, Justinian, lib. IV., tit. III. § 1.

In *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82, it was said: "There is no kind of property over which the exercise of this power is more frequent or more necessary than that which is the subject of the present action. In regard to the ownership of live animals, the law has long made a distinction between dogs and cats and other domestic quadrupeds, growing out of the nature of the creatures and the purposes for which they are kept. Beasts which have been thoroughly tamed, and are used for burden or husbandry, or for food, such as horses, cattle, and sheep, are as truly property of intrinsic value, and entitled to the same protection, as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild nature and destructive instincts, and are kept either for uses which depend on retaining and calling into action those very natures and instincts or else for the mere whim or pleasure of the owner; and therefore, although a man might have such a right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have "no absolute and valuable property" therein which could be the subject of a prosecution for larceny at common law, or even, according to some authorities, of an action of detinue or replevin, or a distress for rent, or which would make him responsible for the trespasses of his dog on the lands of other persons, as he would be for the trespasses of his cattle."

In *Jemison v. Southwestern R. Co.* 75 Ga. 444, it was held that a dog was not property except in a qualified sense, either at common law or under the statutes of this state.

Likewise the court in that case said that dogs

Leonard v. Belknap, 47 Vt. 608. Blackstone declares that the property in a dog is base property, but that such property is sufficient to maintain a civil action for its loss. 4 Bl. Com. 236. Professor Schouler, in his treatise on the law of Personal Property (§ 49), pronounces the dog to be a tame animal, from which definition it would appear that an owner can acquire an absolute property in the animal; and he distinguishes this animal from such others as property can be acquired in only by possession. So it will be seen that at the common law and under our statutes the owner has property in his dog, and not only so, but such property right is sufficient to maintain a civil action to recover its possession.

In the case now under consideration the defendant in error brought an action of trover in a justice's court to recover possession of his dog. A demurrer was filed to the proceeding in that court, which was overruled by the magistrate, and the case taken to the superior

court by writ of certiorari; whereupon the judge of the latter court held that the ruling of the magistrate was correct. So do we, on the authorities before referred to. The action of trover, while changed with us in some respects, was originally a special action on the case, in favor of any person who had a general or special property in goods, against any person who wrongfully withheld them from his possession. The special or qualified property which has been shown to exist in animals of this character is sufficient to support this action. The action lies for every species of personal property, animate or inanimate. 6 Wait, Act. & Def. pp. 128, 155. The question was expressly ruled in the state of Massachusetts, even though the courts of that state had declared that the property right in a dog was only a qualified one. See *Cummings v. Perham*, 1 Met. 555. The question was likewise ruled in *Binstead v. Buck*, 2 W. Bl. top page 1117.

The judgment of the court below is affirmed.

are not property in such a sense as makes them assets belonging to the estate of a deceased person, and are never inventoried or appraised, however numerous or valuable; nor are they subject to levy and sale, so far as we are informed.

Under Mo. Rev. Stat. 1879, § 5434, making it lawful for any person to kill a sheep-killing dog, an instruction that the law recognizes a right of property in dogs, and that it was necessary to show that the dog at that time was killing sheep, was erroneous. *Carpenter v. Lippitt*, 77 Mo. 242.

To say of a peer of the realm that he had no more conscience than a dog was held scandalous, and if spoken of any other person an action upon the case would lie. *Duke Buckingham's Case*, cited in 3 Bulst. 226.

II. Actions of trover, replevin, and trespass.

In *GRAHAM v. SMITH* it was held that the owner of a dog has such a property in it as will enable him to maintain an action of trover for its recovery in case of its wrongful conversion. This is in accord with the uniform rule of law in such cases.

An action of trespass can be maintained for taking away a dog, and an action of replevin, trover, or for conversion can also be maintained. *Binstead v. Buck*, 2 W. Bl. 1117; *Ireland v. Higgins*, Cro. Eliz. 125; *Mullaly v. People*, 86 N. Y. 365; *Cummings v. Perham*, 1 Met. 555; *People v. Maloney*, 1 Park. Crim. Rep. 593; *Athill v. Corbet*, Cro. Jac. 463; *Edwards v. Engleton*, Hob. 283a; *Filow's Case*, 12 Hen. VIII. 3; *Millar v. Taylor*, 4 Burr. 2344; *People, Longwell v. McMaster*, 10 Abb. Pr. N. S. 132; *Lynn v. State*, 33 Tex. Crim. Rep. 153; *People v. Campbell*, 4 Park. Crim. Rep. 386; *Queen v. Slade*, L. R. 21 Q. B. Div. 433; *State v. Lymus*, 28 Ohio St. 400, 20 Am. Rep. 772.

So, an action of trover was maintained for a pointing dog, where the plaintiff proved the dog to be his property, and it was found at the defendant's house twelve months after it was lost, and the defendant demanded twenty shillings for twenty-nine weeks' keep before he would deliver up the dog. *Binstead v. Buck*, 2 W. Bl. 1117.

And an action for trover will lie for a greyhound, and it need not be averred that he is tame. *Ireland v. Higgins*, Cro. Eliz. pt. 1, p. 125.

In *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516, it was said that a dog without a collar is the subject of property, and trover may be maintained for its conversion, even when the statute authorizes the killing of such dog.

- 40 L. R. A.

"A trover lies for conversion of a spaniel dog because it was reclaimed. Enter Pells and Leman adjudged in Banco on Demurrer. See Hub. R. Case 363, between Pells and Leman, and brief on error afterwards in King's Bench where no opinion was given for that, but was reversed for another cause, namely for default of the original. Intr. Tr. 14 Car. B. R. Rot. 217." 1 Rolle, Abr. 5.

In *Mullaly v. People*, 86 N. Y. 365, it was said that dogs are so far regarded at common law as property that an action of trover could be brought for their conversion.

A recovery was allowed in trover for a dog, and it was held that Mass. Rev. Stat. chap. 58, § 12, authorizing any person to kill a dog at large without a licensed collar on, did not warrant a person to convert him to his own use, as the object of the statute was to rid society of a nuisance. *Cummings v. Perham*, 2 Met. 555.

In *People v. Maloney*, 1 Park. Crim. Rep. 593, it was said that the owner of a dog may bring an action for an injury inflicted upon his dog, and if taken away he may bring replevin or trover.

An action of trespass was maintained for taking a greyhound with a collar, and the plea that the dog was coursing a hare on the defendant's land, and therefore he took and led him away, was deemed frivolous. *Athill v. Corbet*, Cro. Jac. 463.

And in an action of trespass for that the defendant with force and arms took and led away *quendam cariem venaticum prec.*, etc., a judgment was given for plaintiff. *Edwards v. Engleton*, Hob. 283a.

So, in an action of trespass charging that the defendant beat his servant and carried away one dog called a bloodhound, on demurrer it was held that he may have his action for this thing. *Filow's Case*, 12 Hen. VIII. 3.

In *Millar v. Taylor*, 4 Burr. 2344, it was said: "In the year book of 12 Hen. VIII., fol. 3, a. b. Great Dispute was made (upon the footing of property too) whether an action would lie for taking away a bloodhound, the arguments used against it were such as have, among others, been used upon the present occasion, viz., that it was of no value nor profit; but for pleasure. That felony could not be committed of it; consequently not trespass. That when the dog was out of the party's possession he ceased to have any property in him. That a dog was not thievable; would not pass by a grant of *omnia bona*. That replevin or detinue would lie of a dog."

And in *Jemison v. Southwestern R. Co.* 75 Ga. 444, 58 Am. Rep. 478, it was said that by the common law and under our Code he may maintain trespass

IOWA SUPREME COURT.

L. V. HAMBY
v
C. C. SAMSON, *Appt.*

(.....Iowa.....)

A dog is the subject of larceny under Code 1873, § 3902, making it a crime for anyone to steal any "chattels" of another.

(April 8, 1898.)

A PPEAL by defendant from an order of W. B. Quarton, one of the judges of the District Court for Kossuth County, discharging

vi et armis for wantonly and maliciously killing his dog.

And in *Dand v. Sexton*, 3 T. R. 37, a recovery was had in trespass *vi et armis* for beating the plaintiff's dog, whereby the dog was hurt and the plaintiff lost the use of him. The question involved was as to the amount of costs under 43 Eliz. § 6.

In *People, Longwell v. McMaster*, 10 Abb. Pr. N. S. 182, it was said that civil actions may be maintained for injury to or conversion of dogs as in regard to other domestic animals.

In *Lynn v. State*, 33 Tex. Crim. Rep. 153, it was said that civil actions would lie for the recovery of a dog or for his conversion, and damages could be recovered for injuries done or imposed, and punishment inflicted for his destruction.

In an action on the case, where it was alleged that a dog came to the hands of the defendant which belonged to the plaintiff, and the defendant did assume to deliver the said dog to the plaintiff upon request, and that the plaintiff had requested him and he did not deliver the dog, on demurrer it was held that an action would lie for the dog. *Ireland v. Higgins, Owen*, 93.

And in *Ireland v. Higgins, Owen*, 93, it was said in argument that in 23 Eliz. Leek's Case, one had judgment to recover great damages for a bloodhound.

In *People v. Campbell*, 4 Park. Crim. Rep. 386, it was said: "An action can be brought to repossess one of a dog of which he has been unlawfully deprived."

So, under 2 & 3 Vict. chap. 71, § 40, providing that upon complaint by any person claiming to be entitled to the property or possession of any goods which are detained by any other person, the value of which shall not be greater than £15, it shall be lawful for such magistrate to order the goods to be delivered to the owner thereof, the word "goods" was held to include a dog. *Queen v. Slade*, L. R. 21 Q. B. Div. 433.

In *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 772, it was said: "At the common law, although it was not a crime to steal a dog, yet it was such an invasion of property as might amount to a civil injury and be redressed by a civil action."

In 8 Bacon, Abr. 549, *Replevin and Acovery*, it was said that replevin does not lie of things which are *fero naturæ*, as dogs, but if things wild by nature are made tame, or are reclaimed, so long as they continue in that condition they belong to the person who has the possession of them, and he may bring a replevin. But it was said that a replevin will not lie for a mastiff dog, though an action of trespass will.

III. Actions against common carriers.

Where a railroad or transportation company received a dog as a common carrier, it was liable for loss of the dog through negligence of its employees. 40 L. R. A.

plaintiff under a writ of habeas corpus from the custody of the defendant, to which he had been committed for larceny of a dog. *Reversed.*

Statement by Deemer, Ch. J.:

This is a habeas corpus proceeding, in which plaintiff alleged that he was unlawfully restrained of his liberty by the defendant, who is sheriff of Kossuth county, under a warrant of commitment issued by a justice of the peace of said county on an information charging the plaintiff with the crime of larceny of a dog. The district judge discharged the petitioner, and defendant appeals.

Kansas City, M. & B. R. Co. v. Higdon, 94 Ala. 286, 14 L. R. A. 515; *Stuart v. Crawley*, 2 Stark. 323; *Cantling v. Hannibal & St. J. R. Co.* 54 Mo. 385; *Kennedy v. American Exp. Co.* 22 Ont. App. Rep. 278; *Ashenden v. London, B. & S. C. R. Co.* L. R. 5 Exch. Div. 190, 42 L. T. N. S. 586, 28 Week. Rep. 511, 44 J. P. 203.

So, a limitation of liability in the ticket for loss of a dog by a railway company, restricting the right of recovery to £2 unless 5 per cent of the value above £2 is paid for carriage to the carrier, was held to be unreasonable and void, under 17 & 18 Vict. chap. 31, railway and canal traffic act, § 7, providing that the company shall be liable for the loss of or any injury done to any animal or to any articles, goods, or things in the receiving, forwarding and delivery, notwithstanding any notice limiting liability, providing the company may make such conditions as the court or judge shall adjudge to be reasonable. *Dickson v. Great Northern R. Co.* L. R. 18 Q. B. Div. 176.

A condition in a printed ticket that the railway company will not be liable in any case for loss or damage to a dog above certain specified value delivered to them for carriage, unless the value is declared, is not just and reasonable under railway and canal traffic act 1854 (17 & 18 Vict. chap. 31, § 7), providing that every such company shall be liable for loss or injury to horses or other animals notwithstanding any notice limiting such liability. The railroad was held liable for a dog lost without any neglect or default on its part or that of the connecting line. *Ashenden v. London, B. & S. C. R. Co.* L. R. 5 Exch. Div. 190, 42 L. T. N. S. 586, 28 Week. Rep. 511, 44 J. P. 203.

Under railway and canal traffic act 1854 (17 & 18 Vict. chap. 31), regulating traffic on railways, and § 1, providing that "traffic" includes "animals," and § 2, providing that railway companies shall afford reasonable facilities for the receiving and forwarding and delivery of traffic, it was held that the company was bound to afford reasonable facilities for carrying dogs. *Dickson v. Great Northern R. Co.* (1886), L. R. 18 Q. B. Div. 176.

And a company was liable where a passenger was required by the conductor to place his dog in the baggage car, without notice that the railroad company's rules required a baggage master's fee, and the owner refused to pay any fee to the baggage master, who refused to put the dog off at the proper station and carried the dog beyond and lost it, and the owner offered to pay a fee before he knew the dog was lost. *Kansas City, M. & B. R. Co. v. Higdon*, 94 Ala. 286, 14 L. R. A. 515.

But where the conditions of a ticket were that the railroad company would not be liable in any case for loss or damage to a dog above the value of £5, unless a declaration of its value was made at the time of booking, and would be liable in no case for an injury to a dog of whatever value when such

Messrs. Raymond & Raymond, for appellant:

Larceny under the common law is defined as the "felonious taking and carrying away of the personal goods of another."

4 Chitty's Bl. Com. p. 179.

As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny. But by statute 10 Geo. III. chap. 18, very high pecuniary penalties, or a long imprisonment and whipping in their stead, may be inflicted by two justices of the peace

(with a very extraordinary mode of appeal to the quarter sessions) on such a steal, or for knowingly harboring a stolen dog, or having in custody the skin of a dog that has been stolen.

4 Chitty's Bl. Com. p. 190; 2 Russell, Crimes, 9th ed. p. 281.

All larcenies at common law are of goods and chattels, and must be of some value, but no particular value is required.

2 Bishop, Crim. L. 7th ed. § 767.

If the carcass was of any value, either for food or for its hide, it would be the subject of larceny.

Bishop, Crim. L. § 775.

The reason of the law being changed, the law is also changed.

Bouvier, Law Dict. 11th ed. 145.

When dogs became domesticated and of

injury arose from fear or restiveness, and if the declared value of the dog exceeded £5 the price of conveyance in addition to regular fare would be at the rate of 2½ per cent or 6 d. in £1 upon the declared value above £5, whatever may be the amount of such value or for whatever distance, and the plaintiff made no declaration of value and paid 3s., and the dog was placed in a horse box and fastened with a leather collar and a strap to the side of the horse box, and escaped through an open window and was lost, a judgment against the company for £21 was set aside upon the ground that the conditions in the ticket were just and reasonable. *Harrison v. London, B. & S. C. R. Co.* 2 Best & S. 122, 31 L. J. Q. B. N. S. 113, 8 Jur. N. S. 740, 6 L. T. N. S. 466.

In *Ashenden v. London, B. & S. C. R. Co.* L. R. 5 Exch. Div. 190, 42 L. T. N. S. 586, 28 Week. Rep. 511, 44 J. P. 203, it was said that *Harrison v. London, B. & S. C. R. Co.*

So, where a greyhound was delivered to a carrier and was tied by a cord in a watch-box, but slipped from the noose and was lost, the carrier was responsible for his value. *Stuart v. Crawley*, 2 Stark. 323.

So, where a passenger delivered a dog to the baggage master and paid the charges thereon, a recovery was allowed where the dog was lost from having been put off at the wrong station, although the company had a rule that "live animals are allowed as baggage-men's perquisites," but it was not shown that the plaintiff had notice of such rule. *Cantling v. Hannibal & St. J. R. Co.* 54 Mo. 385, 14 Am. Rep. 476.

And an express company was liable where dogs were shipped for exhibition, which fact was known to the company, and were not delivered to the address until ten hours after their arrival, and too late to compete, and the plaintiff was entitled to damages including anticipated profits. *Kennedy v. American Exp. Co.* 22 Ont. App. Rep. 278.

The case of *Harrison v. London, B. & S. C. R. Co.* 2 Best & S. 122, 31 L. J. Q. B. N. S. 113, 8 Jur. N. S. 740, 6 L. T. N. S. 466, allowing a railroad company to exempt itself in certain cases by limiting its liability for dogs, was overruled. The cases holding a transportation company not liable do so on the ground that it was not a common carrier.

Where a greyhound was delivered to the servants of a railroad company who were not common carriers of dogs, and the fare demanded was paid, and in transferring the greyhound from one train to another which had not then arrived the dog was fastened to an iron spout on the platform by reason of a strap and collar originally put on by the owner, and while so fastened slipped its collar and ran upon the track and was killed, a recovery was denied. *Richardson v. North Eastern R. R. Co.* L. R. 7 40 L. R. A.

C. P. 75, 41 L. J. C. P. N. S. 80, 26 L. T. N. S. 131, 20 Week. Rep. 461.

In *Richardson v. North Eastern R. Co.* L. R. 7 C. P. 75, 41 L. J. C. P. N. S. 80, 26 L. T. N. S. 131, 20 Week. Rep. 461, the case of *Stuart v. Crawley*, 2 Stark. 323, was distinguished, as in that case the defendant was a common carrier and here the defendants are not, and in that case when the dog was delivered to the defendant's servant he had the means of seeing that it was insufficiently secured by the cord around his neck, whereas here the mode of securing the dog by the collar and strap was originally adopted.

Where a railroad company did not hold itself out as a common carrier of dogs, and refused to accept hire and furnish tickets for their transportation, and the agent referred the owner to the baggage master, who told him, "You know the rules about dogs," but as an accommodation consented to take the dogs in his car and promised to look after them, for which he received \$2, no recovery could be had for the loss of a dog under a complaint charging the defendant as a common carrier, where the proof showed him liable as a private carrier only. *Honeyman v. Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20.

IV. *Actions for injuries to dogs by railroad and street cars.*

In *CITIZENS' RAPID TRANSIT CO. v. DEW* it was held that a motorman could not rely upon the quickness and celerity of a dog in order to absolve the company from all duty and care to prevent running over the dog with an electric car, and a street-railway company was held liable for the killing of a dog by an electric car, caused by the negligence of a motorman. It was further held that a dog is not a trespasser on a street-car track that is laid in the highway on the same level.

But under Miss. Code 1880, § 1059, providing that in all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care upon the part of the company, where a dog was killed by a train a recovery was denied on a showing made that the employees of the company did all that could be done to avoid the accident. It was held that the presumption was that the dog had the instinct and ability to get out of the way of danger, and would do so unless its freedom of action was interfered with by other circumstances. *Jones v. Bond*, 40 Fed. Rep. 281.

And under La. Laws 1882, p. 160 (act July 5, 1882), providing (§ 2) that dogs are property, but no dog shall be entitled to the protection of the law unless placed upon the assessment roll, and (§ 3) providing

value to mankind, the reason for this ancient rule became obsolete and the law itself was repealed.

Mullaly v. People, 86 N. Y. 385; *Haywood v. State*, 41 Ark. 479; *State v. House*, 65 N. C. 315, 6 Am. Rep. 744; *Clark, Crim. Cas. Horn-book Series*, p. 332; *People v. Maloney*, 1 Park. Crim. Rep. 598; *People v. Campbell*, 4 Park. Crim. Rep. 386; *State v. Brown*, 9 Baxt. 53, 40 Am. Rep. 81; *Com. v. Hazelwood*, 84 Ky. 681.

The principles of the common law, ancient or modern, not being enforced in this state except so far as they are applicable to our habits and conditions of society (*Wagner v. Bissell*, 8 Iowa, 896; *Pierson v. Lane*, 60 Iowa, 60), it cannot be said that these obsolete rules were in force in this state at the time of the

enactment of § 3902 by the different legislatures, much less that these ancient rules were considered by the legislature.

Section 3902 of the Code is as follows: "If any person steal, take, and carry away of the property of another any money, goods, or chattels, he is guilty of larceny."

The words "property, goods, and chattels" are words of common use and are to be taken in their actual, plain, and ordinary sense.

Equitable L. Ins. Co. v. Gleason, 56 Iowa, 47; *Blackman v. Wadsworth*, 65 Iowa, 80; *State v. Phippe*, 95 Iowa, 491; *State v. Smith*, 46 Iowa, 673.

It can hardly be said that it was not the object of the statute and the spirit of the law to make it a crime to steal property of any kind

that in civil actions for the killing of or for injuries done to dogs, the owner cannot recover beyond the amount of the value of such dog as fixed by himself in the last assessment, and New Orleans city ordinance, July 1, 1890, providing that no dog shall be permitted to run at large without a license tag, the plaintiff should have shown a compliance with the law of the state and the ordinance of the city as a condition precedent to recovery from the railroad company for negligently killing his dog. *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169.

For prior cases see *St. Louis S. W. R. Co. v. Stanfield* (Ark.) 37 L. R. A. 659, note.

V. Right to kill dogs.

a. Police power.

The question of the right of property in dogs enters largely into the cases of the "right to kill a dog," and reference is made to the case of *Hubbard v. Preston* (Mich.) 15 L. R. A. 249, note on that subject. A summary of the cases on that subject may be grouped as follows:

The following cases affirm that by virtue of the police power certain classes of dogs may be killed: *Leach v. Elwood*, 3 Ill. App. 453; *Haller v. Sheridan*, 27 Ind. 494; *Independence v. Trouvalle*, 15 Kan. 70; *State, Curtis v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529; *Com. v. Markham*, 7 Bush, 487; *Hagerstown v. Witmer*, 86 Md. 293, 39 L. R. A. 649; *Towerv. Tower*, 18 Pick. 262; *Blair v. Forehand*, 100 Mass. 136; *Morewood v. Wakefield*, 183 Mass. 240; *Faribault v. Wilson*, 34 Minn. 254; *Morey v. Brown*, 42 N. H. 373; *Mowery v. Salisbury*, 82 N. C. 175; *Griggs v. Dittoe*, 52 Ohio St. 601; *McKenzie v. Campbell*, 1 U. C. Q. B. 241; *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689; *People, Renshaw v. Gillespie*, 25 App. Div. 91.

Other cases deny the power: *Lowell v. Gathright*, 97 Ind. 313; *Stebbins v. Mayer*, 38 Kan. 573 (no city ordinance); *Bishop v. Fahay*, 15 Gray, 61; *Kerr v. Seaver*, 11 Allen, 151; *Cozzens v. Nason*, 109 Mass. 275; *People, Shand v. Tighe*, 9 Misc. 607; *Lynn v. State*, 33 Tex. Crim. Rep. 153; *Heisrodt v. Hackett*, 34 Mich. 283; *Archer v. Baertschi*, 8 Ohio C. C. 12; *Fox v. Mohawk & H. River Humane Soc.* 25 App. Div. 26.

b. Unlawfully killing dogs.

It was held that an owner may recover for unlawfully killing his dog. *Parker v. Mase*, 27 Ala. 480, 62 Am. Dec. 776; *Johnson v. McConnell*, 80 Cal. 546; *Lowell v. Gathright*, 97 Ind. 313; *Gibbons v. Van Alstyne*, 29 N. Y. S. R. 461; *Dodson v. Mock*, 20 N. C. (4 Dev. & B. L.) 146, 32 Am. Dec. 677; *Wheatley v. Harris*, 4 Sneed, 468, 70 Am. Dec. 258; *Heilgmann v. Rose*, 81 Tex. 222, 13 L. R. A. 272.

Where a constable shot a dog going on his accustomed route from the barn, on the sidewalk, to the garden, and the jury found a special verdict to the effect that if the defendant was not justified in 40 L. R. A.

shooting the dog the damages were \$75, and if he was justified in shooting the dog they found a verdict of \$200 for shooting into the fence and garden, judgment was rendered for \$275. *Swann v. Bowie*, 2 Cranch. C. C. 221.

c. Barking and howling dogs.

Some cases hold that a barking and howling dog may not be killed. *Dequay v. Hartzell*, 1 Ind. App. 500.

Other cases affirm the right to kill such dog. *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Brill v. Flagler*, 23 W. Va. 354, Overruled in *Dunlap v. Snyder*, 17 Barb. 561; *Lavery v. Hogan*, 2 N. Y. City Ct. Rep. 197.

In *Hubbard v. Preston*, 90 Mich. 221, 15 L. R. A. 249, the court said it was a question for the jury.

d. Dangerous dogs.

A dangerous dog may be killed in self-defense. *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Reynolds v. Phillips*, 13 Ill. App. 557; *Anson v. Dwight*, 18 Iowa, 241; *Nehr v. State*, 35 Neb. 638, 17 L. R. A. 771; *Credit v. Brown*, 10 Johns. 265; *Putnam v. Payne*, 13 Johns. 312; *Maxwell v. Palmerston*, 21 Wend. 407; *Dunlap v. Snyder*, 17 Barb. 561; *People, Dillon v. Metropolitan Police*, 15 Abb. Pr. 167; *Lavery v. Hogan*, 2 N. Y. City Ct. Rep. 197; *People, Shand v. Tighe*, 9 Misc. 607; *Bowels v. Fitzrandolph*, Addison (Pa.) 215; *Keck v. Halstead*, 2 Lutw. 630; *Spaight v. McGovern*, 16 R. I. 658, 7 L. R. A. 388; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603; *Quigley v. Pudsey*, 28 N. S. 240.

In *Wright v. Wrancoet*, 2 Neb. 237, 1 Sid. 336, "in an action sur case for killing a mastiff dog, the defendant justified because the plaintiff suffered him to go unmuzzled and that he fell on a dog kept by the defendant for preservation of the house, and that the defendant, to preserve his dog, killed the plaintiff's dog, which per T. and W. is ill, without saying he could not otherwise do it. . . . But per Keeling, Ch. J., this is a sufficient justification, to which Moreton inclined." But the defendant not attending it was adjourned. In 1 Wms. Saund. 84, it was held that the plea was bad, and judgment was given for the plaintiff.

Some cases held that under the evidence the killing was not justified. *Uhelein v. Cromack*, 109 Mass. 273; *Dodson v. Mock*, 20 N. C. (4 Dev. & B. L.) 146, 32 Am. Dec. 677; *Perry v. Phippe*, 32 N. C. (10 Ired. L.) 259, 51 Am. Dec. 387; *Spaight v. McGovern*, 16 R. I. 658, 7 L. R. A. 388 (contributory negligence); *Clark v. Webster*, 1 Car. & P. 104; *Hanway v. Boulbee*, 4 Car. & P. 350, 1 Moody & R. 15; *Morris v. Nugent*, 7 Car. & P. 572.

e. Trespassing dogs.

It is generally held that a mere trespassing dog cannot be killed. *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Tyner v. Cory*, 5 Ind. 216; *Dinwiddie*

that is of value. This is the common meaning of the words used, and must prevail.

Equitable L. Ins. Co. v. Gleason, 56 Iowa, 46; *Marshall v. Blackshire*, 44 Iowa, 478; *Harriman v. State*, 2 G. Greene, 265.

Messrs. Clarke & Cohenour, for appellee:

Under the common law a dog is not the subject of larceny.

1 Hale, Pl. C. 1st Am. ed. p. 512; 4 Bl. p. 286; 2 Bishop, Crim. L. § 773; 1 McClain, Crim. Law, § 539; Davis, Criminal Code and Digest, p. 176; *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 772; *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599; *State v. Holder*, 81 N. C. 527, 81 Am. Rep. 517; *Ward v. State*, 48 Ala. 161, 17

Am. Rep. 31; 12 Am. & Eng. Enc. Law, p. 782.

It then follows that if a dog is to be included in subjects of which larceny can be committed, it must be by virtue of some positive statutory enactment including them in the subjects of larceny.

Under the common law a dog belonged in the same classification of animals as does a coon, all of which were held not to be the subjects of larceny.

Warren v. State, 1 G. Greene, 111; *Shaul v. Brown*, 28 Iowa, 42, 4 Am. Rep. 151.

Statutes worded similarly to our statute do not make a dog the subject of larceny.

State v. Lymus, 26 Ohio St. 400, 20 Am.

v. State, 103 Ind. 101; *Sosat v. State*, 2 Ind. App. 586; *Marshall v. Blackshire*, 44 Iowa, 478; *Barret v. Utley*, 12 Bush, 399; *Bowers v. Horen*, 93 Mich. 420, 17 L. R. A. 773; *Gillum v. Sisson*, 53 Mo. App. 516; *Dudley v. Love*, 60 Mo. App. 420; *Woolsey v. Haas*, 65 Mo. App. 198; *McDaniel v. State*, 5 Tex. App. 475; *Townsend v. Wathen*, 9 East, 277; *Corner v. Champneys*, cited in 2 Marsh. 584.

Other cases hold that such dog may be killed. *Simmonds v. Holmes*, 61 Conn. 1, 15 L. R. A. 253; *Dunning v. Bird*, 24 Ill. App. 270; *Lipe v. Blackwelder*, 25 Ill. App. 119; *Meneley v. Carson*, 55 Ill. App. 74; *Bradford v. McKibben*, 4 Bush, 545; *Barret v. Utley*, 12 Bush, 399; *Hubbard v. Preston*, 90 Mich. 221, 15 L. R. A. 249; *King v. Kline*, 6 Pa. 318.

Where a confectioner and baker placed poisoned bread and cheese behind his counter underneath the same to destroy rats and mice, and plaintiff's dog, while his daughter was waiting to be served, went under the counter and ate some of the poisoned bread and cheese, no recovery could be had. *Stansfeld v. Bolling*, 22 L. T. N. S. 799.

Under 24 & 25 Vict. chap. 97, § 41, providing that whosoever shall unlawfully and maliciously kill, maim, or wound any dog, shall be punished, a conviction could not be had for placing poisoned meat in a garden for the purpose of killing a trespassing dog. In this case it was said that it might be an offense under 27 & 28 Vict. chap. 15, § 2, making it criminal to set up poisoned meat calculated to destroy life. *Daniel v. James*, L. R. 2 C. P. Div. 351.

f. Sheep-killing dogs.

It is generally held that sheep-killing dogs may be killed. *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101; *Johnson v. McConnell*, 60 Cal. 545 (Statute); *Milman v. Shockey*, 1 Houst. (Del.) 444 (Statute); *Hunt v. State*, 3 Ind. App. 383; *Carpenter v. Lippitt*, 77 Mo. 242 (Statute); *Brauer v. English*, 21 Mo. App. 490; *Dunlap v. Snyder*, 17 Barb. 561; *Brown v. Hoberger*, 52 Barb. 15; *Parrott v. Hartsheld*, 20 N. C. (4 Dev. & B. L.) 110, 32 Am. Dec. 673; *Job v. Harlan*, 13 Ohio St. 485; *Campbell v. Brown*, 1 Grant, Cas. 82 (Statute); *Com. v. Gabby*, 5 Pa. Dist. R. 159; *Miller v. Spaulding*, 41 Wis. 221.

Other cases deny the right unless the dog is caught in the act or the statute authorizes it. *Lentz v. Stroh*, 6 Serg. & R. 34 (statute not retroactive); *Wells v. Head*, 4 Car. & P. 568.

g. Dogs chasing other animals.

Dogs chasing other animals cannot be killed. *Spray v. Ammerman*, 65 Ill. 309; *Livermore v. Batchelder*, 141 Mass. 179; *Hinckley v. Emerson*, 4 Cow. 351; *State v. Latham*, 35 N. C. (13 Ired. L.) 83; *Janson v. Brown*, 1 Campb. 41; *Vere v. Lord Crawford*, 11 East, 568; *Wright v. Ramscot*, 1 Wms. Saund. 84; *Kellett v. Stannard*, 2 Ir. C. L. Rep. 156. Some cases, however, affirm the right. *Anderson v. Smith*, 7 Ill. App. 354; *Barret v. Utley*, 12 Bush, 399; *Leonard v. Wilkins*, 9 Johns. 238; *Boeher* 40 L. R. A.

v. Lutz, 13 Daly, 28; *Sutton v. Coover*, 4 York, 22; *Protheroe v. Mathews*, 5 Car. & P. 581; *Wadhurst v. Damme*, Cro. Jac. 45; *Barrington v. Turner*, 3 Lev. 28.

If a man hunt with a tumbler (greyhound) in my warren, still I am not justified in killing the tumbler with my mastiff set on by me. This case was cited in *Barrington v. Turner*, 3 Lev. 28, where a recovery was denied for killing greyhounds which chased a deer in defendant's park. *Lewins's Case*, 2 Rolle, Abr. 567.

Where the defendant justified killing the plaintiff's mastiffs to prevent them from killing the plaintiff's hogs that were trespassing, Hale said: "The justification of killing the mastiffs is well enough; for a man may not set mastiffs upon pigs to kill them, but he may hunt them with a little dog." *King v. Rose*, Freeman. C. L. 347, 4 Raym. 228, 3 Keb. 228.

In *Wadhurst v. Damme*, Cro. Jac. 45, in an action for trespass for killing a mastiff dog, a defense that the dog was in the habit of killing conies in his warren was held good.

A recovery could not be had for damages for killing a dog which chased a rabbit into the lands of the defendant, and ran against a dog spear and was injured. *Jordin v. Crump*, 8 Mees. & W. 782, 11 L. J. Exch. N. S. 74.

In *Deane v. Clayton*, 2 Marsh. 577, 1 J. B. Moore, 203, 7 Taunt. 489, as to whether the owner of woodland was liable for placing dog spears near the paths, thereby killing a trespassing dog chasing a hare, the owner of the dog using all his endeavors to call in his dog, was not decided.

h. Dogs "at large."

Dogs held to be at large. *Com. v. Chase*, 6 Cush. 248; *Com. v. Dow*, 10 Met. 382; *Julienne v. Jackson*, 69 Mass. 34; *Nehr v. State*, 35 Neb. 638, 17 L. R. A. 771; *Griggs v. Dittoe*, 52 Ohio St. 601; *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603.

Dogs held not to be at large. *Lowell v. Gathright*, 97 Ind. 313; *Bishop v. Fahay*, 15 Gray, 61; *McAneany v. Jewett*, 10 Allen, 151; *Swann v. Bowie*, 2 Cranch, C. C. 221.

i. Killing a dog by mistake.

A party killing a dog by mistake is held liable. *Ranson v. Kitner*, 31 Ill. App. 242; *Harris v. Eaton*, 20 R. I. pt. 1, p. 84; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496.

VI. Criminal actions for injuries to dogs.

A criminal prosecution would lie at common law for malicious mischief in injuring a dog, but a dictum in *Missouri* denies that such an action could be maintained.

In *King v. Chaloner*, 12 Mod. 377, "an information was against him for killing my Lord S.'s dog, setting forth that Lord S. was riding in the vill of

Rep. 472; *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599; *State v. Holder*, 81 N. C. 527, 31 Am. Rep. 517; *Ward v. State*, 48 Ala. 161, 17 Am. Rep. 31; 12 Am. & Eng. Enc. Law, p. 782; 1 McClain, Criminal Law, § 539.

At common law a chose in action was not the subject of larceny, and statutes making "personal goods" the subject of larceny are usually construed as not including choses in action, and to be included in the definition of larceny they must be designated in express words as our statute has done.

12 Am. & Eng. Enc. Law, p. 784; *United States v. Davis*, 5 Mason, 356; *Warner v. Com.* 1 Pa. St. 154, 44 Am. Dec. 114; *Culp v. State*, 1 Port. (Ala.) 33, 26 Am. Dec. 357.

D. in the county of Middlesex, and that his greyhound being *tunc et ibidem* following him, the defendant drew his sword, and *tunc et ibidem* killed the dog. Not guilty pleaded; and at *nisi prius* the defendant *relicta verificatione* confessed the action; and the *postea* was, 'that at *nisi prius* at such a day, the defendant *relicta verificatione* confessed the action.' Holt, Chief Justice. 'You should not have mentioned the *nisi prius* at all, but have entered it as of a term before; or, since you have mentioned it, you should have shewed that the jury was called, etc., and then the defendant *relicta*, etc., for now you tell us of a *nisi prius*, and shew nothing that was done there.' Brotherton excepted, that it did not appear what county the dog was in; for though Lord S. is said to be in Middlesex, the dog might be in another county, and *ad tunc et ibidem* shall only go to the vill, which may extend to more counties than one. Sed Per Curiam; 'It shall go to both.'

In a criminal prosecution for malicious mischief in shooting a dog the court said that many actions have been brought in this state and in England for injuries to such property, and it was held "if, then, dogs be personal property, they are protected by the law, and the owner has such an interest in them as that he can protect and defend them; and the destruction of them from malice to the owner is, in law, malicious mischief." *State v. Latham*, 35 N. C. (13 Ired. L.) 33.

But in *State v. Mease*, 69 Mo. App. 581, it was said that it was not an offense at common law to kill a dog, and that in that respect the common law is still in force in Missouri. (But see *State v. Latham*, and *King v. Chaloner*, *supra*).

Under statutes making it criminal to injure "property," prosecutions have been maintained for injury to dogs. *State v. Sumner*, 2 Ind. 377; *Harness v. State*, 27 Ind. 425; *Sosat v. State*, 2 Ind. App. 596; *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516; *Nehr v. State*, 35 Neb. 638, 17 L. R. A. 771.

But the converse was held in the following cases: *State v. Marshall*, 13 Tex. 55; *Patton v. State*, 93 Ga. 111, 24 L. R. A. 732; *Com. v. Maclin*, 3 Leigh, 809; *Davis v. Com.* 17 Gratt. 617; *State v. Mease*, 69 Mo. App. 581.

A dog was embraced in the term "all brute creatures." *State v. Giles*, 125 Ind. 124.

Or "animal." *Warner v. Perry*, 14 Hun, 337.

"Or other beasts." *United States v. Gideon*, 1 Minn. 292.

But a dog was not embraced in "domestic animals." *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423.

Or "cattle." *State v. Mease*, 69 Mo. App. 581.

In some prosecutions it was shown that the word "dog" was mentioned specifically in the statutes against malicious mischief. *Hewitt v. State*, 121 Ind. 245; *Kinsman v. State*, 77 Ind. 132; *State v. Pine*, 80 Tex. 399; *McDaniel v. State*, 5 Tex. App. 475.

40 L. R. A.

The terms "goods" and "chattels" cannot be extended by implication to include dogs, but if they are to be made the subjects of larceny it must be by a statutory enactment using express words for that purpose.

Sentell v. New Orleans & C. R. Co. 166 U. S. 695, 41 L. ed. 1169.

In the first place, the common law adopted and in force in Iowa is the common law and statutes of England in force and operation prior to the year 1707, the date of the union of England and Scotland under the title of Great Britain.

O'Ferrall v. Simplot, 4 Iowa, 381; *Reynolds v. Wilmeth*, 45 Iowa, 693.

The statute of 10 Geo. III., chap. 18, only

Under Ind. Rev. Stat. p. 975, § 71, providing that any person who shall maliciously destroy any property shall be fined, it was held that "a man therefore at common law may have an absolute property in him" (a dog.) "A dog then, being a domestic animal, is a subject of absolute property, and, though not intrinsically for his flesh, yet extrinsically for his use, being of some, we might say of much, value, the killing of him under our statute is an indictable offense." *State v. Sumner*, 2 Ind. 377.

And under 2 Gavin. & H. (Ind.) p. 463, § 13, providing that every person who shall maliciously and mischievously injure any property of another shall be deemed guilty of a malicious trespass and be fined not exceeding twice the value of the damage done, in a prosecution for killing a dog it was held that the amount of damage done, and not the value of the animal killed, constituted the basis for the penalty and as a matter of law. The court said: "We cannot know that the dog was of no value after he was killed; at least, it is a fact that cannot be left to inference. Some animals are of as much value after they are killed as before. The damages occasioned by the injury complained of must be averred." *Harness v. State*, 27 Ind. 425.

And a conviction was had under Ind. Stat. Elliott's Supp. § 448, making it a misdemeanor for any person to mischievously or maliciously injure or kill any dog that has been listed for taxation, except sheep-killing dogs. *Hewitt v. State*, 121 Ind. 245.

Under Ind. act March 7, 1883, Acts 1883, p. 148, providing that any person who shall mischievously injure or kill any dog that has been duly listed for taxation shall be guilty of a misdemeanor, excepting from the act dogs killed while damaging property or sheep-killing dogs, a conviction was had where a dog was properly listed, and was not damaging any property, and was not shown to be a sheep-killing dog. *Dinwiddie v. State*, 103 Ind. 101.

A conviction could be had under Ind. Rev. Stat. 1881, § 1955, providing whoever maliciously or mischievously injures or causes to be injured any property of another is guilty of malicious trespass, notwithstanding the act of March 7, 1883, § 5, providing against maliciously injuring or killing any dog that has been listed for taxation. *Sosat v. State*, 2 Ind. App. 586.

In *Sosat v. State*, 2 Ind. App. 586, it was said that the case of *Kinsman v. State*, 77 Ind. 132, was decided before the dog law of 1883 and 1881 had been enacted.

In *Kinsman v. State*, 77 Ind. 132, under 2 Ind. Rev. Stat. 1876, p. 462 (1881, p. 186), in a prosecution for unlawfully, maliciously, and mischievously killing a dog, it was said that ever since Ind. act of March, 1861, providing for licensing dogs, the laws of this state have recognized the property in dogs, and have required that their owners should contribute certain sums to the revenue of the township on account of their ownership of such property; that the first act of March, 1861, called it a

provided for the punishment for taking and carrying away a dog, but did not make it larceny.

1 McClain, Criminal Law, § 589; 1 Hawk. P. C. chap. 38, § 23.

Criminal and penal statutes are to be strictly construed, and their effect not to be extended by implication.

23 Am. & Eng. Enc. Law, pp. 374, 375, 387.

Deemer, Ch. J., delivered the opinion of the court:

The sole question presented by this appeal is whether or not a dog is the subject of larceny. That it was not at common law is conceded. The reasons for this were twofold: First, be-

cause it had no intrinsic value; and, second, because it was not fully domesticated, but by nature base. The courts held that dogs, although reclaimed, could not be used for food, but were kept for the mere whim or pleasure of their owners, and therefore had no intrinsic value. A great deal of research and eloquence has been wasted in attempting to show the fallacy of this rule. It appears to be well settled, however, that, in the absence of statutory modification of the common law, dogs are not the subject of larceny. *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 772; *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599. When the statute relating to larceny covers "personal property in general," or "anything of value," some

license fee, and the act of March, 1865, called it a township tax. The court said it may well be said that any article of property which the law subjects to taxation is prima facie an article of value.

Under Elliott's Supp. § 335, punishing cruelty to animals and defining the word "animal" to include all brute creatures and all domestic fowls, a conviction could be had for mutilating a dog. *State v. Giles*, 125 Ind. 124.

But under Ind. Rev. Stat. 1881, § 2101, providing that whoever cruelly beats or needlessly mutilates or kills any animal shall be fined, etc., a conviction could not be had where some fox hounds were killed, and the defendant by mistake believed that they were chasing his sheep, although the hounds were on a fox trail. *Hunt v. State*, 3 Ind. App. 383.

In a prosecution for killing a dog under N. H. Rev. Stat. chap. 215, providing that if a person wilfully and maliciously commit any act whereby the personal estate of another shall be injured, such person shall be punished, it was held that dogs are the subject of property, and capable of being wilfully and maliciously injured under the statute. *State v. McBuffie*, 34 N. H. 523, 39 Am. Dec. 516.

So, under a prosecution for maliciously killing a dog under Neb. Crim. Code, § 109, providing that if any person shall wilfully and maliciously injure or destroy any personal property, etc., it was held that a dog was property, and no one could destroy the same maliciously without making himself liable. *Nehr v. State*, 35 Neb. 638, 17 L. R. A. 771.

In *State v. Marshall*, 13 Tex. 55, under Tex. Hart. Dig. art. 560, providing that if any person shall wilfully and maliciously kill any horse, cattle, goat, sheep, or swine, or shall wilfully injure or destroy any property of another he shall be punished, a conviction could not be had for killing a dog. The statute has been changed since this decision.

In *State v. Marshall*, 13 Tex. 55, it was said that in some states dogs are by statute placed upon the same footing as other personal property, but we have in this state no statute upon the subject (malicious mischief). "They are not regarded by the law as being of the same intrinsic value, as property, as the animals enumerated in the statute."

But under Paschal's Dig. art. 2344, providing that if any person shall wilfully kill, maim, wound, poison, or disfigure any dog of another with intent to injure the owner thereof, he shall be fined, etc., a conviction could be had for killing a dog, the property of A. B. This statute changed the rule of law in Texas. *State v. Pine*, 30 Tex. 399.

And under Paschal's Dig. art. 2344, a conviction was had for killing a trespassing dog. *McDaniel v. State*, 5 Tex. App. 475.

In an action for false imprisonment it was held that under N. Y. Sess. Laws 1866, chap. 682, p. 1456, amending Rev. Statutes, pt. 4, tit. 6, chap. 1, § 26, and providing that any person who shall maliciously kill, maim, wound, or injure other animals shall be guilty of a misdemeanor, and Laws 1867, chap. 375, § 40 L. R. A.

1, providing that if any person shall needlessly mutilate or kill any living creature such person shall be guilty of a misdemeanor, a conviction was wrongful where there was no allegation that the shooting of a dog was needlessly or maliciously done. *Warner v. Perry*, 14 Hun. 337.

In a prosecution for malicious mischief for killing a dog, a conviction was set aside because of failure of proof of ownership. The court said: "A dog, although for some purposes regarded in law as the subject of property, ministers rather to the pleasure than to the necessities or profit of his owner, especially when the latter is a youth. It is not, therefore, such an article as the father is bound to furnish to his minor child living with and dependent upon him. The dog of Chalmers Bookman was not given to him by his father, nor had the latter ever owned it. The son's title was wholly independent of the father." *State v. Trapp*, 14 Rich. L. 203.

It was necessary to allege and prove the value of a dog that was alleged to have been killed, under Minn. Rev. Stat. chap. 101, § 39, providing punishment for wilfully and maliciously killing, maiming, or disfiguring horses, cattle, or other beasts of another person. *United States v. Gideon*, 1 Minn. 292.

Under Ga. Penal Code, § 729, providing all other acts of wilful and malicious mischief in that injuring or destroying any other public or private property not herein enumerated shall be a misdemeanor, a conviction was had for the wilful and malicious killing of a dog. *Wilcox v. State* (Ga.) 39 L. R. A. 709.

But a conviction could not be had under Ga. Code, § 4637, providing that acts of wilful and malicious mischief in the injuring or destroying of any other public or private property not herein enumerated shall be punished, as this was intended to apply to inanimate property; and § 4612, providing against maliciously maiming or killing any horse, mule, bull, steer, ox, cow, calf, heifer, or other animal under the description heretofore given of horses and cattle, was not intended to apply to dogs. *Patton v. State*, 93 Ga. 111, 24 L. R. A. 732.

In *Wilcox v. State* (Ga.) 39 L. R. A. 709, it was said that the discussion in the Patton Case as to whether dogs were property was not necessary for the determination of the question involved.

So, under Va. Laws 1822-23, chap. 34, § 1 (Sess. Acts, p. 36), providing that any person who shall knowingly and wilfully without lawful authority destroy or injure any tree or property, real or personal, belonging to another, shall be guilty of a misdemeanor, a conviction could not be had for killing dogs belonging to another. *Com. v. Macolin*, 3 Leigh. 809.

And under Va. Code, chap. 192, § 53, p. 796, providing that if a person unlawfully, but not feloniously destroy, deface, or injure any property, real or personal, not his own, he shall be guilty of a

courts hold that a dog is included and becomes the subject of larceny. *Mullaly v. People*, 86 N. Y. 865; *Harrington v. Miles*, 11 Kan. 480, 15 Am. Rep. 355; *Hurley v. State*, 30 Tex. App. 333; *State v. Yates*, 10 Crim. L. Mag. 439. But the cases are by no means harmonious upon this proposition. See *Ward v. State*, 48 Ala. 161, 17 Am. Rep. 31. In some states it is suggested that in subjecting dogs to taxation they are thereby made the subject of larceny under the generic terms "personal property" or "chattels," found in the statutes. *Com. v. Hazelwood*, 84 Ky. 681; *Mullaly v. People*, 86 N. Y. 865. It is also said by other quite as respectable courts that these taxes are not imposed

on the theory that dogs are property, but as police regulations, and therefore such taxation does not bring them within the statute. *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599, and *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 773. See also *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169. Our statute (Code 1873, § 3902) makes it a crime for anyone to steal any money, goods, or chattels of another; and if dogs are intended to be included it must be under the terms "goods and chattels." That they are not goods is clear. "Chattels," however, is a broader and more comprehensive term, and includes all kinds of property except the freehold and things which are a parcel of it. The supreme

misdemeanor, a conviction could not be had for killing a dog. *Davis v. Com.* 17 Gratt. 617.

And an indictment for killing a dog could not be sustained under Me. Rev. Stat. chap. 127, § 1, providing punishment for killing or wounding "domestic animals." *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 453.

Under Mo. Rev. Stat. § 3820, providing punishment for persons who shall wilfully and maliciously kill, maim or wound any horse, mare, colt, mule, or ass or neat or horned cattle of another, and § 3821, providing punishment against any person who shall wilfully and maliciously or cruelly maim, wound, beat, or torture any horse or other cattle, a conviction could not be had for killing a dog. *State v. Mease*, 69 Mo. App. 581.

And under Mo. Rev. Stat. § 3593, providing punishment against any person who shall wilfully destroy or injure any goods, wares, or merchandise or other personal property of another, a conviction could not be had for killing a dog, as this statute was applicable to inanimate subjects of property, and did not include dogs. *State v. Mease*, 69 Mo. App. 581.

Under S. C. act Jan. 1861 (12 Stat. at L. 903), providing for malicious trespass against certain animals and "other personal property," the question whether the malicious killing of a dog was embraced within the act was not decided. *State v. Trapp*, 14 Rich. L. 203.

A prosecution could not be maintained for maliciously killing a dog listed for taxation, under Ind. act March 7, 1893, as said act was repealed by act May 5, 1891 (Acts 1891, p. 453). *State v. Brugh*, 5 Ind. App. 592.

No reference was made to the case of *Sosat v. State*, 2 Ind. App. 589, probably because the prosecution was under a different statute.

In a suit for false imprisonment where a man beat a small dog that ran out barking towards him, and he was arrested a mile from the house and was taken before a magistrate and was discharged, and it was pleaded in justification that 7 & 8 Geo. IV. chap. 30, § 24, giving magistrates power of awarding compensation in cases of wilful and malicious injury to "property," and § 28, authorizing the immediate apprehension without warrant of persons found committing any offense against the act, the court left it to the jury to say whether the plaintiff had committed a wilful injury to the dog, and secondly whether he was found committing that offense and immediately apprehended, and a verdict was given for the plaintiff. *Hanway v. Boulton*, 1 Moody & K. 15, 4 Car. & P. 350.

Under Ind. Rev. Stat. chap. 28, § 8, providing that it shall be an offense to deposit any of certain poisons within 200 rods of a highway, pasture, field, or other improved land for the purpose of killing wolves, foxes, dogs, or other animals, an indictment which alleged that the defendant deposited poison in a certain field within 200 rods of a highway and pasture was held good on demurrer. *State v. Bucknam* (Me.) 2 New Eng. Rep. 697.
40 L. R. A.

In regard to cruelty to animals, in some cases the prosecution failed on account of evidence.

So, under a statute against cruelty to animals a conviction could not be had where a man set a trap on his own premises in a bucket of slop, and a dog that had been in the habit of prowling at night and committing depredations was caught by the tongue. *Hodge v. State*, 11 Lea. 528, 47 Am. Rep. 307.

Where a party lawfully shot a neighbor's dog which was trespassing, and told the owner and policeman, and the defendant dragged the dog into the road, where he died some hours afterwards in great pain, a conviction could not be had under 12 & 13 Vict. chap. 92, § 2, for illtreating and torturing and causing to be cruelly illtreated and tortured a dog. It was held that the shooting was not unlawful, and no act of torture under the statute in this case was done by the defendant. *Powell v. Knight*, 38 L. T. N. S. 607, 25 Week. Rep. 721.

In *People, Walker, v. New York Special Sessions*, 4 Hun. 441, it was held that although a dog was not a beast of burden, yet it was not cruelty to train and subject him to any useful purpose. The court said that his use upon a treadmill or upon an inclined plane, or in any mode by which his strength and docility may be made serviceable to man is commendable and not criminal, but his abuse while so employed, whenever it amounts to cruelty, is a crime and punishable precisely under the same circumstances as the cruel usage of the higher animals.

Among the earliest laws for the protection of dogs is that mentioned in 7 Edinburgh Enc. p. 64: "Thus, this animal is put under the protection of the most ancient laws, which enact that 'no one should disturb or stop a bloodhound or man passing with him to follow thieves, or take malefactors.'"

VII. Larceny and obtaining a dog by false pretences.

At common law it was not larceny to steal a dog. The reason given was that larceny was punishable by death, and it was not fit that a man should suffer death for stealing a dog, and yet it was larceny to steal a hawk because used by princes and noblemen for hunting. At the same time the right of property in dogs was protected by allowing a civil action for their recovery or for injuries done to them, and a statute was passed, 10 Geo. III., chap. 18, making it a criminal offense to steal a dog. In this country some few states still preserve the relics of the common law in regard to prosecutions for larceny of a dog, while others have passed statutes making it larceny. In regard to construing statutes to include a dog which make it larceny to steal goods, chattels, or other property and the like, there is some conflict of authority. The construction of the courts in Kansas, Kentucky, New York, Tennessee, and Texas was that a dog was included in such a statute. In Alabama, Indiana, and Ohio it was held that such a phrase did not include dogs. But in Ohio this was changed by a subsequent amendment adding "anything of value."

In *Coke Litt.* 3, 109, it was said that a man hath a

court of Kentucky, in the case of *Com. v. Hazelwood*, 84 Ky. 681, held that a dog was a "chattel," basing its holding upon the thought that the laws of that state recognized dogs as property, for the reason that they imposed a tax upon them, made the owner liable for damages done, and recognized the animal as property in all civil proceedings. But the supreme court of Pennsylvania, in the case of *Findlay v. Bear*, 8 Serg. & R. 571, held to exactly the contrary doctrine. See also *Reg. v. Robinson*, 28 L. J. M. C. N. S. 58. Those courts which hold that a dog is not "personal property," a "thing of value," or a "chattel," bottom their conclusion upon the assumption

mere property in some things which are tame by nature, and yet in respect of the baseness of their nature a man shall not commit any larceny, great or small, though he steal them, as of mastiffs, bloodhounds, or other kind of dogs, or cats.

In *Lambard's Eirenarcha*, 267, cited in *Reg. v. Robinson*, Bell, C. C. 35, it was said that "it is felonie to steale any the moveable goods of any person; but because it may in some cases be doubted whether the things so taken are to bee numbered amongst moveable goods or no I will proceed in particularitie . . . to take dogges of any kind, . . . though they be in the house, is no felonie."

And a person could not be convicted of obtaining a dog by false pretenses, since it was not an animal in respect to which larceny could be committed. *Reg. v. Robinson*, Bell C. C. 34, 5 Jur. N. S. 203, 28 L. J. M. C. N. S. 58.

In *Hale*, P. C. 512, it was said that "larceny cannot be committed in some things, whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, greyhounds, bloodhounds" though reclaimed; "they serve not for food, but pleasure." But it was said to be larceny to steal a reclaimed hawk because used by princes and great men, and on account of the nobleness of its nature.

In *Swan's Case*, 7 Coke, 18a, it was said that a man may have property in some things which are of so base a nature that no felony can be committed of stealing them, and no man shall lose life or member for them, as of a bloodhound or mastiff *molesterus*.

In *State v. Latham*, 35 N. C. (13 Ired. L.) 33; *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573, it was said that by the old authorities a dog was not a subject of larceny because he was without value, but notwithstanding it is a species of property recognized as such by the law, and for an injury to which an action at law will be sustained.

In *Davis v. Com.* 17 Gratt. 617, it was said that at common law a conviction of larceny could not be had for stealing a dog, and this has never been altered by statute notwithstanding the reason for the distinction between other property and dogs has long since ceased.

And in *Com. v. Maclin*, 3 Leigh, 809, and *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516, it was said that by the common law the property in dogs is not such that larceny can be committed by stealing them.

And in *Mullaly v. People*, 86 N. Y. 365, it was said that at common law it was not larceny to steal a dog, but that it was larceny to steal the "skin of a dead dog."

1 Burne's Justice of the Peace, p. 1174, says: "A remark has been made by Sir John Fielding in his 'Observations on the Penal Laws,' which ought to be repeated here. He 'recommends it to all persons to put brass or steel collars on their dogs' necks, with the name and place of abode of their owners, and to fasten them with a padlock; for the stealing such collars being felony, it will facilitate

that it is not property in the strict sense of the term, and that dogs as a class have no intrinsic value. In the case of *Warren v. State*, 1 G. Greene, 106, we held that a raccoon was *fera nature*, and of so base a nature, in contemplation of law, as that one who stole it was not guilty of a larceny; citing *Norton v. Ladd*, 5 N. H. 204, 20 Am. Dec. 573. But in the subsequent case of *Anson v. Dwight*, 18 Iowa, 241, which was, it is true, a civil case, we said: "Dogs may be personal property, and have value." Neither of these cases decides the question now before us, although it must be conceded that, if we follow the rule of the *Warren Case* to its logical conclusion, and

tate the punishing of the offender; and the dog, when found, is recoverable by action."

In *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689, it was said that they were not the subject of larceny at the common law. "Later cases, however, in the United States, hold that such property is also the subject of larceny."

In *People, Shand, v. Tighe*, 9 Misc. 607, it was said that the excuse of the courts in ancient times for not regarding the dog as property was that the prescribed punishment at that time for larceny of property of the value of 12 pence or more was death, and they thought it not fit that a man should die for a dog, and yet it was larceny to steal a tame hawk or a dog's hide.

In *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573, it was said that things of a base nature in contemplation of law, as dogs, cats, etc., cannot by the common law be the subject of larceny, although a man may have property in them which the law will protect by civil action.

In *State v. Holder*, 81 N. C. 527, 31 Am. Rep. 517, and *Mowery v. Salisbury*, 82 N. C. 175, it was said that the common law was the law of that state in regard to larceny of a dog, and that there was no statute making it larceny to steal a dog.

In *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599, it was said that the owners of dogs may have a property in them which the law will protect; that they are not a subject of larceny; that they are a subject of malicious trespass as held in *Kinsman v. State*, 77 Ind. 132. The court said that this, however, does not settle the question; it does not follow that because a dog is the subject of malicious trespass it is the subject of larceny.

In *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94, it was said that "beasts which have been thoroughly tamed, and are used for burden or husbandry, or for food, such as horses, cattle, and sheep, are as truly property of intrinsic value, and entitled to the same protection, as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild natures, . . . and therefore although a man might have such a right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have "no absolute and valuable property therein, which could be the subject of a prosecution for larceny at common law, or even, according to some authorities, of an action of detinue or replevin or a distress for rent."

Under Ind. Rev. Stat. 1881, § 2647, providing that anyone who shall own or harbor a dog on or before April 1, 1882, shall pay \$1 for a registry number for a male dog and \$2 for a female, and \$2 for each additional dog, and § 2648, providing that it is unlawful for any unregistered dog to run at large and anyone may kill him, and § 2649, providing that anyone who shall steal or take any registered dog shall be guilty of a misdemeanor, a conviction could not be had under Rev. Stat. 1881, § 1963, making it grand larceny to steal "the personal

hold that the terms "goods and chattels," as used in this criminal statute, are to be interpreted according to the strict rules of the common law, we must ultimately decide that dogs are not the subject of larceny. Code 1873, § 45, ¶ 2, provides that words and phrases should be construed according to the context and the approved usage of the language; paragraph 10, that "the word 'property' includes personal and real property;" and that (¶ 9) the words "personal property" include money, goods, chattels, evidence of debt, and things in action. In the case of *State v. Phipps*, 95 Iowa, 491, we held that the word "chattel," as used in a criminal statute relating to malicious mis-

chief, covered horses and every other kind of personal property. We are constrained to believe that the definition of the words "goods and chattels," as used in the statute under consideration, should be referred to the common understanding at the time when the statute was enacted, and not to the strict rules of the common law that have no application to our present ideas with reference to the value and use of domesticated animals. No argument is needed to demonstrate that dogs are of much greater value to man than some animals to which the common law attributed value because of their use for food. Much that is said by Justice Earl in the *Mulky Case* might be

goods of another" of the value of \$25, and § 1834, making it petit larceny to steal the "personal goods of another" of the value of less than \$25, where a dog was stolen in 1881, as he was not the subject of larceny, and the legislature did not intend by the words "personal goods" in defining grand and petit larceny to include dogs. *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599.

In *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 772, it was said, "In describing the property of which a larceny, either grand or petit, may be committed, the statutes of this state use the words 'goods and chattels.' . . . As dogs, at the common law, were held not to be the subjects of larceny, they are not included in the words 'goods and chattels' as used in the statutes referred to."

And the common-law rule that dogs are not such personal property as is the subject of larceny was held to apply under Ala. Rev. Code, § 3708, providing that any person who steals any personal property under any other circumstances than are specified in the two preceding sections is guilty of petit larceny. *Ward v. State*, 48 Ala. 161, 17 Am. Rep. 81.

So, under Pa. act April 5, 1790, 2 Sm. Laws, 531, providing that if any person shall feloniously steal, take, and carry away any goods, chattels, etc., he shall be guilty of petit larceny, it was not slander to charge that the plaintiff stole a dog, as there could be no felony of a dog. *Findlay v. Bear*, 8 Serg. & R. 571.

In 2 East, P. C. 614, it was said that there are some animals which, though they may be reclaimed, are considered of so base a nature that no larceny can be committed of them, and the same rule applied to dogs. But now by statute 10 Geo. III., chap. 18, the stealing of dogs is made punishable upon conviction before two justices.

Blackstone says, vol. 4, p. 236, as to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and may maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny. But by stat. 10 Geo. III., chap. 18, very high pecuniary penalties, or a long imprisonment and whipping in their stead, may be inflicted by two justices of the peace (with a very extraordinary mode of appeal to the quarter sessions) on such as steal, or knowingly harbor a stolen dog, or have in their custody the skin of a dog that has been stolen.

In *Rex v. Helps*, 3 Maule & S. 331, a conviction was had under 10 Geo. III., chap. 18 (act against dog stealing.)

Stat. 7 & 8 Geo. IV., chap. 29, § 31, provides that if any person shall steal any dog, or shall steal any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law, every such offender being convicted thereof before a justice of the peace shall forfeit, etc. Dr. 40 L. R. A.

Burns in *Burns's Justice of the Peace*, vol. 3, p. 673, questions whether under this statute it is not doubtful if the act makes it penal to steal a bitch.

24 & 25 Vict. chap. 26, and 8 & 9 Vict. chap. 47, and 7 & 8 Vict. chap. 47, were enacted against stealing a dog, or having possession of a stolen dog or the skin of a stolen dog, knowing the same to have been stolen.

In *Jemison v. Southwestern R. Co.* 75 Ga. 444, 53 Am. Rep. 478, it was said that at common law a dog was not the subject of larceny, and slander could not be brought under the charge of stealing a dog; but by Ga. Code, § 4402, all domestic animals fit for food, and also a dog, are made subjects of simple larceny.

In *Weathley v. Harris*, 4 Sneed, 468, it was said by statute 10 Geo. III., chap. 18, to steal a dog was made subject to penal punishment by fine or imprisonment at the discretion of the justices, and for the second offense, in addition, the dog stealer was to be whipped.

In *State v. Brown*, 9 Baxt. 53, 40 Am. Rep. 81, it was said that the doctrine of the common law in regard to dogs not being personal property within the definition of larceny was abrogated by 10 Geo. III., chap. 18. It was said that there is a conflict of rulings in the different states.

In *Johnson v. McConnell*, 80 Cal. 545, it was said that at common law and in some of the states dogs are not the subject of larceny, but under Cal. Penal Code, § 491, they are declared to be property, and made subject of larceny.

In *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175, it was said at common law property in a dog, though recognized, has always been held to be "base," inferior, and entitled to less regard and protection than property in other domestic animals, and the court said: "Although since protected by express statutes from theft, the common-law estimate of property in them has never been changed."

In *Patton v. State*, 93 Ga. 111, 24 L. R. A. 732, it was said: "We do not think it probable the legislature of this state ever regarded the dog as being, in a general sense, property concerning which a criminal offense could be committed. After provision is made in the 6th division, title 1, of the [Ga.] Penal Code, for the indictment and punishment of larcenies of various domestic animals, § 4402 provides as follows: 'All other domestic animals which are fit for food, and also a dog, may be subjects of simple larceny; and any person or persons who shall steal any such animal or animals shall be punished' etc. If a dog had been considered as property, as are domestic animals fit for food, it is not likely that it would have been deemed necessary to provide especially that the stealing of one should be simple larceny."

The stealing of a dog is larceny, and it is slander to charge another person with stealing a dog. It was said that under Kan. Gen. Stat. 332, § 78, the

quoted with profit, but the length of this opinion forbids. There are other provisions of the Code of 1873 which recognize property in dogs. Thus we find that an owner is liable for all damages done by his dog (§ 1485); that dogs are assessable both by the county and city authorities (see Acts 20th Gen. Assem. chap. 70, and § 499, Code 1873); and that cities may require dogs to be kept upon the premises of the owners thereof (17th Gen. Assem. chap. 25). While these are all in the nature of police regulations, yet they clearly recognize property in dogs; and it seems to us they are comprehended within the term "chattels" as used in the statute defining larceny. Surely, it was not the

intent of the legislature to recognize dogs as property for the purposes of taxation, and yet leave them to the mercy of thieves. We reach this conclusion unmindful of the fact that the legislature in adopting the new Code added after the word "chattels" as it appears in the Code of 1873 these words: "Including all domesticated or restrained animals." In our opinion, the statute covered "dogs" before its amendment, and the added words have reference to other animals not covered by the generic term "chattels." We are of opinion that a dog is the subject of larceny, and that the trial court erroneously discharged the appellee.

Reversed.

taking and carrying away of any money, goods, rights in action, or other personal property or other valuable thing whatever, is declared to be larceny, and the legislative act levying a tax on dogs and rendering the owner of a dog liable for injuries to sheep, indicate that a dog is property and a thing of value. *Harrington v. Miles*, 11 Kan. 481, 15 Am. Rep. 355.

And under Ky. Gen. Stat. chap. 29, art. 11, § 1, providing for the punishment of persons guilty of larceny of goods and chattels, it was held that a dog was property, so as to bring him within the meaning of the term "chattel," as the legislature by various acts recognizes the dog as property, such as by the act of January 31, 1865, making them liable to assessment and taxation; and this was so without regard to the act of May 17, 1866, providing that upon the listing of a dog with the county clerk and the payment of taxes therein provided, he should for one year from that time be considered personal property for all purposes as fully as any other kind of personal property. The court said that he was already personal property. *Com. v. Hazelwood*, 84 Ky. 681.

In *State v. Mease*, 69 Mo. App. 581, it was said that under Mo. Rev. Stat. 1889, § 3535, dogs are the subject-matter of larceny by special statute.

In *Carthage v. Rhodes*, 101 Mo. 175, 9 L. R. A. 352, in a prosecution for failing to pay a license, it was said that dogs by statute have been made the subject of larceny.

Under 2 N. Y. Rev. Stat. 690, § 1, providing that every person who shall be convicted of stealing the "personal property" of another of the value of \$25 or under shall be adjudged guilty of petit larceny, and p. 703, § 33, defining "personal property" to mean "goods, chattels, effects, evidences of rights of action," etc., it was held that this was comprehensive enough to include dogs. *Mullaly v. People*, 86 N. Y. 365.

In *Mullaly v. People*, 86 N. Y. 365, it was said that a system of taxation of dogs is enacted in Rev. Stat. 704, and "it can scarcely be supposed that the legislature meant to regard dogs as property for the purpose of taxation, and yet leave them without protection against thieves."

So under 2 N. Y. Rev. Stat. 679, § 363 (63), providing that any person who shall be convicted of the felonious taking and carrying away of personal property of another of the value of more than \$25 shall be adjudged guilty of grand larceny, and 2 Rev. Stat. 702, § 33, defining personal property to mean goods, chattels, effects, etc., an indictment for grand larceny for stealing one dog of the value of \$50 and one collar of the value of \$1, the property of A. B., was maintained. The court said if what is property depends upon the law or usages of society it would be impossible to say that the quality of the exclusive right of the owner to the use or enjoyment of his dog, his absolute power to sell and dispose of it, and the other characteristics and

attributes of property had not been impressed by these laws and usages upon a dog. *People v. Campbell*, 4 Park. Crim. Rep. 386.

Under 2 N. Y. Rev. Stat. p. 679, § 63, p. 702, § 33, an indictment charging grand larceny in stealing a dog of the value of \$100, the property of A. B., was sustained. *People v. Maloney*, 1 Park. Crim. Rep. 593.

In *People, Shand, v. Tighe*, 9 Misc. 607, it was said that under the common law of England a dog was not property, and it was not larceny to steal a dog although it was to steal a dead dog's hide, but the world moves and these crudities no longer exist, and in this state a dog is property.

In *Lavery v. Hogan*, 2 N. Y. City Ct. Rep. 197, and *People, Longwell, v. McMaster*, 10 Abb. Pr. N. S. 132, it was said that dogs are the subject of larceny.

An indictment charging that the defendants in the night season forcibly broke and entered a stable with intent to steal two dogs, and that so entering they did steal two dogs of the value of \$40, was good, as the larceny act of Ohio now defines property that may be stolen as "anything of value," and a dog comes within the meaning of the phrase "anything of value." *State v. Yates*, 19 Ohio L. J. 150.

In *State v. Yates*, 19 Ohio L. J. 150, it was said that since the decision of *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 772, which held that goods and chattels in the larceny act did not include a dog, the statute has been changed, and the words now used are "anything of value."

In that case the court also said that at the common law dogs were property, and although it was not a crime to steal a dog, yet it was such an invasion of property as might amount to a civil injury and be redressed by a civil action; but "why trespass would lie for stealing a dog, when it was no crime to steal him, is not plain to a mind unversed in that 'perfection of human reason' once, as before said, part of the common law."

Under Pa. act May 15, 1889 (Pub. Laws, 222), entitled, "An Act for the Taxation of Dogs and the Protection of Sheep," and providing that all dogs in this commonwealth shall hereafter be personal property and subject of larceny, a conviction was sustained. *Com. v. Depuy*, 148 Pa. 201.

In *Harris v. Eaton*, 20 R. I. pt. 1, p. 84, it was said that R. I. Pub. Stat. chap. 93, providing for licensing dogs, makes a licensed dog property and the subject of larceny.

The Ala. act February 12, 1887, § 2, providing that anyone who shall take away with intent to steal or hold for a reward a dog registered under that act shall be punished on conviction as in other cases of larceny, was void for uncertainty, as the act did not provide punishment dependent upon value, or that the offender should be guilty of grand or petit larceny, or that he should be punished as in cases of grand larceny or petit larceny; and the court held

TENNESSEE SUPREME COURT.

CITIZENS' RAPID-TRANSIT COMPANY, *Appt.*,

J. H. DEW.

(.....Tenn.....)

1. Negligence of a street-railway company in operating an electric car with only one employee who does duty both as motorman and conductor, on a line laid on a turnpike at grade, where persons, horses, and vehicles are constantly passing, is a question for the jury.

that the act created an offense, but it failed to fix any certain punishment. *Johnston v. State*, 100 Ala. 32.

A dog not registered under Pa. act May 18, 1878, extending the act of April 6, 1854, throughout the commonwealth, was not the subject of larceny in a county in which the option act of June 12, 1878, had not been established. *Com. v. Huggins*, 4 Pa. Co. Ct. 671.

In the note to Pepper and Lewis's Digest, 1239, it was said: "But § 3 of the act of 1854, April 6 (Pub. Laws, 286), made registered dogs personal property and the subject of larceny, the act of 1878, June 12, (Pub. Laws, 198, § 6), made all dogs subjects of larceny in counties which by vote accepted the act, and by the act of 1893, May 25 (Pub. Laws, 136, § 7), supplying the act of 1889, May 15 (Pub. Laws, 22, § 6), all dogs in this commonwealth shall be the subject of larceny."

Under Tenn. Code, § 51, defining "personal property" to mean "goods and chattels," a dog is personal property, and if of any value is the subject of larceny under the statute. *State v. Brown*, 9 Baxt. 53, 40 Am. Rep. 81.

Under Texas Penal Code, art. 724, defining theft to be the fraudulent taking of corporeal property belonging to another, and § 725, providing that the personal property must be such as has some specific value which can be ascertained, embracing every species of personal property capable of being taken, and art. 733, providing that all domesticated animals and birds when they are proved to be of any specific value are within the meaning of "personal property," and art. 679, making it an offense to wilfully kill, wound, poison, or disfigure any dog or other domesticated animal,—a dog was held to be an animal and a subject of theft. *Hurley v. State*, 30 Tex. App. 333.

In *Lynn v. State*, 33 Tex. Crim. Rep. 153, it was said that for the theft of a dog the party could be convicted of a felony.

VIII. Value.

The value of a dog may be proved as that of any other property, by evidence that he was of a particular breed and had certain qualities, and by witnesses who knew the market value of such an animal, if any market value be shown. Some cases hold that it is not necessary to allege or prove the value in an action for unlawfully shooting a dog. This was so at common law, yet it was held at common law that the absence of any value was the reason that prevented a prosecution for larceny of a dog.

In *CITIZEN'S RAPID TRANSIT CO. v. DEW* it was held that the value of a dog could be shown by proving his pedigree, in addition to proof of qualities that made him valuable as a hunting dog. But 40 L. R. A.

2. A dog is not a trespasser on a street-car track which is laid in the highway on the same level with it.

3. The right to recover for injury to a dog is not lost by killing him under the honest but mistaken belief that he was fatally injured.

4. A motorman cannot rely upon the quickness and celerity of a dog to absolve himself from all duty and care to prevent running over him with an electric car.

5. A jury may consider common knowledge and observation about the habits and qualities of dogs.

6. The owner of a dog has such prop-

erty the verdict was sustained by proof of value without regard to pedigree.

In an action against a street-railway company for killing a dog on the track, evidence by a witness who raised, trained, exhibited, and bought and sold dogs, that he knew their market value at that place, and that the dog in controversy was worth from \$100 to \$200, uncontradicted, was sufficient to sustain a verdict for \$96. *Melech v. Rochester Electric R. Co.* 72 Hun, 604.

And in a suit against a railroad company for loss of a dog by baggagemen, the evidence concerning the dog in question by the owner, and the opinions of other witnesses on the value of dogs generally having the qualities attributed to this particular dog, was rightly admitted. The court said that such is the usual mode of ascertaining the price of cattle or sheep or any other marketable commodity, and it is necessarily more or less a matter of opinion among the dealers of such stock or property. *Cantling v. Hannibal & St. J. R. Co.* 54 Mo. 385, 14 Am. Rep. 476.

In an action for wrongful killing of a dog it was held that the value of the personal property may be established by the opinion of witnesses who first show that they know that value. The court said that dogs may be personal property and have value, and are in such cases within the rule. *Anson v. Dwight*, 18 Iowa, 241.

So, in an action to recover damages for killing a shepherd dog valuable to herd cattle, it was competent for farmers who have knowledge of the characteristics and qualities of the dog and of the value of such an animal to a person who keeps stock, to testify as to his value. The court said: "It is not necessary that personal property must have a market value in order to render such opinions competent." *Bowers v. Horen*, 93 Mich. 420, 17 L. R. A. 772.

So, in *Mullin v. People*, 86 N. Y. 365, it was said that large amounts of money are now invested in dogs, and they are largely the subject of trade and traffic, and in many ways they are put to useful service, and, so far as pertains to their ownership as personal property, they possess all the attributes of other personal property.

In an action against a common carrier it was said that all evidence concerning the value of the dog in question by the owner, and the opinion of other witnesses, and the value of dogs generally having the qualities of this particular dog, was rightly admitted. *Cantling v. Hannibal & St. J. R. Co.* 54 Mo. 386, 14 Am. Rep. 476.

So, an instruction that if the jury found the dog to have a market value on account of its qualities as a watch dog they were to give that value as damages was sustained. *Uhlein v. Cromack*, 100 Mass. 273.

In *Perry v. Phipps*, 32 N. C. (10 Fred. L.) 259, 51 Am. Dec. 387, it was said that as a watch dog his value is constituted by his being sharp and dauntless, and

erty in him that he may maintain an action for killing or injuring him.

7. It is a matter of common knowledge that pedigree enters into the consideration of the value of dogs, including such as are kept for sporting purposes.

8. Evidence of the pedigree of a dog is not inadmissible on the ground that it is hearsay.

9. A street-railway company is liable for the killing of a dog by an electric car, caused by the negligence of the motorman.

(February 9, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Davidson County

therefore it would seem these properties cannot in themselves convert him into a nuisance.

In an action for killing a dog that was chasing cattle, it was held that an instruction assuming, as a matter of law, that such dogs have not an established commercial value in that county was erroneous, and it was not a question of law, but one of fact for the jury,—especially as the evidence showed that such animals had been frequently sold for a valuable consideration. *Spray v. Ammerman*, 66 Ill. 309.

An instruction that "they should find his value from his qualities rather than from the opinions of witnesses, who place their estimate on the loss of services of the dog for a given time" was wrong, as the jury would have a right to consider both in fixing the value of the dog, and as it took from the jury the consideration of any question of commercial value and loss of services. *Spray v. Ammerman*, 66 Ill. 309.

In *Heiligmann v. Rose*, 81 Tex. 223, 13 L. R. A. 372, where a recovery was allowed for poisoning a dog, it was said: "The authorities well state that dogs are property, and that an owner has his action and remedy against a trespasser for the damages resulting from injuries inflicted upon them. Some authorities hold that dogs have no market value. This may be relatively true, but it is not a rule that will govern in all cases. It may be difficult in the majority of cases to ascertain the market value of a dog, but such a result may in some cases be accomplished. The special charge asked by appellant and given by the court substantially presents the true rule in determining the value of dogs. It may be either a market value if the dog has any, or some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog."

In *Harrington v. Miles*, 11 Kan. 483, 15 Am. Rep. 356, in an action of slander for charging larceny of a dog, the court reviews the dog statutes of that state, and says it seems impossible in the light of these legislative and judicial expressions to decide that a dog is not property nor a thing of value.

In *Archer v. Baertschi*, 8 Ohio C. C. 12, it was said: "No controversy is made here, but that a dog is an animal that is of value, and that is recognized as property. While the supreme court at one time held that it was not the subject of larceny, yet they recognize under the decisions from the common law and from Blackstone down, that it was property sufficient to maintain a civil action, and could be protected as property."

So, in *Kinsman v. State*, 77 Ind. 132, it was said, referring to a dog, that any article of property which the law subjects to taxation is prima facie an article of value.

And in *Dickson v. Great Northern R. Co.* L. R. 18 Q. B. Div. 176, it was said by Lindley, L. J.: "So far 40 L. R. A.

in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of a dog. *Affirmed.*

The facts are stated in the opinion.

Mr. James Stuart Pilcher for appellant.

Mr. J. D. B. De Bow for appellee.

Wilkes, J., delivered the opinion of the court:

This is an action for negligently injuring and killing a dog. It was commenced before a justice of the peace, and on appeal was tried in the circuit court, before the court and a jury. There have been two trials, the first resulting in a mistrial, and the second in a verdict and judgment for \$250, and defendant, the Rapid-Transit Company, has appealed and

as I know, dogs in general are not more valuable than sheep or pigs in general."

In a prosecution for maliciously killing a dog it was held that a dog has value, and the prosecution could be maintained. *Nehr v. State*, 35 Neb. 638, 17 L. R. A. 711.

In *State v. Yates*, 19 Ohio L. J. 150, the court said: Tested by the common sense of men, and even by the common law, can there be any question that dogs come within the meaning of the phrase, "anything of value?" And a demurrer to an indictment alleging that dogs are of the value of \$40 admitted the averments.

In *Brown v. Hoburger*, 52 Barb. 15, it was held that in order to render opinions as to the value of a dog competent evidence, it should first be shown that the dog in question is a marketable animal either belonging to some peculiar breed or possessing some peculiar qualities which make him an animal usually vendible at some proximately regular price.

In *Brown v. Hoburger*, 52 Barb. 15, it was said that in *Dunlap v. Snyder*, 17 Barb. 561, it was held unanimously by the four judges that evidence of the value of a dog was incompetent (Overruling the decision in *Brill v. Flagler*, 23 Wend. 354), and that it was held in that case that the jury were the judges of the value of the animal after hearing all the evidence touching his qualities.

In *Brill v. Flagler*, 23 Wend. 354, in regard to the value of a well-broke setter dog, it was held that the opinions were barely competent, and the answers of the witnesses depended in a measure upon their skill and judgment in respect to these animals.

In *Dunlap v. Snyder*, 17 Barb. 561, it was said by C. L. Allen, criticizing the case of *Brill v. Flagler*, 23 Wend. 354, that "there is no standard market value for such property, if property it can be called, and men differ in opinion as their fancies dictate in respect to value;" that "it is not to be presumed that a court or jury would have found a dog of any value, who had been accustomed to worry and kill sheep." Hand, P. J., said: "I have some doubt whether it is competent for any witness to give an opinion as to the value of a dog. If that can be done I think it must first appear that the animal belongs to a species (if there are such) that have a market value; and the witness must have some acquaintance with the qualities of that class; and also have some knowledge of their value. . . . If the testimony upon the general character of the dog was admissible the defendant had a right to impeach it on the question of value by showing that he was a sheep killer."

In *Harger v. Edmonds*, 4 Barb. 256, it was said that in *Brill v. Flagler*, 23 Wend. 354, "the opinion of Chief Justice Nelson (for that was not necessary to the decision of the cause) went too far when it professed to sanction the competency of evidence

assigned many errors. They are too numerous to treat separately and *seriatim*.

It is said there is no evidence to sustain the verdict. It appears that the Rapid Transit Company operates a line of electric street cars from Nashville to West Nashville, over a highway known as the "Charlotte Pike." This pike is a public thoroughfare for wagons and other vehicles, horses, cattle, pedestrians, and is much used and frequented. The plaintiff was passing over this turnpike, returning from a nutting expedition into the country, in a conveyance, with his two daughters. He had taken his gun with him, and also a favorite bird dog. The accident occurred about 5

o'clock in the evening. The dog was running along the turnpike or thoroughfare some 150 or 200 yards in front of the plaintiff's vehicle, when he started across the tracks of the street-car line, which were laid on the bed of the turnpike. Some little birds flying up attracted his attention, and he stopped in the center of the track, and, as some witnesses say, was in the act of "setting" the birds. The term "setting," as used here, has a somewhat technical meaning, and means that he was "standing" and intently looking in one direction. In dog parlance, therefore, "setting" means "standing," and the attitude is also called "pointing." While in this attitude a street car came up

as to "the value of the services of a person in breaking a setter dog."

Blackstone, vol. 4, p. 236, says: "As to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny."

The reasoning of this statement should not apply to dogs, notwithstanding the contempt originally bestowed upon them. In some countries they are valuable as beasts of burden. "The ancients ate puppies as a delicacy, and they offered them in sacrifice to their gods. Dogs are generally an article of food in the South Sea Islands, and provided to regale the visitors of the inhabitants. In various parts of Africa they are held in like estimation, and in the kingdoms of Whidaw and Dahomy their flesh is exposed for sale in the public markets." 7 Edinburgh Enc. 646. So they are esteemed in China, Japan, and among the North American Indians. The dog is as necessary an adjunct to the hunter as his gun, and we are dependent upon this animal for all the delicacies in game season. Gloves made from his skin rival those from a kid or a chamouis. Clothing is made from his hide. His instinct is unerring. His affection is unwavering, and with this animal more than any other the relation of master and slave develops into mutual regard and affection. Were it not for the prejudice and hue and cry against hydrophobia and the difficulty in fixing liability for injuries to sheep, this animal would take the place he deserves and be regarded as any other species of property. The personal pronoun in the old adage "Love me, love my dog" expresses the regard and estimation the owner feels in his property, however others may feel inclined to regard it as a base cur. Vast sums of money are invested annually in dogs, and their values may be said to be no more fictitious than that of a seal skin saque out in the latest style, or a pedigreed Jersey cow.

In *Lentz v. Stroh*, 6 Serg. & R. 34, in an action for killing a dog the plaintiff to swell the damages had given evidence of the excellent qualities of the dog, a first-rate hunting dog worth a cow, and that the plaintiff would as soon have lost the best horse in his stable, which had cost him \$120. The court said that the value of the dog was a proper inquiry, but shall not the defendant on the general issue contradict the evidence, and say: "But the dog was a most worthless cur, a most mischievous animal, . . . that he was a wolf in the clothing of a dog; a *caput lupinum*, and, instead of being of the value of \$50 as the plaintiff states in his writ, he was really of no value beyond the value of his skin."

In *State v. Latham*, 35 N. C. (18 Ired. L.) 23, it was said that by the old authorities a dog was not the subject of larceny because it was without value. 40 L. R. A.

It was not necessary for the maintenance of an action for shooting a dog that the dog be shown to have pecuniary value. *Parker v. Miss*, 27 Ala. 483, 62 Am. Dec. 778; *Dodson v. Mock*, 20 N. C. (4 Dev. & B. L.) 146, 32 Am. Dec. 677.

And under a prosecution for maliciously killing a dog it was not necessary that the value of the dog should be alleged in the indictment, or proved on the trial. *United States v. Gideon*, 1 Minn. 292.

In an action for wrongfully killing a dog the court cited a statute authorizing a tax on dogs for the protection of sheep owners, and held that an instruction requiring the plaintiff to show that the dog was of some pecuniary value was wrong, saying: "The law recognizes the right of property in dogs." *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35.

In *Simmonds v. Holmes*, 61 Conn. 1, 15 L. R. A. 253, where plaintiff contended that "neither the common law nor the statute will justify the killing of a dog unless for the necessary protection of property, to be ascertained by comparing the value of the property being injured with the value of the dog," it was held that Conn. Gen. Stat. § 3757, allowed the killing of all dogs irrespective of their value, if engaged in mischief away from their keepers. The court said that "there is no time or opportunity to place a value on the dog or on the thing threatened with injury."

And in *Johnston v. State*, 100 Ala. 82, in a slander case it was said: "Dogs are not property. There is no presumption, therefore, that any dog is valuable. Not being property, the *prima facie* presumption in any case is that the animal has no value. It is, of course, competent for the legislature to make dogs property, and a status thus given them would, we may concede without deciding, carry with it a presumption of value. This act does not do this, even in respect of dogs registered under its provisions."

In *Gibbons v. Van Alstyne*, 29 N. Y. S. R. 461, in an action for wrongfully killing a dog it was said: "If a dog had no value," it was nevertheless a trespass to kill the dog upon the land of the plaintiff, for which he was entitled to a verdict against the defendant.

And in an action for killing a dog evidence as to his market value was improper where the dog was not shown to have any market value. *Smith v. Griswold*, 15 Hun, 273.

In *Jemison v. Southwestern R. Co.* 75 Ga. 444, 38 Am. Rep. 476, it was said dogs seem to have no market value, and the rule of damages in the case of live stock killed by running of trains could not apply to them.

IX. As to license and tax laws.

a. Generally.

Dog license laws are generally held to be within the police power. Cases in regard to actions for

rapidly, and some of the witnesses say almost noiselessly, upon him, and ran over and crushed him, so much that his owner, seeing that he was fatally injured, shot and killed him. It appears that the gong was not sounded, the motorman did not shout at the dog, and did not make any effort to check the car until it was so close that it was impossible to prevent running over the dog. The motorman excuses his act by saying that the dog came upon the track so abruptly and unexpectedly, and so nearly in front of the car, that there was no time to stop the car or sound the gong, or take any other precautions. There is other evidence to show that

the dog could be seen, and was seen, quite a distance before the car reached him, and the weight of the evidence is in favor of this view of the case. The car was running rapidly and smoothly at the time, the dog was in plain view upon the track, and, according to some of the witnesses, the motorman was looking at him for some distance, and evidently expecting that he would leave the track in time to escape injury.

All other questions out of the way, there is ample evidence to sustain the verdict of the jury as to the killing, the negligence of the motorman, and the reckless running of the cars at a rapid rate of speed, and without due pre-

funds raised by taxing dogs, and license cases that do not pass on property rights in dogs, are not intended to be included in this note.

An unlicensed dog running at large could be killed under an ordinance of Ogden City, Utah, providing that all dogs found running at large within the limits of the city, not registered and collared, shall be liable to be killed, where the charter provided that the city council shall have power to license dogs, regulate or prohibit the keeping of dogs, and to authorize the destruction of the same when at large contrary to ordinance. *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689.

And where a person was refused a certificate of exemption from the dog license duty, under 41 & 42 Vict. chap. 16, § 22, custom and inland revenue act 1878, providing for exemption in cases of shepherd dogs, a conviction could be had and the justices could not dismiss the prosecution on the ground that the offense was trivial.

In *Independence v. Trouville*, 15 Kan. 70, it was said that an ordinance providing for fees for a marshal for killing dogs at large should not be held to be invalid because of the sacredness of the property that may be held in dogs. The court said that "property in dogs is of such a low character that it is hardly considered as property at all. . . . We do not suppose that property in dogs is of such a sacred character that dogs found running at large upon the public streets, in violation of a city ordinance, cannot be destroyed, but must be taken up and impounded, as a cow or other more valuable animal."

In *Julienne v. Jackson*, 69 Miss. 34, in an action against a city for killing a dog at large, it was said: "It may be conceded that the plaintiff had a property right in the animal, and might have recovered his value as against one unlawfully killing him. But of all property, dogs are more peculiarly the subjects of police regulations than any other class."

The license laws are generally held to be an exercise of police power, and not an exercise of the taxing power.

So, under Ill. act May 29, 1879, entitled "An Act to Indemnify the Owners of Sheep in Cases of Damage Committed by Dogs," providing for license fee of \$1 on each dog, it was held that the license fee was in no sense a tax, and was not within the operation of Ill. Const. art. 9, § 1, providing that all needful revenue shall be raised by levying a tax by valuation. The court said: "It is simply what it purports to be, a 'license fee,' and is imposed under the police power, and not under the taxing power of the state. Undoubtedly 'dogs' are regarded as a species of property for some purposes, but owing to their habits, which are known to be hurtful sometimes to persons and to some kinds of domestic animals, the keeping of them may be the subject of regulation provided by law." *Cole v. Hall*, 103 Ill. 30.

In *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599, it was 40 L. R. A.

said that specific taxes upon dogs can be upheld only on the ground that they are not revenue measures, but police regulations, and the specific tax levied on dogs in Indiana is a *per capita* tax on the dogs, and not *ad valorem*. The court said that "dogs are not by these statutes recognized as subjects of general taxation for revenue purposes, and taxed accordingly."

Indiana act March 2, 1865, entitled, "An Act to Discourage the Keeping of Useless and Sheep-Killing Dogs, and Providing Penalties for the Violation of Any of the Provisions of said Act by Officers and Others, and Also Repealing an Act to License Dogs," did not conflict with Ind. Const. art. 10, § 1, requiring that the general assembly shall provide by law for the uniform and equal rights of assessment and taxation, as the plain purpose of the act is not to provide a revenue, but to discourage the keeping of dogs, and as a measure of internal police the legislature has the power to encourage the rearing of sheep and to discourage the keeping of dogs. The court said it is a matter of no consequence how the sum charged to the owner of the dog may be collected. *Mitchell v. Williams*, 27 Ind. 62; *State v. Cornnall*, 27 Ind. 120.

Under a city ordinance requiring the payment of a tax of \$2 by the owner of a dog, and providing a fine for the failure to pay for each dog owned, and authorizing the marshal to kill the dog, a conviction fining the owner of a dog could be had. The court said, although called a tax, yet it is not a revenue levy in either purpose or operation; that it was intended as a police regulation for reducing the number of mischievous dogs, and is a license law; \$2 the price of license, or a tax for the privilege, and the collar and stamps are passports for the security of registered dogs. *Com. v. Markham*, 7 Bush, 487.

In *Com. v. Markham*, 7 Bush, 487, under an ordinance requiring the owner of a dog to pay \$2 for license, which was held to be within the police power, it was said: "Had revenue been the object the charter gave ample power by an increase of taxation *ad valorem* without a fruitless resort to an unauthorized specific tax on dogs, which, moreover, would have violated the statute of 1865, allowing to every citizen of the state two dogs free from taxation."

And a dog tax is not a tax within the meaning of Mich. Const. art. 14, providing for specific state taxes, and is not a double tax, but is an exercise of the police power, and is valid. *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159.

Under Mich. Comp. Laws, § 2482, exempting a city railway from taxes other than the state specific tax on all the property of the company, a dog was not exempt, as Laws 1877, p. 239, imposes a tax on dogs, not by value, but specifically, of \$1 for male dogs, and \$3 for female dogs. It was held to be regarded as a license rather than a tax law, imposed on those who chose to keep animals that have

caution to prevent accidents to animals on the track.

It was not error in the trial judge to charge that the street-car company must have sufficient employees on its cars to operate them in a careful manner, so as to prevent damages or injuries to persons and animals that might go upon the track, and was liable for a failure to do so; the question of what number would be sufficient being left to the jury, under all the circumstances. It appears that at this time and place the motorman was the only employee on the car, and he was doing duty both as motorman and conductor, the latter having left the car after it passed from the more crowded portion of the track nearer the city.

always been regarded as requiring special regulations different from that applied to others. *Hendrie v. Kalthoff*, 48 Mich. 306.

Under a charter of a city providing that a city shall have power to tax, regulate, restrain, and prohibit the running at large of dogs or cats, and providing for the impounding or destruction of either, it was held that the power granted was to tax dogs and regulate dogs, and was not limited simply to the power to restrain and prohibit dogs from running at large, and the city could impose a tax *per capita* upon dogs by way of license, and such power was not precluded by Mo. Const. art 10, § 4, requiring all property to be taxed in proportion to its value. *Carthage v. Rhodes*, 101 Mo. 175, 9 L. R. A. 352.

In *Mowery v. Salisbury*, 82 N. C. 175, it was said that "the plaintiff's contention is that, as dogs are property, the power of this municipal body is limited by the Constitution to the imposition of an *ad valorem* tax, and that for its nonpayment the destruction of the animal is not an authorized remedy. It is difficult to apply the rule to animals that have no standard value, and are not the subject of sale and traffic, in order to put upon them a share of the police burdens. But the sum required to be paid by the owner is not an *ad valorem*, but a specific tax for the privilege of keeping the dog within the town, with an annexed penalty if he is found running at large without the required badge, the evidence of its payment and the ownership of the dog."

Under Ohio Rev. Stat. § 2754, providing that every dog over three months of age shall be listed by the assessor in the name of the owner without affixing any valuation thereto, but the owner may affix any valuation thereto he wishes without swearing to the valuation, and § 2833, providing that in the tax list there shall be columns for the number of and *per capita* tax on dogs, and in addition to the property tax on the valuation that may be fixed upon a dog by the owners, which shall be included in the personal-property valuation and taxed therewith, the auditor shall levy \$1,—it was held that the *per capita* tax on dogs was not in conflict with the Constitution, art. 12, § 2, providing that laws shall be passed taxing by uniform rule all real and personal property according to its true value in money, as the exercise of the police power is different from the taxing power and amounted to a license. As to whether dogs were property within the meaning of this constitutional provision was held not necessary to be decided in this case. *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459.

In *Griggs v. Dittoe*, 52 Ohio St. 601, it was said that Ohio act May 14, 1891, providing that any dog returned for taxation and the tax on which is paid when due shall be regarded as, and shall be, property, was not inconsistent with Rev. Stat. § 7006, authorizing any person to kill a dog at large.

In *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 40 L. R. A.

The roadway of the street-car company being on the roadway of the turnpike, where persons, horses, and vehicles were constantly passing, and had the right to pass, and on the same grade as the turnpike, were all circumstances for the jury to consider, and they could properly do so under the charge as given. The motorman had also stated that the reason he did not see the dog sooner was because he was looking around at the passengers to see if any desired to get off, so that the charge was called for and appropriate.

It was not error to charge that, inasmuch as the street-car track was laid on the roadway and on the same level with it, the dog was not a trespasser if he went upon the track, in-

152, it was said that dogs are not recognized as other property and subject to an *ad valorem* taxation.

Texas act 1876, exempting to each family one dog, and imposing on all other dogs a tax of \$1 per annum under a penalty of \$5, is not a tax law, but a police regulation. *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152.

That the sum exceeded the expenses of issuance did not transcend the licensing power, and make it a tax. *Tenney v. Lenz*, 16 Wis. 566.

In *Jemison v. Southwestern R. Co.* 75 Ga. 444, 56 Am. Rep. 476, it was said that "dogs are not generally the subjects of taxation. . . . Dogs are not property in such a sense as makes them assets belonging to the estate of a deceased person, and are never inventoried and appraised, however numerous or valuable, nor are they subject to levy and sale so far as we are informed."

But there are cases holding that the license law is a tax on property which cannot be enforced by fine or imprisonment.

An ordinance of Washington, January 14, 1858, providing that it shall not be lawful for any person to own or keep any dog without obtaining from the city a license for which he shall pay \$3 per annum for a male and \$5 per annum for a female, and \$2, imposing a forfeiture of from \$5 to \$10 for a male dog, and \$10 to \$20 for a female, if the owner or keeper fails to obtain a license, is invalid because it declared the owner a criminal and subjected him to arrest, imprisonment, and fine for keeping his property at home unless he first obtained a license. The court said that "the law recognizes property in and to dogs, and the owner thereof is entitled to his remedies for an invasion of his rights of property," and "if dogs are property they may be taxed and the tax assessed to the owner." *Washington v. Meigs*, 1 MacArth. 58.

In *Cranston v. Augusta*, 61 Ga. 573, the recorder dismissed a prosecution under an ordinance requiring the owner of a dog annually to purchase a dog collar for \$1, under a penalty of \$1 to \$5, saying "the city has the right to impose special taxes and collect them by execution. But as it has been decided that dogs are property, the city has no more right to fine a citizen for not paying tax on his dog than on other property," and the dismissal was sustained on the ground that the defendant could not be twice tried. The court does not discuss any other question involved in the case.

In some states provision is made for direct tax on dogs as on other property.

South Dakota Laws 1889, chap. 121, imposes a tax on every dog, to be collected in the same manner as other taxes upon personal property. *Liberty Twp. v. Hutchinson County*, 7 S. D. 530.

And in *Lynn v. State*, 33 Tex. Crim. Rep. 153, it was held that the legislature has made the dog the subject of a direct *ad valorem* tax, thereby placing it upon the same footing as all other taxable property.

asmuch as the dog was not improperly on the highway.

It was not error to tell the jury that, if after the dog was injured his master killed him, under the honest belief that he was fatally injured, this would not prevent a recovery. The action in this case was for both the injury and killing, and, if the jury should have found that the dog ought not to have been killed, still the plaintiff would be entitled to damages for his injuries.

It is said that the judge should have told the jury that the motorman might rely upon the keen sense of hearing, great alertness, intelligence, and active celerity common to dogs, and they might consider and weigh their own

practical knowledge as to the nature, character, and quality of dogs, and consider all these matters in reaching a verdict in the case. The request, we think, is too broad. Unquestionably, the jury might take into consideration common knowledge and observation about the habits and qualities of dogs, but it was going too far to say that the motorman might rely upon the quickness and celerity of the dog and thus absolve himself from all duty and care to prevent the accident, which is virtually what the request implies.

The court sufficiently stated to the jury the rule applicable if the dog appeared so suddenly and immediately in front of the car that it could not be stopped and no precaution

And where a majority of taxpayers was required to obtain a petition for the issuing of railroad bonds, under N. Y. Laws 1869, p. 2303, chap. 907, it was held that persons who paid a tax of 50 cents as the owner of a dog should be counted. The court said that "it is settled at this day in this state that dogs are property." *People, Longwell, v. McMaster*, 10 Abb. Pr. N. S. 182.

And in *Kinsman v. State*, 77 Ind. 132, it was said, referring to a dog, that any article of property which the law subjects to taxation is *prima facie* an article of value.

So, under Vt. Gen. Stat. chap. 19, § 1, subd. 4, providing that every person of full age who shall reside in any town in this state, and whose ratable estate held in his own right, the percentage of the value of which besides his poll shall be set in the list of such town at the sum of \$3 or upwards for five years in succession, shall thereby gain a settlement in such town, a pauper obtained a settlement where his father's list was real estate \$2.40, personal property \$.30, one dog \$1, one poll \$2, total, \$5.70. *Marshfield v. Middlesex*, 55 Vt. 545.

In *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159, it was said: "As the charge laid on the owners of dogs is a pecuniary burden imposed by public authority, it partakes, no doubt, of the character of a tax, and for many purposes might be so spoken of without harm." Referring to this, the court in *Longyear v. Buck*, 83 Mich. 236, 10 L. R. A. 43, said: "But a constitutional provision for the taxation of property by value will not preclude a *per capita* tax on dogs. . . . Each person assesses himself in determining how many dogs he will own and keep."

In *Bowen v. Tioga County*, 6 Pa. Co. Ct. 613, it was held that Pa. act June 12, 1878, for the taxation of dogs and the protection of sheep, to take effect upon a majority vote, was contrary to Const. art. 3, § 7, prohibiting local legislation.

Ind. act 1891, p. 199, § 47, 53, provided another and antagonistic method of taxation of dogs, differing from the act of March 5, 1891, creating a method for the taxation of dogs. *Kerlin v. Reynolds*, 142 Ind. 466.

In *Wilcox v. State* (Ga.) 39 L. R. A. 709, it was said that in Ga. Const. (Civ. Code, § 5883), authorizing the general assembly to impose a tax on such domestic animals as from their nature and habits are destructive of other property, the words "domestic animals" were intended to refer to dogs.

b. Taking property without due process of law.

Some cases hold that a dog is such property that he cannot be summarily killed without notice to his owner, as this would be contrary to the constitutional provision against depriving a person of his property without due process of law. But on this question there is some conflict of authorities.

In an action for damages for the killing of plaintiff's dog by the dog of another person it was said 40 L. R. A.

that, under a statute authorizing any person to kill a dog not having a licensed collar on, "a statute under which a party is, in so summary a manner, to be deprived of his property by having it destroyed, should not be extended by construction. That dogs have a value and are the property of their owner cannot be well denied at the present day, whatever may have been the rule heretofore." *Heisrodt v. Hackett*, 34 Mich. 283, 22 Am. Rep. 529.

And a city ordinance providing for the killing or selling of unlicensed dogs found running at large without a license check then attached as provided for by the ordinance is contrary to Ohio Const. art. 1, § 19, protecting the "property" of every individual, subject only to the public welfare, and providing for compensation when taken. *Archer v. Baertschi*, 8 Ohio C. C. 12.

So, under N. Y. Laws 1896, chap. 448, requiring the owner of every dog within the city to procure a yearly license for the dog, and pay to the humane society of the city \$1 therefor under penalty, upon refusal, of death to the dog or his confiscation, and vesting the execution of the law and the proceeds of the license or sale of the dog in the society, it was held that such society could not seize or confiscate the plaintiff's dog, as in New York dogs are now regarded as property and within the law for the protection of property, and the plaintiff could not be deprived of his property without due process of law. It was further held that the mere fact of not wearing a licensed collar could not of itself render a dog a nuisance, and thus give the right to kill or confiscate. *Fox v. Mohawk & H. River Humane Soc.* 25 App. Div. 26.

And under a city ordinance providing that if any dog shall attack a person at any place except on the premises of his owner, the mayor or police justice shall order the owner or possessor of such dog to kill him immediately, and if the owner refuses he shall forfeit, etc., it was held that the ordinance was invalid because it gave no opportunity for the owner of the dog to be heard in his defense, and the court said that under N. Y. Const. art. 1, § 6, "property may not be taken, affected, or destroyed except by due process of law, which requires notice of hearing to the owner, and opportunity to be heard." *People, Shand, v. Tighe*, 9 Misc. 807.

But under N. Y. Laws 1892, chap. 888 (county law, §§ 125, 126), providing that the owner or possessor of any vicious dog who shall neglect to kill him within forty-eight hours after having received an order from the justice of the peace directing such a dog to be killed, shall forfeit, etc., it was held that this statute did not deprive the relator of his property without due process of law, in that the order of the justice directing the relator to kill his dog immediately was made without notice to him, as the relator did not kill his dog and refused to do so, and the statute imposed a money penalty, and the justice did not. It was further held that in the action to recover the penalty the relator would have full

could have prevented the accident. The special request on this point was not necessary, nor as made was it correct.

Assignments are made which raise the question of the *status* of dogs before the law, and on what plane they are to be put, and how regarded. It has been held that the owner of a dog has such property in him as that he may maintain an action for killing or injuring him. *Wheatley v. Harris*, 4 Sneed, 468, 70 Am. Dec. 258. Also that he is the subject of larceny as personal property. *State v. Brown*, 9 Baxt. 58. It has also been held that a dog is an animal such as the statute contemplates in providing statutory precautions when they appear upon railroad tracks. *Fink v. Evans*, 95 Tenn. 416. It is true that at common law a dog was not considered as property, the reason given being that they were base in their nature and kept merely for whims and pleasures. But this rule of law has not found favor in later days, and the reason of the rule is not regarded as well founded. In *Mullaly v. People*, 86 N. Y. 365, the court said very enthusiastically that "when we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history, . . . and the faithful St. Bernards, which, after a storm has swept over

the crests and sides of the Alps, start out in search of lost travelers, the claim that the nature of the dog is essentially base, and that he should be left a prey to every vagabond who chooses to steal him, will not now receive ready assent. . . . This common-law rule was extremely technical, . . . [for] while it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog . . . Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic." They are the negro's associates, and often his only property, the poor man's friend and the rich man's companion, and the protection of women and children, hearthstones and henroosts. In the earlier law books it was said that "dog law" was as hard to define as was "dog latin," but that day has passed, and dogs have now a distinct and well-established status in the eyes of the law.

Much evidence is given in the case upon the question of the dog's pedigree and ancestry. The objections made are that these matters are attempted to be proven by general reputation, and this is characterized as hearsay. But the question of pedigree and ancestry is a matter of common or general reputation, whether the question concerns horses, cattle, dogs, or men. The matter, from the very nature of

opportunity to contest the truth of the complaint upon which the justice made the order, and thus would have due process of law. *People, Renshaw, v. Gillespie*, 25 App. Div. 91.

In *People, Renshaw, v. Gillespie*, 25 App. Div. 91, *People, Shand, v. Tighe*, 9 Misc. 607, was distinguished, the court saying: "We assume that the relator when brought before the police justice had no opportunity to contest the truth of the original complaint, and in that view the case was correctly decided, and thus is clearly distinguishable from the one before us."

And in *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, it was held that La. Laws 1882, p. 160, providing that dogs are personal property, but that no dog is entitled to the protection of the law unless the same shall have been placed upon the assessment roll, and that in a civil action for a recovery for injuries done to dogs, a recovery can only be had to the amount of the value fixed by such owner in the last assessment, was not in conflict with the Constitution of the United States, providing that no person shall be deprived of his property without due process of law.

New Hampshire Rev. Stat. chap. 127, § 5, providing that no person shall be liable by law for killing a dog which shall be found not having around his neck a collar of brass, tin, or leather with the name of the owner carved or engraved thereon, did not conflict with N. H. Const. providing against taking property for public uses, or deprive parties of their property in dogs, but merely regulated the use and keeping of such property, and was a police regulation. *Morey v. Brown*, 42 N. H. 373.

A city ordinance authorizing a city marshal to shoot all dogs not muzzled, found in any street, was held to be contrary to Texas Bill of Rights, § 17, providing no person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation, and § 19, providing that no citizen of this state shall be deprived of life, liberty, or property except by due course of the law of the land. *Lynn v. State*, 33 Tex. Crim. Rep. 153.

In *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689, it was said that the 8th Amendment of the Constitution of the United States declares that no person shall be deprived of life, liberty, or property 40 L. R. A.

without due process of law, and dogs being property their owners cannot be deprived of them without due process of law, but it was held that this provision should be construed to sustain a city ordinance providing that a dog at large not registered or collared could be killed, as the protection against dogs justified such police powers.

In an action of quo warranto to oust a city from the exercise of certain powers, claiming that an ordinance requiring a registration fee for each dog, and rendering the person violating the same liable to a fine, and authorizing the killing of a dog, was unconstitutional, it was held that the proposition that dogs are property has seldom, if ever, been questioned, and so far as this case is concerned it will be admitted, but that this would not prevent a statute or ordinance restricting the running at large of dogs, or for their destruction in case they are permitted to run at large in violation of law. It was further held that the license tax was valid because imposed for regulation and restriction, and not merely for revenue. The court said: "Under the almost unbroken current of authority we think that statutes and ordinances may be passed regulating, restricting, or even prohibiting the running at large of dogs in cities, and this, although dogs are unquestionably property; that the owners, keepers, or harborers of dogs in cities may be required to register the same and to pay a registration fee therefor, although this fee may in one sense be a tax, though not a tax within the meaning of Kan. Const. art. 11, § 1: "That dogs in cities may be classified and the owners, keepers, or harborers thereof, may be required to register all the dogs of one class and not the dogs of another class, and to pay a greater registration fee for the registration of the dogs of one class than for the registration of the dogs of another class; and such owners, keepers, or harborers of dogs may also be required to put collars around the necks of their dogs, and that any dog found running at large in a city in violation of the statutes or ordinances may be summarily destroyed; and that all this is constitutional and valid and is 'due process of law,' and that by the same no one is denied 'the equal protection of the laws.'" *State, Curtis, v. Topeka*, 36 Kan. 78, 50 Am. Rep. 539.

I. T.

things, depends upon reputation or common repute. It is shown that certain books are kept, and in them there is a registration of pedigrees, kept up for the information of the public, not only as to horses, but also as to cattle and dogs. These are shown to be received as satisfactory evidence of pedigree in the same manner and upon the same idea as entries in family records of births, deaths, and marriages are received with regard to the human family. 18 Am. & Eng. Enc. Law, p. 258; *Flowers v. Haralson*, 6 Yerg. 494; *Rogers v. Park*, 4 Humph. 480; *Swink v. French*, 11 Lea, 79, 47 Am. Rep. 277; *Morris v. Swaney*, 7 Heisk. 591; *Ford v. Ford*, 7 Humph. 92.

It is true that in family records the entries in the books are usually made by the relatives and friends of the person, but, inasmuch as dogs have no relatives competent to make entries for them, it is allowable for such entries to be made by the owners, friends, and admirers of the dog. Upon the general question as to the admissibility of evidence of the dog's pedigree, and the qualities and performances of his ancestors, we think there can be no doubt but that such evidence is competent. It is certainly competent to show pedigree upon the question of value of horses, cattle, and even sheep and swine,—their different strains of blood; and especially as to horses and cows, it is competent to show the qualities of the sires and dams and more remote ancestry, as these matters enter largely into the question of value. It is a matter of common knowledge that the same questions enter into the consideration of the value of dogs, not only such as are kept for common use, such as guard dogs, shepherd dogs, Newfoundland dogs, but also such as are kept for sporting purposes, such as grey, blood, and fox hounds, bird dogs, and others. There are high and low degrees among dogs as well as among men, and while the common coon dog has his value, it is not the same as that of the trained bird dog or the trained bloodhound. It is a matter of common knowledge and observation that certain strains of blood among horses add materially to, if they do not entirely fix, their values, and so among cows and hogs and sheep, and even among chickens and turkeys. Different strains of blooded horses are valuable because it is found that for generations the achievements of horses of that strain have been noteworthy upon the turf and elsewhere; and, so with dogs, these qualities, as a matter of common observation, are much the same, in the same strain, for generation after generation. We think there is no error in admitting evidence upon these matters of pedigree, and the reputation of this particular dog killed is shown to have had what in dog circles is regarded as "blue blood," and among these he belonged to the inner circles of the "400,"—a member of the "F. F. T.'s," or "First Families of Tennessee." In addition, he was of English descent. His sire was "Champion Tribulation, by imp. Beppo III., out of imp. Champion Lass of Bow," and so on for twenty or more generations. His dam was "Dick's Sue, by Dick, out of Ida Heath," etc., for as many generations. It is fully shown that on both sides the ancestry

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is traced back to the best of English nobility blood in dog circles. The sire of the dog is shown to have had a remarkable record in field trials and bench shows, and so with the dam. Dogs of the grade of the dog that was killed, and with such pedigree, are shown by the proof to be worth from \$500 to \$1,000 in the market. It is also shown that this dog had had the distemper, and, under the proof, this added to his value 100 per cent. It is attempted to show that this dog's descent may not have been entirely pure, and it is intimated that he may have had "terrier" blood in him, but the only foundation for this inference is the fact that he "tarried" so long on the track when the car was approaching. But it appears from the record that it is a characteristic of the pointer when he sets to become oblivious to all earthly surroundings, and the bluer his blood the more absent-minded he becomes on such an occasion. The question of pedigree is really important so far only as it bears upon the question of value of the animal killed. But it is evident, on examining the record, that the jury were not influenced by considerations of pedigree in fixing the damages, since they have named an amount below that fixed by any witness who placed a value upon the animal based upon his pedigree, and adopted as their verdict the evidence given by the plaintiff and other witnesses of value without regard to pedigree, and fixed the amount at the smallest sum named by him for the dog, taking in view his qualities, and leaving out of view his ancestry or pedigree. The plaintiff fixes the value of the dog at \$250, without any reference to his blood or lineage, and in this he is sustained. He describes him as a handsome dog, very fast, wide ranger, very staunch on his game and to the gun, thoroughly broken, a fine retriever from land or water, with an excellent disposition. He is shown also to have been a valuable, reliable yard and house dog, and to have made himself generally useful, and almost indispensable to the plaintiff's household. With such an eloquent recital of the dog's qualities, the jury could not, perhaps, have given less damages than \$250. The defendant company introduced no evidence of value, and no assignment is made that the damages are excessive. Whatever might be our opinion as to the value of a dog is immaterial, as we are controlled by the evidence in the record. While we have not passed *seriatim* upon the many errors assigned, we have considered them all, and given a general view of such matters as we consider important.

Upon the whole case, we are of opinion that the defendant company was guilty of negligence in the killing of this dog, that his death could have been prevented by the exercise of proper care and diligence, that he was fatally injured by the car, and killed as an act of humanity by his owner, and the company is liable for the killing. As to value, it is placed by the jury at the lowest estimate made by any witness, and evidently without regard to his pedigree or the performances of his ancestors.

We are satisfied with the verdict and judgment, and it is affirmed with costs.

MICHIGAN SUPREME COURT.

Gurdon CORNING *et al.*

v.

City of SAGINAW, *Plff. in Err.*

(.....Mich.....)

A city is not liable, in the absence of any statutory provision, for an injury to a private barge caused by the failure of a bridge tender seasonably to open a draw in the bridge in response to proper signals, because of the bridge becoming caught, where the city does not derive any benefit from the bridge, but simply maintains it for the public good.

(March 1, 1898.)

ERROR to the Circuit Court for Saginaw County to review a judgment in favor of plaintiffs in an action brought to recover damages for injuries to their barge by collision with the pier of a bridge maintained by the defendant city. *Reversed.*

The facts are stated in the opinion.

Mr. E. L. Beach, for plaintiff in error:

There being no statute in this state holding municipal corporations liable for damages, because its agents or servants have failed to repair a bridge out of repair, the city in no way could be responsible in this action.

Lewis v. State, 96 N. Y. 71, 48 Am. Rep. 607; *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 44; *Toolan v. Lansing*, 38 Mich. 315; *Pontiac v. Carter*, 32 Mich. 164; *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Lansing v. Toolan*, 37 Mich. 153; *Davis v. Jackson*, 61 Mich. 532; *Shippy v. Au Sable*, 65 Mich. 500; *Bigelow v. Kalamazoo*, 97 Mich. 127; *Malloy v. Walker Twp.* 77 Mich. 458, 6 L. R. A. 695; *Cooley, Torts*, p. 740; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368.

No court has ever held a municipal corporation liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers or agents.

Meechem, Pub. Off. p. 848.

No private action, unless expressly authorized by statute, can be maintained against a city for the neglect of a public duty imposed by statute for the benefit of the public, and from the performance of which the corporation receives no profit or advantage.

Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; *French v. Boston*, 129 Mass. 592, 37 Am. Rep. 393; 2 Dill. Mun. Corp. § 965a; *Winbiger v. Los Angeles*, 45 Cal. 37; *Crowell v. Sonoma County*, 25 Cal. 313; 1 Beach, Pub. Corp. §§ 261-263. Also 3 How. Anno. Stat. §§ 1446C, 1446D.

The city is not obliged to keep its bridges in repair, except as governed by statute, which requires it to keep them in repair for travelers, and the statute makes it liable to travelers only.

McDougall v. Salem, 110 Mass. 21; *Larrabee v. Peabody*, 128 Mass. 561; *French v. Boston*,

NOTE.—As to distinction between private and public functions of municipalities in respect to liability for negligence, see note to *Barron v. Detroit* (Mich.) 19 L. R. A. 452.

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129 Mass. 592, 37 Am. Rep. 393; 2 Am. & Eng. Enc. Law, p. 554.

If the agents of the city failed to keep the bridge in repair, they being municipal officers and in no such sense municipal agents, their negligence is not the negligence of the municipality, nor will their misconduct be chargeable against it, unless the act complained of be either authorized or ratified.

Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450; *Webster v. Hillsdale County*, 99 Mich. 261; *McCutcheon v. Homer*, 43 Mich. 486, 38 Am. Rep. 212; *O'Leary v. Marquette Fire & Water Comrs.* 79 Mich. 232, 8 L. R. A. 170; *McArthur v. Saginaw*, 58 Mich. 360, 55 Am. Rep. 637; *Larkin v. Saginaw County*, 11 Mich. 88, 82 Am. Dec. 63; *Barron v. Detroit*, 94 Mich. 604, 19 L. R. A. 452; *Rolf v. Greenville*, 102 Mich. 544.

Where a tow is in charge of a tug, the tug and tow are to be treated as being one vessel, and that a steam vessel.

16 Am. & Eng. Enc. Law, p. 319; *The Cleadon*, 14 Moore, P. C. C. 92, Lush. 158; *Anglo-Australasian Steam Nav. Co. v. Cornell S. B. Co.* 32 Fed. Rep. 798; *New York & B. Transp. Co. v. Philadelphia & S. Steam Nav. Co.* 23 How. 461, 16 L. ed. 397; *The Herbert Manton*, 14 Blatchf. 37, Affirming *The J. H. Gautier*, 5 Ben. 469, and cases cited.

Messrs. Weadock & Purcell and James H. Davitt, for defendants in error:

When authority to construct this bridge with a suitable draw was obtained and acted upon, the duty was thereby imposed upon the city to keep it in substantially the same condition as proposed, or at least to use ordinary care to prevent it from becoming dangerous to navigation through neglect to repair it.

4 Am. & Eng. Enc. Law, 2d ed. pp. 925, 926, and cases cited; *Powers v. Irish*, 23 Mich. 429; *Oregon City Transp. Co. v. Columbia Street Bridge Co.* 58 Fed. Rep. 549.

And a private action will lie for further injuries resulting from such a structure.

Powers v. Irish, 23 Mich. 429; *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22 L. ed. 619; *Greenwood v. Westport*, 60 Fed. Rep. 560; *Patterson v. Proprietors of East Bridge*, 40 Me. 404.

In such a case as this the municipality is liable without any statute expressly creating such liability.

2 Am. & Eng. Enc. Law, 1st ed. p. 549; *Weisenberg v. Winneconne*, 56 Wis. 667; *Edgerton v. New York*, 27 Fed. Rep. 230; *Ecorse Twp. Board v. Wayne County Supers.* 75 Mich. 264.

That a city or township is liable under such circumstances is held in—

Greenwood v. Westport, 60 Fed. Rep. 560; *Van Eiten v. Westport*, 60 Fed. Rep. 579; *Boston v. Cronley*, 38 Fed. Rep. 202.

Railroads and other private corporations constructing and controlling draw bridges are liable to persons injured while navigating the stream, through negligence in caring for and operating the draw.

Gates v. Northern P. R. Co. 64 Wis. 64; *Central R. Co. v. Pennsylvania R. Co.* 20 U. S. App. 186, 59 Fed. Rep. 192, 8 C. C. A. 86;

Pennsylvania R. Co. v. Central R. Co. 59 Fed. Rep. 190; *Blanchard v. Western U. Teleg. Co.* 60 N. Y. 510; *Re Pratt*, 24 Fed. Rep. 835; *King v. Ohio & M. R. Co.* 25 Fed. Rep. 799; *The City of Richmond*, 43 Fed. Rep. 85.

The duty of the city with respect to maintaining and operating this draw, as between it and those navigating the Saginaw river, and its duty to keep the bridge in repair, as between it and persons using the bridge for travel as a part of the highway, are widely different.

Greenwood v. Westport, 60 Fed. Rep. 560; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629; *Oregon City Transp. Co. v. Columbia Street Bridge Co.* 53 Fed. Rep. 549; *Edgerton v. New York*, 27 Fed. Rep. 280.

Long, J., delivered the opinion of the court:

Plaintiffs are the owners of the barge King, and recovered a judgment for damages resulting from the colliding of their barge with the pier which supports the draw of what is known as the "Johnson Street Bridge," in the defendant city. The collision occurred on April 13, 1895, while the barge was being towed down stream by a tug; and it is claimed that the immediate cause of it was the failure of the bridge tender to seasonably open the draw in response to properly given signals; that the inability to so open the draw in time was attributable to the sticking or binding of the ends of the draw against the adjoining ends of the bridge. While the declaration contained four counts, yet the case was submitted to the jury upon the fourth count solely, which charged substantially that it was the duty of the defendant to keep the ends of the swing and the adjoining portions of the bridge in repair, so that the draw could not stick or become caught or fastened when it became necessary to open it for the passage of vessels, and that defendant had neglected to perform its duty in that regard. The court charged that the burden was upon the plaintiffs to show either that the city had actual notice that the bridge was out of repair in the manner charged in this fourth count, or that it was so out of repair for such a length of time before the accident that the city, in the exercise of ordinary care, ought to have known it; and, further, that, whether the city received actual notice of its defective condition or only constructive notice, a sufficient length of time must have elapsed after the notice was received in which, in the exercise of ordinary care, the necessary repairs could have been made. Before any witnesses were sworn in the case, the following facts were agreed to: "That, when the collision in question occurred, the city was the owner and in control of the Johnson street bridge; that, a number of years ago, it was built by the city by the permission of the general government and the board of supervisors of Saginaw county; that the bridge tender was in the employ of the city, having been appointed as such bridge tender under the ordinance of the city, and was placed there by the city; that the plaintiffs presented a claim for damages to the council before this suit was brought, and the same was disallowed; that the Saginaw river, at the point where the bridge crosses it, is a

navigable stream, and tributary to the Great Lakes." Plaintiffs introduced testimony tending to sustain the claim that the bridge was out of repair in the manner alleged, and that the barge was injured by reason thereof, and that the plaintiffs were in the exercise of due care. The defendant introduced testimony tending to show that the bridge was not out of repair, and that on the day in question the bridge did bind, and that there was a short delay in opening it; that the city had no notice of any such defect. The court instructed the jury that if they found that the bridge was out of repair in the manner alleged in the declaration, and the barge was injured by reason of its being so out of repair, and that the plaintiffs, in handling the tug, were without fault, the plaintiffs were entitled to recover. The jury found a verdict in favor of plaintiffs; and, judgment having been entered thereon, defendant brings error.

The defendant requested the court to charge the jury that, there being no statute providing for any action against the city for the negligence complained of, the verdict must be in favor of defendant. This was refused. The plaintiffs contend that the city is liable without any statute expressly creating such liability. The argument in support of this contention is that our state Constitution (art. 18, § 4) forbids the bridging of a navigable stream without authority obtained from the board of supervisors under the provisions of law, and "that no such law shall prejudice the right of individuals to the free navigation of such streams;" that a law was passed in 1851 authorizing the bridging of such streams, but requiring persons or corporations wishing to construct a bridge over a stream which is navigable, like the present, for vessels of 15 tons burden or more, to petition the board of supervisors for authority to do so, and also to give due notice by publication of the application for such authority, as provided by 1 How. Anno. Stat. § 495, which, among other things, states: "Every such petition shall set forth the kind and description of the bridge proposed to be constructed, and, whether the same is to be constructed with a draw, or whether any and what provision is to be made for the passage of vessels or boats; and such board shall have the power to grant or refuse the prayer of such petition, upon such terms as they may deem just and reasonable, and to prescribe what description of bridge may be constructed, or to prohibit the construction of any bridge on the proposed location, as in their judgment the public interest may require." It is therefore contended that, inasmuch as it is admitted that the city built the bridge under the authority obtained from the board of supervisors, it must be presumed that, in obtaining that authority, the requirements of the statute must have been complied with both by the city and board; that on this assumption the petition must have contained provisions for a suitable draw to permit the passage of boats and vessels, and the authority given must have included a like provision, as a draw was actually constructed which was adequate while in repair. It is further contended that the city, after so obtaining authority to construct such a bridge, and after actually con-

structing and operating it for years, could not permit the draw through negligence to become dangerous or useless without liability to persons navigating the stream who might be injured thereby; that is, that when authority to construct the bridge with a suitable draw was obtained and acted upon, the duty was thereby imposed upon the city to keep it in substantially the same condition as proposed, or, at least, to use ordinary care to prevent it from becoming dangerous to navigation through neglect to repair.

This contention cannot be maintained. It is undoubtedly true that, without the action of the board of supervisors, the bridge could not have been erected, and it would probably never have been permitted without the erection of a draw or swing therein for the purpose of the passage of boats, as the Saginaw river is navigable for craft of the burden mentioned in the act. If not erected in accordance with the requirements of the board of supervisors as provided in the act, or if it impeded the navigation of the river, it could undoubtedly have been abated as a nuisance. 4 Am. & Eng. Enc. Law, 2d ed. p. 926, and cases cited in note; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332. There is nothing in those statutes, however, creating a liability upon the part of the municipality to private persons for injuries occasioned through the failure of the municipality to either construct or maintain a draw, or for failure to keep the draw in repair. Neither has the general statute creating liabilities against municipalities for failure to keep its highways, etc., in repair, any application here. The only question, therefore, is whether there is any common-law liability for the damages occasioned. Judge Dillon, in his work on Municipal Corporations, vol. 2, 4th ed. § 963, says: "According to the prevailing rule, counties are under no liability in respect of torts, except as imposed (expressly or by necessary implication) by statute. They are political divisions of the state created for convenience, and are usually regarded not to be impliedly liable for damages suffered in consequence of neglect to repair a county road or bridge; such liability, unless declared by statute, is generally, but not quite universally, denied to exist." In this state it is the settled rule that it requires legislative action to create any liability to private suit for nonrepair of public ways. *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450. The rule in the above case has been followed since it was announced in 1870. The statute creating liability for nonrepair of highways has since been passed. But, as we have said, it has no application to the present case, and in fact it is not contended by counsel that it is applicable. Although the English books contain numerous cases of indictments or informations for neglect to repair highways and bridges, in no instance referred to have the English courts sustained a private action against a municipal corporation for such neglect, except under a statute expressly or by necessary implication giving such remedy. *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, and cases there cited. In *French v. Boston*, 129 Mass. 592, 37 Am. Rep. 393, it appeared that the statute imposed upon the city the duty of main-

taining Warren bridge as a public highway "at its own expense, and in accordance with such ordinances as the city council of said city may establish." The duty thus imposed upon the city was a public duty, from the performance of which it received no profit or advantage. It was said by the court: "It is well settled in this commonwealth that no private action can be maintained against a city for the neglect to perform such a duty, unless it is expressly authorized by statute. *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, and cases there cited. By statute, the city is liable to a traveler thereon for any defect in the highway of which the bridge is a part; but there is no statute which makes it liable to a private action for a failure to provide a draw of proper width, or for the carelessness of the superintendent of the bridge in delaying vessels which seek to pass through the draw. It follows that the plaintiff cannot maintain this action." In the present case it does not appear that the city derives any benefit from the bridge. It is maintained for the public good by the city in its governmental or public character, and not in its proprietary or private character, and is therefore not liable to private action, as the statute fixes no such liability. 1 Dill. Mun. Corp. 4th ed. § 66. The court below was in error in refusing the defendant's request to charge.

Judgment is reversed, and no new trial ordered.

The other Justices concur.

John S. FOWLES, Admr., etc., of Alexander T. Fowles, Deceased, *Plff. in Err.*,

Daniel W. BRIGGS *et al.*

(.....Mich.....)

1. **A shipper of lumber is not liable for injury to a railroad brakeman while coupling cars, by the shunting of the lumber, because it was negligently loaded, where the accident happened after it had become the duty of the railroad company to provide for the inspection of the car.**
2. **The duty of a railroad company to provide for the inspection of a car of lumber negligently loaded constitutes the intervention of an independent human agency between the negligence of the shipper and the injury to a railroad brakeman caused thereby.**

(March 29, 1898.)

ERROR to the Circuit Court for Saginaw County to review a judgment in favor of defendants in an action brought to recover damages for causing the death of plaintiff's intestate by so carelessly loading a car that the cargo shifted and crushed him while he was engaged in the performance of his duties. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to the liability of a shipper for negligence in making a shipment, by which persons are injured, see also *Standard Oil Co. v. Tierney* (Ky.) 14 L. R. A. 677; and *Goodlander Mill Co. v. Standard Oil Co.* (C. C. App. 7th C.) 27 L. R. A. 593.

Messrs. George W. Wendock and John F. O'Keefe, for plaintiff in error:

Defendants owed a duty to deceased.

Chapman v. Atlantic Refining Co. 38 Hun, 637, 108 N. Y. 638; *New York, L. E. & W. R. Co. v. Atlantic Refining Co.* 129 N. Y. 601; *Elliott v. Hall*, L. R. 15 Q. B. Div. 320; *Conlon v. Eastern R. Co.* 135 Mass. 195; *Stewart v. Harvard College*, 12 Allen, 58; *Ella v. Boyce* (Mich.) 70 N. W. 1106; 2 Sutherland, Damages, 435; *Smith v. New York & H. R. Co.* 19 N. Y. 127, 75 Am. Dec. 305; *Moon v. Northern P. R. Co.* 46 Minn. 106; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311.

The question "of what was the cause of this injury" was one for the jury (*Alpern v. Church-st.*, 53 Mich. 613; *Barnowsky v. Helson*, 89 Mich. 523, 15 L. R. A. 33); and though the proof of plaintiff depended upon inference to establish the main fact, the question of whether the inference suggested by the plaintiff's theory is the correct one, or whether it was sufficiently rebutted, was a question for the jury.

Crosby v. Detroit, G. H. & M. R. Co. 58 Mich. 458; *Hagan v. Chicago, D. & C. G. T. Junction R. Co.* 86 Mich. 615; *Woods v. Chicago & G. T. R. Co.* 108 Mich. 396; *Schoepper v. Hancock Chemical Co.* (Mich.) 71 N. W. 1081.

The plaintiff's action is in tort, and is founded upon the legal duty imposed upon the defendants out of the relationship that existed between the parties.

Lake Superior Iron Co. v. Erickson, 39 Mich. 492, 33 Am. Rep. 428; *Johnson v. Spear*, 76 Mich. 139; *Piette v. Bavarian Brewing Co.* 91 Mich. 605; *Ella v. Boyce* (Mich.) 70 N. W. 1106.

As to shipper's liability to employees or carriers, see further—

Standard Oil Co. v. Tierney, 92 Ky. 367, 14 L. R. A. 677.

Messrs. Hanchett & Hanchett, for defendants in error:

The car went from the defendants' yard properly loaded. They are not answerable for anything that occurred afterwards.

Haugh v. Chicago, R. I. & P. R. Co. 73 Iowa, 66.

They loaded this car in the way that such lumber is usually loaded, and that is the extent of their duty. They are not required to use the best and safest means of loading.

Michigan C. R. Co. v. Smithson, 45 Mich. 212; *McGinnis v. Canada Southern Bridge Co.* 49 Mich. 466; *Fort Wayne, I. & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Werbowsky v. Fort Wayne & E. R. Co.* 86 Mich. 236; *Richards v. Rough*, 53 Mich. 212.

There is not a single fact proved by the plaintiffs that shows that there was ice on the car when it was loaded. The mere speculations and opinions of the witnesses, who never saw the car, have no weight against the actual facts that have occurred and have been observed by the witnesses who were present.

Treat v. Bates, 27 Mich. 390; *People v. Millard*, 53 Mich. 66.

A duty owing to everybody can never become the foundation of an action, until some individual is placed in position which gives 40 L. R. A.

him particular occasion to insist upon its performance; it then becomes a duty to him personally.

Cooley, Torts, p. 660.

There was no relationship between the defendants and Alexander Fowles involving any legal duty, either contractual or implied by law.

Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543; *Loose v. Clute*, 51 N. Y. 495, 10 Am. Rep. 638; *Conlon v. Bailey*, 58 Ill. App. 261; *Atchison, T. & S. F. R. Co. v. Bump*, 60 Ill. App. 444; *Goodlander Mill Co. v. Standard Oil Co.* 24 U. S. App. 7, 63 Fed. Rep. 400, 11 C. C. A. 253, 27 L. R. A. 583; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1035; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L. R. A. 821; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322; *McInerney v. Delaware & H. Canal Co.* 151 N. Y. 411; *Davidson v. Nichols*, 11 Allen, 514; *Necker v. Harvey*, 49 Mich. 518.

The railroad company having inspected the loading and having approved of it, defendants are not liable for Fowles's injury.

Dewey v. Detroit, G. H. & M. R. Co. 97 Mich. 329, 22 L. R. A. 292; *Jarman v. Chicago & G. T. R. Co.* 98 Mich. 185.

Montgomery, J., delivered the opinion of the court:

Alexander T. Fowles, plaintiff's intestate, on the 4th day of February, 1896, was an employee of the Flint & Père Marquette Railroad Company. His employment was that of rear brakeman on a freight train. The defendants, lumber dealers, loaded a flat car with lumber, in their yards in the city of Saginaw, and shipped it over the Flint & Père Marquette Railroad Company, to Toledo, Ohio. The lumber was maple, 11,000 feet, weighing about 33,000 pounds, and piled flat upon the cars in two tiers parallel with the sides of the car. It was put upon this flat car by the defendants three days before the day of the accident. The testimony of the plaintiff tended to show that the railroad crew, of whom the deceased was rear brakeman, were ordered by the railroad company, on the morning of the 4th of February, to make up some freight trains for transportation; and, in the line of their duty, this car load of lumber was shunted at a rate of not to exceed from three to five miles an hour upon a level track, towards a box car. The deceased was upon the ground, and stepped in between the box car and the car load of lumber for the purpose of coupling the two; and, when the car of lumber came in contact with the box car, the lumber shifted 25 inches upon the surface of the flat car, and crushed to death the deceased, by pinning him against the end of the box car.

The plaintiff's declaration declares the several acts of negligence of the defendants to be (1) that they carelessly and recklessly loaded said flat car of said railroad company so as to cause the death of the deceased by the shifting of the lumber while upon said car; that said lumber was so loaded upon said car that it was not safe for an employee of said railroad company to couple it to another car, and that said

danger was not apparent to deceased; (2) that it was the duty of said defendants not to ship maple lumber upon a flat car without having the lumber so fastened and staked as to hold it from shifting; (3) that a piece of timber or other material should have been placed crosswise upon the floor, and near the ends of said flat car, under the lumber, for the purpose of elevating the extreme ends of the lumber; (4) that the defendants loaded this lumber upon the deck of said car, while the deck of said car was covered with ice and snow and sleet, and in a slippery condition; and (5) that the lumber should have been placed in a box car, and not upon a flat car. The cause was tried before a jury, and, after the proofs were all in, the trial judge said to the jury that "the evidence failed to show that the defendants violated any legal duty that they owed the deceased. Consequently there is no question of fact to be submitted to you for consideration. Your verdict, therefore, will be in favor of defendants of no cause of action."

The deceased had no contract relations with the defendants, and, if his representative has a right of action based upon defendants' negligence, it must rest upon a duty owed to deceased in common with all other employees of the Flint & Père Marquette Railroad Company, or other road over which the car in question might ultimately be shipped; in short, a breach of duty owing to the public. An accurate statement of this duty is: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence." Whart. Neg. § 438. Yet, as stated by the same author, the confidence must be immediate, or the action fails. In other words, there must be casual connection between the action and the hurt, and such casual connection is interrupted by the interposition between the negligence and the hurt of an independent human agency. Id. § 438. In the present case the defendants owed the railroad company the duty of using ordinary care in loading the car in question; but, before the car came to decedent, it was the duty of the railroad company to provide for the inspection. Here was the intervention of an independent human agency. A leading case is *Winterbottom v. Wright*, 10 Mees. & W. 109, in which case it was held that the defendant, who had contracted with the postmaster general to provide a mail coach, and keep it in repair, was not liable to an employee of one Atkinson, who had contracted with the postmaster general to provide horses and coachmen for the purpose of carrying the mail.

40 L. R. A.

See also *Loose v. Clute*, 51 N. Y. 495, 10 Am. Rep. 638; *Goodlander Mill Co. v. Standard Oil Co.* 24 U. S. App. 7, 63 Fed. Rep. 400, 11 C. C. A. 253, 27 L. R. A. 583; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 548; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746. In *Necker v. Harrey*, 49 Mich. 519, the leading cases on this point are cited with approval by Mr. Justice Cooley. Plaintiff seeks to bring this case within a line of cases cited creating an apparent exception to the rule stated; but we think these cases may be all classed as coming under one of three heads: First, as in *Johnson v. Spear*, 76 Mich. 139, where the fault was not keeping defendant's premises in a suitable and safe condition; or, second, as in *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 13 L. R. A. 746, where the defendant reserves the right to direct the manner of work, or undertakes to supply the instrumentalities. Of this class is also *Ellott v. Hall*, L. R. 15 Q. B. Div. 315, relied upon by plaintiff, in which case it was said by the court that "the defendant had entire dominion over the track" which caused the injury.—a fact which distinguishes the case from the present. Cases belonging to a third class, more closely analogous to the case under consideration, have arisen where the shipper of a dangerous substance, the character of which is not made known to the carrier, has been held liable. But liability in this class of cases has been limited to instruments and articles in their nature calculated to do injury. *Davidson v. Nichols*, 11 Allen, 514. We think the case of *Chapman v. Atlantic Refining Co.* 38 Hun, 637, and 108 N. Y. 638, which counsel for plaintiff cite as fully sustaining their contention, is clearly distinguishable from the present case. The statement of facts in that case is found in 129 N. Y. 601, from which it appears that the defendant corporation was engaged in constructing some oil tanks on the line of the Lake Erie & Western Railway Company, at a place called Dick's Switch. The employees of defendant left a car of lumber, after it had been delivered to defendant, and partly unloaded, in such unsafe condition that a portion of the lumber fell upon or was blown upon the track of the railroad company, causing the derailment of the engine operated by the plaintiff. It will be seen that the defendant had complete control over the partly unloaded car, and whatever duty was owing was owing by defendant. In the present case the defendant had parted with the control of the car. The railroad company owed the duty to decedent of causing an inspection or of providing a rule for inspection. We think the circuit judge was right in his holding.

Judgment affirmed.

The other Justices concur.

NEBRASKA SUPREME COURT.

City of OMAHA, *Pff. in Err.*,

v.

Fannie BOWMAN, Admrx., etc., of Albert
D. Bowman, Deceased.

(52 Neb. 293.)

1. With respect to water forming a pond on private property within the limits of a city, but not on, or in dangerous proximity to, a public highway, street, or alley, such city owes no duty to the general public (aside from that of a sanitary character), other than such as devolves on private owners of property similarly situated, even though the city may have created the pond of which complaint is made.

2. Negligence must be fairly inferable from the evidence. Its existence cannot be a mere matter of conjecture, and it must be the proximate cause of the injury complained of.

3. Instructions which assumed that evidence of such overflow of lots by the massing thereon by a city of the water of a running stream as would entitle the lotowners to damages would be proper proof in support of a claim for compensation for personal injury to one who had no interest in the lot itself.—*held erroneous.*

(September 22, 1897.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover damages for negligence in maintaining an unguarded pond, which resulted in the drowning of plaintiff's intestate. *Reversed.*

The facts are stated in the commissioner's opinion.

Mr. E. J. Cornish, for plaintiff in error:

At common law a municipal corporation was not liable in actions like the one at bar for injuries from defective streets, unless made so by the charter creating them, either in express terms, or by imposing a duty, the failure to perform which renders the city liable for resulting injuries.

Richards v. Connell, 45 Neb. 467; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Carter v. Railway*, 55 N. J. L. 177; *Fort Smith v. York*, 52 Ark. 84; *Winbiger v. Los Angeles*, 45 Cal. 36; *Barnett v. Contra Costa County*, 67 Cal. 78; *Hevison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Aldrich v. Gorham*, 77 Me. 287; *Detroit v. Putnam*, 45 Mich. 263; *McKellar v. Detroit*, 57 Mich. 158, 58 Am. Rep. 357; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Sweeney v. Newport*, 65 N. H. 85; *Pray v. Jersey City*, 32 N. J. L. 394; *Wild v. Puterson*, 47 N. J. L. 406; *Wiron v. Newport*, 18 R. I. 454, 43 Am. Rep. 35; *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Wilkins v. Rutland*, 61 Vt.

336; *Wiltse v. Tilden*, 77 Wis. 152; *Goeltz v. Ashland*, 75 Wis. 643; *Roberts v. Detroit*, 102 Mich. 64, 27 L. R. A. 572; *Reed v. Madison*, 83 Wis. 171, 17 L. R. A. 733.

Under the laws of this state the city is not obliged to care for the surface water, the common law as to surface water being in force.

Morrissey v. Chicago, B. & Q. R. Co. 38 Neb. 406; *Anheuser-Busch Brew. Assn. v. Peterson*, 41 Neb. 897; 2 Dill. Mun. Corp. 4th ed. §§ 987, 988, 1040, 1041; *Champion v. Crandon*, 84 Wis. 405, 19 L. R. A. 856; *Beatrice v. Knight*, 45 Neb. 546.

The cost of filling lots to the grade of the street is proper to be considered in determining the damages which, under the charter, the city must pay before it can lawfully grade or change the grade of a street.

Loice v. Omaha, 33 Neb. 587; *Barr v. Omaha*, 42 Neb. 341; *Seanson v. Omaha*, 38 Neb. 550; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420; *Schaller v. Omaha*, 23 Neb. 325; *Omaha v. Schaller*, 26 Neb. 522.

The damages are too remote.

Charlebois v. Gogebic & M. River R. Co. 91 Mich. 59; *Murphy v. Brooklyn*, 118 N. Y. 575.

A municipal corporation is not liable for a failure to exercise legislative or judicial powers conferred upon it, nor for an improper or negligent exercise of such power, nor for failure to perform public functions under the police power conferred upon it as an instrument of government.

2 Beach, Pub. Corp. § 1021; *Tiedeman*, Mun. Corp. ed. 1894, § 331; 2 Beach, Pub. Corp. § 1010; *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 31; 2 Dill. Mun. Corp. 4th ed. § 951; *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712.

A municipal corporation is an instrumental-ity of government, and is not liable for a failure to exercise legislative or judicial powers, nor for an improper or negligent exercise of such powers.

Wheeler v. Plymouth, 116 Ind. 158; *Dooley v. Sullivan*, 112 Ind. 451; *Terre Haute v. Hudnut*, 112 Ind. 542; *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Lafayette v. Timberlake*, 88 Ind. 330; *McDade v. Chester*, 117 Pa. 414; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687; *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 338; *Hines v. Charlotte*, 72 Mich. 278, 1 L. R. A. 844; *Kiley v. Kansas*, 87 Mo. 103, 56 Am. Rep. 443; *Hubbell v. Viroqua*, 67 Wis. 843, 58 Am. Rep. 866; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857, and note. See also *Davis v. Montgomery*, 51 Ala. 139, 23 Am. Rep. 545; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451; *Cain v. Syracuse*, 95 N. Y. 83; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272.

The city owes no duty to either child or adult

*Headnotes by RYAN, C.

NOTE.—As to the liability for dangerous ponds or excavations near highways, see note to *Lepnick v. Gaddis* (Miss.) 26 L. R. A. 686; also *Pekin v. Mc-40 L. R. A.*

Mahon (Ill.) 27 L. R. A. 206; *Moran v. Pullman Palace Car Co. (Mo.)* 83 L. R. A. 755; and *Dobbins v. Missouri, K. & T. R. Co. (Tex.)* 88 L. R. A. 573.

on the public streets or adjacent thereto, unless they are using said streets for the purpose of travel thereon.

Richards v. Connell, 45 Neb 467; *Murphy v. Brooklyn*, 118 N. Y. 575; *Goeltz v. Ashland*, 75 Wis. 642; *Hamilton v. Detroit*, 105 Mich. 514; *Reed v. Madison*, 83 Wis. 171, 17 L. R. A. 733; *Westfall v. Detroit Water Comrs.* 93 Mich. 210; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Schmidt v. Bauer*, 80 Cal. 565, 5 L. R. A. 580; *Benson v. Baltimore Traction Co* 77 Md. 535, 20 L. R. A. 714; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461; 2 Thomp. Neg. p. 1183, note.

Mr. Silas Cobb, for defendant in error:

If in grading a street the city is guilty of negligence which is the natural and proximate cause of injury to a property owner, the city may be accountable therefor.

Beatrice v. Leary, 45 Neb. 149.

Why shouldn't the city be liable for its own negligent acts which have caused the death of a little child, whether the fruits of that negligence be upon the city's property or not?

Since the great increase of corporations, and since so much of the business of the world is transacted through their agency, it becomes necessary that courts should meet their expanding powers by an extension of the limits of their liability.

Rhodes v. Cleveland, 10 Ohio, 160, 36 Am. Dec. 82.

Whenever a corporation or individual has become bound by agreement to do certain things, such individual or corporation is liable in case of neglect to a private action "at the suit of every person injured by such neglect."

Conrad v. Ithaca, 16 N. Y. 158.

In the *Richards Case* the court below said: "It would be immaterial whether said Weston in fact drowned in the water on the street or on property adjacent to said street." This court upheld that instruction, saying: "This language correctly stated the rule of liability as applicable to the case made by the proofs, according to the authorities. It would have been different if the pond had been entirely upon private property and not in close proximity to a street."

Omaha v. Richards, 49 Neb. 244.

Ryan, C., filed the following opinion:

This action was brought in the district court of Douglas county by Fannie E. Bowman, as administratrix of the estate of Albert D. Bowman, for the recovery of damages sustained by the estate of the intestate by reason of his death. The deceased, it was alleged in the petition, was about seven years of age when he was drowned in a pond of water which plaintiff in error negligently had permitted to accumulate and be and remain in, over, and by the side of Davenport street, in the city of Omaha. There were a verdict and a judgment against the city in the sum of \$1,000. The accident happened on June 15, 1892. The evidence showed that about six years before the date just named the city had constructed an embankment on Davenport street, which interfered with the flowing of water from certain lots abutting on said street. The pond in question was caused by this water. The sidewalk was about 7 feet from the water, and

quite a distance above the water level. There seems to be no dispute in the evidence that to reach the water from the street it was necessary that a person should cross an intervening strip of private property at least 6 feet in width. A few days before the date of the accident some boys tore up a part of the sidewalk, and launched it upon the pond. Albert D. Bowman and some juvenile friends took possession of this piece of sidewalk, and were using it for a raft, when young Bowman fell off and was drowned. The mere fact that he was thus drowned was alleged in the petition and admitted in the answer. There was no effort to show whether the deceased reached the pond, as he might have done, by passing from his home, near by, over private property, or by way of the street. It is not clear from the petition just what acts and omissions on the part of the city are claimed to constitute negligence on its part. There was charged a failure to place a fence or visible boundary between the street and the private property adjoining. In view of the fact that it was not claimed that the child entered the water from the street, this averment has no bearing on the questions under consideration. The following averments seem to have described the negligence principally, if not entirely, relied upon, and we shall therefore quote them at length: "Plaintiff further states that said pond of water was formed by the water that formerly would have run through a ravine at said place, the same being filled over at said place by said city in constructing and filling up Davenport street at said place, which said water was negligently permitted to accumulate and remain as aforesaid; and the natural outlet for said water being closed and filled up by the defendant city of Omaha a long time previous to the said June 15, 1892, by the city filling up the street at said Davenport, near 28th street and thereabouts, where said death occurred, being filled about 5 feet on the north side and about 15 feet on the south side of said Davenport street, and thereby filling up and stopping a creek or ravine that was wont theretofore to flow along where said street was filled as aforesaid; and although there is, and has been a long time prior to June 15, 1892, a sewer about two blocks away from the place of said death, yet there was no provision made for the drainage of said water by the city or said Moody and Stockdale [the owners of the private property on which the pond was] from said lots; said water thereby being discharged upon said lots in and over and upon Davenport street as aforesaid, and there negligently confined, and negligently by all of said defendants permitted to remain upon said property." In this connection it was alleged that the pond caused in the manner above described had before June 15, 1892, been dangerous and menacing for many years, was very enticing and attractive to children of tender age, many of whom in that locality were in the habit of playing in said pond of water, and that the dangerous, menacing, and enticing condition of the pond had been well known by said Moody and Stockdale and the officers and authorities of the city of Omaha at the time of and before said death.

The defendant in error was permitted to recover upon a theory rather narrower than that

above stated, as appears from the following instruction given by the court: "(1) The court charges the jury that if the grade and fill was over and across the ravine, through which, prior to the filling, water from springs and the drainage from the vicinity was accustomed to flow, then it was the duty of the defendant, in making said fill, to provide a passageway for the escape of the water which might reasonably be expected to flow along the course of the ravine." The instruction following that above quoted was in this language: "(2) If by reason of the failure of the defendant, when making the fill in Davenport street, to provide a culvert or other passage for the water naturally flowing in and along the ravine, the pond in question was formed, and you shall so find from the evidence, then that is a fact that you should consider, along with other facts, as hereinafter instructed, in making up your verdict." In the brief for the defendant in error it is insisted that this court in *Beatrice v. Leary*, 45 Neb. 149, has recognized the applicability of the principles laid down in the above instructions to the facts in this case. In the case just cited there was involved the question of the liability for the diversion of the water from a watercourse by the city, it is true, but this liability was for physically damaging the real property of a private person. The rule is general that the city may not divert the flowage of a running stream from real property, or mass its water on such property, without making compensation for such damage as thereby may ensue to the property rights of the property owner. This principle is in no manner, however, connected with or correlative of the proposition contended for, and that is that the massing of the water of a flowing stream on private property renders the city liable to one who has no interest in such property for whatever personal damages he may sustain from his own voluntary use of such water. It is also urged that these instructions were correctly given in this case in view of the holding of this court in the case of *Omaha v. Richards*, 49 Neb. 244, and in the opinion on the rehearing on the same case, reported in 50 Neb. 804. In both the opinions there was enforced the liability of the city for damage caused by the drowning of a child. The negligence of the city consisted in permitting water to collect and remain on a traveled street without any precaution being taken to avoid accidents therefrom to the public. The pond which formed was partly in the street and partly on private property, and it was held that the mere fact that the child had fallen off the improvised raft into the water on the private property did not exonerate the city from the consequences of its negligence. Whether the water was that of a flowing stream, or was the accumulation of surface water, was a question of no importance.

As has already, perhaps, been sufficiently indicated, there is presented in the case at bar the question of the liability of a city for the death of a child from drowning in a pond situated on private property. This child is not shown to have used the street in any way, even for the purpose of reaching the pond in which afterwards he was drowned. This question is connected with or modified by no

other, as, for instance, the fact that the city had invited the public to go upon, or even in dangerous proximity to, the water. In so far as the facts of this case are disclosed, there is shown nothing of the acts of the child before its presence on the raft. That fact was merely alleged and admitted by the pleadings. The inducement charged was that the water was enticing to a person of the age of this one. This was a statement of a general proposition, applicable to the attraction of any body of water for boyish nature. In what was the city negligent in its duty towards the public, by passively permitting or actively causing the accumulation of this water on private property? We have already pointed out the fact that we are not considering the property rights of the owner of the lots whereon the pond was formed. There is involved no element of damage resulting from loathsome smells or from dangerous sanitary conditions permitted by the city in violation of its duties in that respect. Simply stated, the fact is that the city—so far as the record shows, without any objection from the owner of the lots—overflowed said lots with water. In respect to the public traveling upon its highways, except as above indicated, the city, with respect to the pond formed in the manner indicated, held the same relations as did the owner of the real property submerged. In *Richards v. Connell*, 45 Neb. 467, these relations, with attendant obligations and liabilities, were fully considered, and it was held that a cause of action could arise in none but one of the following classes of cases: "(1) Cases in which the owner of land has made or permitted a dangerous excavation, embankment, or the like, so near a public highway as to injure one in the rightful use thereof. . . . (2) Cases in which the defendant has negligently left exposed dangerous machinery likely to attract children and resulting in their injury. Illustrative of this class, which constitutes a recognized exception to the rule, are the so called *Turntable Cases*. (3) Cases where the plaintiff was injured while upon the defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition." This case has been cited with approval in *Peters v. Bowman*, 115 Cal. 845, in which, as well as in the two opinions of *Omaha v. Richards*, 49 Neb. 244, 50 Neb. 804, the adjudicated cases are reviewed to sustain the proposition above stated. In an opinion on a rehearing of *Peters v. Bowman*, 115 Cal. 855, it was pointed out that the principle of the *Turntable Cases* should not be applied, because a turntable is not only a danger specially created by its owner, but it is a danger differing in kind from those under consideration. "A pond," said Beatty, Ch. J., "although artificially created, is in no wise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer

the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always useful, and often necessary, and, where they do not exist naturally, must be created, in order to store water for stock and for domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises, and happens to fall into the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out." Referring back to the three classes of cases described in *Richards v. Connell*, 45 Neb. 467, it may be said confidently that this case falls within neither. The intestate, uninvited by the city, on private property, took possession of a fragment of a floating sidewalk, from which, accidentally, he fell into the water. Negligence is a fact to be shown by evidence. Its existence cannot be left to mere conjecture. *Kilpatrick v. Richardson*, 37 Neb. 731, 40 Neb. 478; *Omaha & R. Valley R. Co. v. Clarke*, 39 Neb. 65; *Omaha Street R. Co. v. Leigh*, 49 Neb. 782. The negligence pleaded and proved must be the proximate cause of the injury of which complaint is made. *Brotherton v. Manhattan Beach Improv. Co.* 48 Neb. 563.

There was not sufficient evidence to meet the first of the above requirements, and as to the second there was not only a failure of proof, but the instruction hereinbefore quoted proceeded upon the theory that the city could be held liable for the injury of a person on a state of facts showing that the injury, if any, was one to the mere property right of an individual not a party to the suit.

For the errors indicated the judgment of the District Court is reversed.

Harrison, J., not sitting.

Rehearing denied.

A. J. NEIMEYER LUMBER COMPANY,
Plff. in Err.,

v.

**BURLINGTON & MISSOURI RIVER
RAILROAD COMPANY** in Nebraska.

(.....Neb.....)

***1. Where delivery of property sold is to take place** is to be determined by the contract between the vendor and vendee.

2. If the contract between the parties expressly provides that delivery shall be made at a certain place, then the vendor's title to the property is not divested until delivery is so made.

3. Where the contract between a ven-

*Headnotes by RAGAN, C., propositions 5-10 expressing his own views.

NOTE.—As to the passing of title to property by delivery to a carrier for transportation, see *note* to *Ramsey & G. Mfg. Co. v. Kelsee* (N. J.) 22 L. R. A. 415.

40 L. R. A.

dor and vendee is silent upon the subject of the place of delivery, then the delivery of the property by the vendor to a carrier for transportation, consigned to the vendee, divests the vendor's title to the property, and the vendee's title from the moment of such delivery to the carrier attaches.

4. In such a case the carrier is, in contemplation of law, the bailee of the person to whom, and not by whom, the goods are consigned.

5. Where a vendor of goods delivers them to a carrier for transit to his vendee, and causes the goods to be consigned in the bill of lading to himself, his agent, or his order, the presumption arises that he thereby intended to retain the title in himself to the goods.

6. Where a vendor of goods delivers them to a carrier for transit, and causes his vendee to be named in the bill of lading as the consignee of the goods, the presumption arises that the vendor by that act intended the title to the goods to vest in the vendee on their delivery to the carrier for shipment.

7. The prepayment of freight by a vendor on goods sold and shipped to his vendee is prima facie evidence of an intention on the part of the vendor to retain the title to the goods while in transit.

8. The contract between a vendor and vendee set out in the opinion construed, and held that the delivery of the property sold took place at the place of its shipment, and that the title to the property vested in the vendee on its delivery by the vendor to the carrier for transit to the vendee.

9. In order that a vendor of goods may exercise the right of stoppage in transitu, it is essential that the goods at the time be in transit from such vendor to his immediate vendee.

10. D., of Omaha, ordered a bill of lumber of S., of Dallas, Texas. S., not having the lumber in stock, sent the order to N. at Waldo, Arkansas, requesting him to ship the lumber to D., at Omaha, on account of S., and send him the invoice and bill of lading. This was done. While the lumber was in transit, S. failed, and N. notified the carrier in possession not to deliver the lumber. The carrier delivered to D., the consignee, and N. sued the carrier for conversion. *Held* (1) that the transaction amounted to a sale and delivery by N. to S. at Waldo; (2) a resale and delivery by S. at Waldo to D.; (3) that the lumber, when it left Waldo, was not in transit from N. to S., but from S. to D.; (4) that N. was not D.'s vendor, but consignor merely, and could not exercise the right of stoppage in transitu.

(Norval, J., dissents.)

(March 17, 1898.)

ERROR to the District Court for Douglas County to review a judgment in favor of defendant in an action brought to recover the value of certain lumber alleged to have been wrongfully delivered by defendant, which had possession of it for transportation. *Affirmed.* The facts are stated in the commissioner's opinion.

Mr. A. S. Churchill, for plaintiff in error:

In many mercantile contracts it is stipulated that the vendor shall deliver the goods "f.o.b.,"

i. e., "free on board." The meaning of these words is, that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped, and the goods are at the risk of the buyer from the time when they are so put on board.

Benjamin, Sales, 6th ed., p. 655.

In the case at bar the contract was f. o. b. at Omaha, Nebraska, and until the lumber was at Omaha, for and on account of the vendee, free of all expense, it was not at his risk, but at the risk of the vendor.

Ogg v. Shuter, L. R. 10 C. P. 159; *Stook v. Inglis*, L. R. 12 Q. B. Div. 564.

Until put on board at the place named in the contract, free of expense, they would not be at the buyer's risk.

Benjamin, Sales, 6th Am. ed. § 693, p. 668; *The Frances*, 8 Cranch, 418, 3 L. ed. 609; *Dunlop v. Lambert*, 6 Clark & F. 600; *Taylor v. Cole*, 111 Mass. 363; *Wolfe v. Missouri P. R. Co.* 97 Mo. 473, 3 L. R. A. 539; *McNeal v. Braun*, 53 N. J. L. 617.

The contract entered into by the correspondence between Simpson, Perkins, & Co. and the plaintiff was not an executed contract, but was executory.

Hatch v. Standard Oil Co. 100 U. S. 124, 131, 25 L. ed. 554, 556; *Savage Mfg. Co. v. Armstrong*, 19 Me. 147; *Howard v. Miner*, 20 Me. 325; *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104; *Swift's Iron & Steel Works v. Deuey*, 37 Ohio St. 242; *Braddock Glass Co. v. Irwin*, 153 Pa. 440; *Llanauer v. Bartels*, 2 Colo. 514.

There were two items in the order which the plaintiff did not have in stock and which were not shipped.

To bind the purchaser to pay for goods forwarded upon his order, the terms of the order must be complied with; and when only part of the goods ordered have been forwarded, there is no express contract between the parties, and no implied promise to pay for them arises until the purchaser has received them.

Downs v. Marsh, 29 Conn. 409; *Rochester & O. Oil Co. v. Hughey*, 56 Pa. 322; *Rommel v. Wingate*, 103 Mass. 327; Benjamin, Sales, 6th Am. ed. §§ 689, 693.

The bills of lading were retained and held by the plaintiff until the carriers were notified not to deliver the lumber to the consignee named in the bills of lading, when they were turned over to the initial carrier, the St. Louis Southwestern Railroad Company. When the defendant company was notified to hold the lumber, it was also notified by Mr. Key, the agent of the initial carrier, that he held the original bills of lading; so that the defendant company acted with full knowledge of this fact.

When goods which have been shipped are sold and the bill of lading indorsed by the vendors, the title passes by the sale, and not by the indorsement, which if held would certainly indicate that the consignor meant to retain the whole, or a lien upon the cargo for the price.

Lickbarrow v. Mason, 2 T. R. 63, Smith, Lead. Cas. 8th Am. ed. pt. 2, p. 1232; *Craven v. Ryder*, 6 Taunt. 433; *Jenkyns v. Osborne*, 7 Mann. & G. 678; *Holbrook v. Vose*, 6 Bosw. 76; *M'Ewan v. Smith*, 2 H. L. Cas. 309; *Bass v. Glover*, 63 Ga. 746; *Furman v. Union P. R. Co.* 40 L. R. A.

106 N. Y. 579; *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Gates v. Chicago, B. & Q. R. Co.* 42 Neb. 379; *Union P. R. Co. v. Johnson*, 45 Neb. 57; *Gurney v. Behrend*, 3 El. & Bl. 683; *Shaw v. North Pennsylvania R. Co.* 101 U. S. 557, 25 L. ed. 892; *Hutchinson, Car.* § 130; *Walker v. Detroit, G. H. & M. R. Co.* 49 Mich. 446; *Colgate v. Pennsylvania Co.* 102 N. Y. 120.

The plaintiff had the right to countermand the direction given in the bill of lading.

Hutchinson, Carr. § 337; *Scothorn v. South Staffordshire R. Co.* 8 Exch. 341; *Braithwaite v. Aikin*, 1 N. D. 455; *Straus v. The Martha*, 85 Fed. Rep. 313; Benjamin, Sales, § 396; *Moakes v. Nicholson*, 34 L. J. C. P. N. S. 273.

On petition for rehearing.

The assent must, in order to constitute a valid contract, be mutual, and intended to bind both sides. It must also co exist at the same moment of time. A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be unconditional.

Benjamin, Sales, 6th Am. ed. § 39; 2 Schouler, Pers. Prop. §§ 222, 223; *Usher, Sales*, chap. 4, § 74; 1 Parsons, Contr. 5th ed. p. 477; Benjamin, Sales, p. 73-78; *Eggleston v. Wagner*, 46 Mich. 610; *First Nat. Bank v. Hall*, 101 U. S. 43, 25 L. ed. 822; *Tilley v. Cook County*, 103 U. S. 155, 161, 26 L. ed. 374, 376; *Bruce v. Pearson*, 3 Johns. 534; *Eliason v. Henshaw*, 4 Wheat. 230, 4 L. ed. 557.

Where nothing is said about time the law implies the sale is for cash.

Usher, Sales, § 438; *Jones v. Home Furnishing Co.* 9 App. Div. 103; *Wabash Elevator Co. v. First Nat. Bank*, 23 Ohio St. 312; Benjamin, Sales, 6th Am. ed. p. 651.

The plaintiff proposing, then, to deliver the lumber at Omaha at the specified prices, nothing being said as to payment, the law implied payment to be a concurrent act with delivery, and not a sale on sixty days' time.

2 Schouler, Pers. Prop. § 309. See *Southwestern Freight & Cotton Press Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Morris v. Resford*, 18 N. Y. 552; *Brehen v. O'Donnell*, 34 N. J. L. 408; *Metz v. Albrecht*, 52 Ill. 491; *Behrends v. Beyschlag*, 50 Neb. 304.

It was, then, a cash sale, and there was no waiver of this condition. Had the lumber been actually delivered into the manual possession of Simpson, Perkins, & Co. under such circumstances no title would have passed.

Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 312; Benjamin, Sales, p. 233 note; *Hammett v. Linneman*, 48 N. Y. 399; *Dows v. Kidder*, 84 N. Y. 121; *Harkness v. Russell*, 118 U. S. 675, 30 L. ed. 289; *Usher, Sales*, § 433; *Lecen v. Smith*, 1 Denio, 572; *Acker v. Campbell*, 23 Wend. 372; *Ilays v. Currie*, 3 Sandf. Ch. 535; *Tiedeman, Sales*, § 93; *Walter v. Reed*, 34 Neb. 544; *National Bank of Commerce v. Chicago, B. & N. R. Co., Chicago, B. & N. R. Co. v. L. T. Squire Elevator R. Co.* 44 Minn. 224, 9 L. R. A. 263; *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40.

The statement in these invoices, if it be held to extend time, was not made until after the lumber was shipped and without consideration.

Billings v. Filley, 21 Neb. 511.

Suppose we say it was at sixty days, then it must be upon the terms stated, viz., "sixty days' acceptance," when delivery is made.

Then the delivery of the lumber and the delivery of the acceptance would have been "interconditional." Then in effect it would have been a conditional sale.

Withwell v. Vincent, 4 Pick. 449, 16 Am. Dec. 355; *Furlow v. Ellis*, 15 Gray, 229; *Hartwell v. Louisville & N. R. Co.* 15 Ky. L. Rep. 778; *Thomas v. First Nat. Bank*, 66 Ill. App. 59; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Mitchel v. Ede*, 11 Ad. & El. 888; *Sutherland v. Second Nat. Bank*, 78 Ky. 250; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363; *Buffington v. Curtis*, 15 Mass. 528, 8 Am. Dec. 115; *Freeman v. Kraemer*, 63 Minn. 242; *Union P. R. Co. v. Johnson*, 45 Neb. 57.

The fact that either payment in cash or sixty days' acceptance was to be given is also evidence tending to show delivery was at Omaha, Nebraska.

See *Congar v. Galena & C. U. R. Co.* 17 Wis. 482; *Peabody v. Maguire*, 79 Me. 572; *Eccerett v. Hall*, 67 Me. 498; *Brown v. Haynes*, 52 Me. 50; *Armour v. Pecker*, 123 Mass. 143; *Stone v. Waile*, 88 Ala. 599; *Campbell Printing Press & Mfg. Co. v. Dyer*, 46 Neb. 830; *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40; *Paul v. Reed*, 52 N. H. 188. See also *Hodgson v. Barrett*, 33 Ohio St. 63, 31 Am. Rep. 527; *Kinney v. Hickox*, 24 Neb. 167; *Congar v. Galena & C. U. R. Co.* 17 Wis. 482.

Messrs. C. J. Greene and C. V. Miles, for defendant in error:

The railroads were not the agents of plaintiff, but were common carriers, employed to transport the property from consignor to consignee.

King v. Meredith, 2 Campb. 639.

The relation of principal and agent does not exist between shipper and carrier. The carrier is a bailee, not an agent.

Hutchinson, Carr. § 1.

A delivery of freight to a common carrier effects a change of possession, and puts an end to the seller's lien, though, unless other facts interfere, his right of stoppage *in transitu* remains.

Jones, Liens, § 821.

"Prices f. o. b. Omaha," the language of the correspondence forming the contract between Neimeyer & Company and Simpson, Perkins, & Company, cannot determine that the common carrier is the agent of the consignor.

When the lumber was delivered to the carrier at Waldo, Arkansas, and consigned to Dietz, plaintiff in error, Neimeyer & Co. parted with its possession, and title passed to Dietz.

Benjamin, Sales, Corbin's ed. § 181; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Kruidler v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402.

A consignor who is not the vendor, and between whom and the consignee no privity exists, cannot stop the goods in transit.

Hutchinson, Carr. § 411; 1 *Jones, Liens*, § 870; *Memphis & L. R. R. Co. v. Freed*, 38 Ark. 614; *Eaton v. Cook*, 32 Vt. 58; *Rowley v. Bigelow*, 12 Pick. 814, 23 Am. Dec. 607; *Noble* 40 L. R. A.

v. Adams, 7 Taunt. 59; *Treadwell v. Aydlott*, 9 Heisk. 388; *Feise v. Wray*, 3 East, 93.

The vendor can only exercise the right of stoppage *in transitu* against one who is insolvent.

Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496.

Ragan, C., filed the following opinion:

C. N. Dietz is a lumber merchant in the city of Omaha, Nebraska, and will be hereinafter designated as Dietz. The A. J. Neimeyer Lumber Company is a corporation engaged in the manufacture and sale of lumber at Waldo, Arkansas, and will be hereinafter designated as Neimeyer & Co. Simpson, Perkins, & Co. are lumber merchants in the city of Dallas, Texas, and will be hereinafter designated as Simpson & Co. The Burlington & Missouri River Railroad Company in Nebraska is a railway corporation organized under the laws of this state, and will be hereinafter designated as the railway company. About the 1st of January, 1892, Dietz ordered of Simpson & Co. a large quantity of a certain class of lumber. It appears that Simpson & Co. did not have the material ordered on hand, and purchased the lumber to fill the order from Neimeyer & Co., and they, in pursuance of the directions of Simpson & Co., shipped it by rail to Dietz, the bills of lading issued by the initial carrier being made out to Dietz, consignee. Soon after the shipment of this lumber, which consisted of seventeen car loads, Simpson & Co. failed, and Neimeyer & Co. then notified the railway company, into whose possession as a common carrier the lumber shipped had come as the last carrier in the line of transit, of the insolvency of Simpson & Co., that the seventeen cars of lumber belonged to them, Neimeyer & Co., to hold such lumber, and not to deliver it to Dietz. It seems that when the railway company received this notice it had already delivered six car loads of the lumber, and, disregarding the notice of Neimeyer & Co., delivered the other eleven cars also to Dietz; and thereupon Neimeyer & Co. brought this suit against the railway company in the district court of Douglas county to recover the value of the eleven cars of lumber delivered by it to Dietz after receiving notice not to deliver. The railway company had a verdict and judgment, and Neimeyer & Co. have filed here a petition in error to review the same.

1. Neimeyer & Co. contend that, by virtue of the contract existing between them and Simpson & Co., the delivery of the seventeen cars of lumber shipped to Dietz was to take place at Omaha, Nebraska, and that until the lumber reached that place the title thereto remained in Neimeyer & Co., and that the railway company, all the time it had such lumber in its possession, held it as the agent and bailee of Neimeyer & Co. A vendor's title to property sold by him is divested on its delivery to his vendee, and immediately upon such delivery the title to the property vests in the vendee. But where delivery of property sold is to take place is, of course, to be determined by the contract between the vendor and vendee; and if the con-

tract between the parties expressly provides that delivery shall be made at a certain place, then the vendor's title to the property is not divested until delivery is made at such place. But the universal holding of the courts is that, where the contract between the vendor and vendee is silent upon the subject of the place of delivery, then the delivery of the property by the vendor to a carrier for transportation to the vendee of itself then and there divests the vendor's title to the property, and the vendee's title to such property from the moment of such delivery to the carrier attaches. 21 Am. & Eng. Enc. Law, pp. 528-530; Benjamin, Sales, 2d ed. §§ 181, 682; 2 Chitty, Contr. 11th Am. ed. § 1201; *Smith v. Gillett*, 50 Ill. 290; *Kruller v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402, and cases there cited; *McKee v. Bainter* (Neb.) 72 N. W. 1044; *Congdon v. Kendall* (Neb.) 73 N. W. 659. In such case the carrier is, in contemplation of law, the bailee of the person to whom, and not by whom, the goods are sent.

Keeping in view these principles, we now proceed to an examination of the contract existing between Neimeyer & Co. and Simpson & Co., which resulted in the former selling to the latter the seventeen car loads of lumber involved in this controversy. The contract existing between these parties is found in certain letters which passed between them. It would seem that prior to the 8th of January, 1892, Neimeyer & Co. had sent out to the lumber dealers of the country statements showing the various kinds of lumber which they manufactured and had for sale; and it was prior to this sale that Dietz had ordered of Simpson & Co. the bill of lumber, which the latter did not have on hand. On this date, January 8, 1892, Simpson & Co. wrote Neimeyer & Co., saying: "We received your stock sheet some time since, and herewith send you two orders, which you will find very nice ones. Please name your figures as low as possible on these orders. . . . Also inclose us your lowest f. o. b. price list." Accompanying this letter were the two orders mentioned therein. These orders, so far as material here, were as follows: "A. J. Neimeyer Lumber Company, Waldo, Arkansas: Ship to C. N. Dietz, Omaha, Nebraska," seventeen cars of certain described lumber. "If for any reason you cannot ship promptly, advise. Please also send bill of lading and invoice to us at Dallas." Neimeyer & Co. at once filled the order of Simpson & Co. by shipping the seventeen car loads of lumber, as already stated, to Dietz, and on the 9th of January, 1892, wrote to Simpson & Co. as follows: "Your valued order of January 8th received and filed for prompt shipment, with the exception of two items. . . . We have filled your order as follows: [Here follow the description and price of the lumber in the seventeen cars.] Prices f. o. b. Omaha, Nebraska." It is to be observed that in the correspondence between Simpson & Co. and Neimeyer & Co. the question of the place of delivery of this lumber was not inquired about nor discussed. The place of the delivery of the lumber was not the subject of the negotiations. The expression in the Neimeyer & Co. letter of January 9th, "Prices f. o. b. Omaha, Nebraska," they insist, affords conclusive evi-

dence that the intention of the parties was that the delivery of this lumber to Simpson & Co. should take place at Omaha, Nebraska. Three witnesses testified on the trial as to the meaning among railroad men and shippers of the expression, "Prices f. o. b. Omaha, Nebraska." One of them said it meant "that the price named in the shipper's invoice is the price at Omaha." Another said it meant "to be delivered at Omaha free on board cars." Neimeyer himself, president of Neimeyer & Co. testified: "If we say f. o. b. Omaha, that means that it is the price delivered at Omaha."

We think the true construction of the contract is the one placed thereon by the district court, and is in line with the explanation of the phrase in the contract under consideration made by the first and last of the witnesses just named. The word "prices," which precedes "f. o. b. Omaha, Nebraska," is of importance in the construction of this contract. By that expression Neimeyer & Co. meant that the prices which they had affixed to the lumber sold Simpson & Co. were to be the prices which the lumber should cost Simpson & Co. at Omaha. Not that the delivery of the lumber to Simpson & Co. should take place at Omaha, but that the price charged Simpson & Co. by Neimeyer & Co. for the lumber was to be its price at Omaha. In other words, that Neimeyer & Co. should pay the freight on this lumber from Waldo, Arkansas, to Omaha, Nebraska; or, what is the same thing, that Simpson & Co., or their vendee, Dietz, might pay the freight, and then remit the purchase price of the lumber less the freight. But the fact that Neimeyer & Co. agreed to pay the freight on this lumber from its place of shipment to its place of destination does not afford conclusive evidence that the delivery of the lumber was to take place at Omaha, Nebraska. To summarize: The contract between Neimeyer & Co. and Simpson & Co. was this: Neimeyer & Co. sold them seventeen car loads of lumber, at the price of \$—, at Omaha,—not the delivery at Omaha, but the price at Omaha; and Simpson & Co., by their letter of January 8th, when asking Neimeyer & Co. to inclose "us your lowest f. o. b. price list," were seeking to ascertain from Neimeyer & Co. what the lumber would cost them (Simpson & Co.) at Omaha; and when Neimeyer & Co. answered that letter, and shipped the goods and said, "Prices f. o. b. Omaha, Nebraska," they meant to inform, and did inform, Simpson & Co. what the lumber would cost them in Omaha, Nebraska.

The contract then, between the parties, as evidenced by their correspondence, does not provide that the delivery of this lumber should take place at Omaha. To give that construction to the contract, the expression, "Prices f. o. b. Omaha," would have to be read, "Delivery f. o. b. Omaha." To give the contract this effect would be to put a violent and unnatural construction upon the language used. We have been referred by counsel for plaintiff in error to several cases which, he insists, sustain his construction of this contract. We have carefully examined all these cases, and not one of them, we think, is in point here; and we confidently say that no decision of any court can be found which has construed

"prices free on board" at a named place as equivalent to "delivery free on board" at such place. Among the cases cited by counsel for plaintiff in error is the following: *Gates v. Chicago, B. & Q. R. Co.* 42 Neb. 379. But this case has no bearing whatever on the question under consideration here. It simply holds that a carrier makes delivery of goods to a consignee thereof at its peril, unless at the time of delivery the bill of lading be surrendered. To the same effect is *Union P. R. Co. v. Johnson*, 45 Neb. 57. And in *Shellenberg v. Fremont, E. & M. Valley R. Co.* 45 Neb. 487, the title to the goods sold never passed to the vendee, as he procured their delivery to him by fraud. *Stock v. Inglis*, L. R. 12 Q. B. Div. 564, so far as the same bears upon the question under discussion here, is an authority against the contention of plaintiff in error. In that case a merchant ordered 200 tons of sugar. The vendor shipped 400 tons of sugar, consigned to the city where the purchaser lived. The goods were lost at sea. After the vessel left its wharf the seller sent invoices of 200 tons of this sugar to the vendee, who, upon its receipt, paid the price of the 200 tons of sugar, and obtained the bill of lading for the same. The sugar was insured, and the vendee sued the insurance company for the value of the 200 tons of sugar lost. The insurance company claimed that the title to this 200 tons of sugar never vested in the vendee, because that specific amount of sugar was not set apart and delivered by the vendor to the carrier for the vendee, and that, therefore, he had no insurable interest in the sugar lost. But the court ruled that the action of the seller, after the ship left its wharf, in sending to the vendee an invoice for 200 tons of the 400 tons shipped was a delivery of 200 tons of the 400 tons of sugar shipped, to the vendee at the time of its shipment. This case rests upon the principle that whether the vendor delivered to the vendee 200 tons of the sugar shipped at the time of the shipment was a question of intention, to be gathered from the vendor's conduct, and that his making out an invoice of the 200 tons, and transmitting it to the vendee, after the ship sailed, evidenced his intention of vesting the title of 200 tons of the sugar in the vendee at the time the whole cargo was put on shipboard. Another case cited by plaintiff in error is *Miller v. Seaman*, 176 Pa. 291. The contract in that case was made in February, 1894, between Miller, of Elmira, New York, and Seaman & Co., of Williamsport, Pennsylvania, and by the contract Miller agreed to sell to Seaman & Co. 406,000 feet of hemlock lumber, belonging to Miller, and then piled in the lumber yard of the Dent Lumber Company at Duboisstown, Pennsylvania, at a price of \$8.25 per thousand shipping count, f. o. b. cars Williamsport. The lumber was to be loaded, inspected, and measured as ordered by the purchasers. After a quantity of this lumber had been shipped and delivered to Seaman & Co. a flood occurred and washed away the part of the lumber which had not been shipped, and Miller sought to recover the purchase price of the lumber washed away from Seaman & Co., upon the theory that he had delivered the 406,000 feet of lumber to them on the date of the contract of sale. But the court held that "the title did not pass until measure-

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ment inspection, and actual shipment," and then only as to the amount shipped, and that plaintiff, Miller, had to bear the loss of such part of the lumber as, not having been measured, inspected, and shipped, was carried away by the flood. But this case is not an authority for the contention of the plaintiff in error here. It is not a decision that "prices f. o. b. Omaha" is equivalent to "delivery f. o. b. Omaha." The principle upon which the case rests and was decided is that the contract of sale was an executory one, and that no title to the lumber agreed to be sold passed to the vendee until the lumber was measured and inspected.

Plaintiff in error's argument that delivery was to take place in Omaha, because in answer to an inquiry of his vendee the plaintiff in error named the price of the goods at that point, is not sustained by any authority that I have been able to find. On the other hand, the cases in which the question has been presented are against plaintiff in error's contention. One of these cases is *Star Glass Co. v. Longley*, 64 Ga. 576. In that case it was held that if the seller, upon inquiry, priced goods to the buyer, and thereupon the buyer ordered at that price, and the seller delivered the goods to a common carrier, consigned to the buyer, there was a complete sale at the price named. In *Mee v. McNider*, 109 N. Y. 500, the vendor resided in London, and the vendee in the city of New York. By the contract between the parties the vendor sold to the vendee 500 bags of cocoa at 59 shillings per hundred-weight. These 59 shillings per hundred-weight, by the terms of the contract, were "to include cost, freight, and insurance;" and it was held that the title of the vendee to the cocoa vested upon its delivery on board ship for transit to New York. There is no difference in principle between this case and the one at bar, so far as regards the terms of the contract under consideration. Here the vendor agrees to sell the vendee lumber for so many dollars, and this price includes the freight from the place of shipment to the lumber's destination, and by the contract the bills of lading are to be sent by the vendor to his vendee, Simpson & Co.

Thus far we have considered whether it was the mutual intention of the parties that the title to the lumber sold should vest in the vendees only upon its arrival and delivery at Omaha; and the contract—the correspondence—between the parties does not afford evidence that such was their intention, but, rather, that the thing specially negotiated about between the parties was the price of the lumber, and the contract does not afford evidence that the parties did intend that the delivery of the lumber should take place at Omaha, but left the delivery to take place in the ordinary manner of the delivery of goods by a vendor when ordered by a distant vendee. But notwithstanding the sale of this lumber by Neimeyer & Co., and its delivery to a carrier consigned to their vendee, Neimeyer & Co. might have exercised the *ius disponendi*, as it is called in the text-books, over the property sold; that is, Neimeyer & Co. might have retained the title to the lumber shipped, and by exercising this right made the carrier of this lumber their bailee. Schouler, Pers. Prop. 3d ed. § 271, and cases there cited.

The claim of the plaintiff in error here is that it did exercise this *jus disponendi*, and that, notwithstanding it sold the lumber to Simpson & Co., and at their request consigned it to Dietz, it retained the title, and the carrier held it as its bailee. We know what Neimeyer & Co. did, and the question before us now is whether its conduct in the premises authorizes an inference that notwithstanding the sale and the shipment of these goods it intended to retain title in itself until their arrival in Omaha. Their intention must be found in their conduct, and it is that intention that we are now in pursuit of, and, for the purpose of ascertaining it, it is our duty to follow every trail, however dim and tortuous it may be, which leads in the direction of such intention. If Neimeyer & Co., at the time of the shipment of these goods, intended to reserve in themselves the title thereto until their arrival at Omaha, it must have been because by so reserving the title they desired to make themselves sure of receiving the pay for the goods sold before they should part with them. Certainly they would not voluntarily, and in the absence of a contract requiring them to do so, reserve the title for the purpose of suffering the loss in case the goods should be destroyed in transit. But, by the contract of sale between Neimeyer & Co. and Simpson & Co., these goods were not sold for cash on delivery, but on sixty days' time. If the goods, then, had been consigned by Neimeyer & Co. to Simpson & Co. at Dallas, Texas, the fact that they were sold on sixty days' time would afford a presumption that the seller did not intend at the time he shipped them to reserve title in himself until they were paid for. Again, it is to be remembered that Neimeyer & Co. did not sell these goods to Dietz, their consignee, and it is an unreasonable claim on the part of Neimeyer & Co. to say, in the face of this record, that they sold the goods to Simpson & Co. on sixty days' time, and at their request consigned them to Dietz, and yet all the time intended to retain the title to these goods. Are we to understand from the argument of Neimeyer & Co. that they did not intend that these goods should be delivered to Dietz until sixty days from the date of their shipment? At the time Neimeyer & Co. shipped these goods they might have caused themselves to have been made consignees in the bill of lading, and, had they done this, then their conduct in so doing would have authorized the presumption that they thereby intended to reserve the title to the goods, and that the carrier held them as their bailee. 2 Schouler, Pers. Prop. 3d ed. § 273, and cases there cited; Usher, Sales, §§ 228-230, and cases there cited; Newmark, Sales, § 147, and cases there cited; Benjamin, Sales, p. 92, where the rule is thus concisely stated: "Where goods are shipped, and by bill of lading the goods are delivered to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal." *First Nat. Bank v. Crocker*, 111 Mass. 163; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Seeligson v. Philbrick*, 30 Fed. Rep. 600. But Neimeyer & Co., at the time they shipped these goods, did not cause them to be consigned to themselves, to their agent, or to their order. On the contrary, they caused these goods to be consigned to Dietz, the vendee of their vendee,

and this fact authorizes the inference that it was then and there the intention of Neimeyer & Co. that the title to the goods should pass upon their delivery to the carrier for transit to their vendee's vendee. Upon this subject the cases are all one way.

In Usher, Sales (§ 232), it is said: "If the bill of lading or other written evidence of the delivery to a carrier be taken in the name of the consignee, or be transferred to him by indorsement, this, if not controlled by other evidence, affords the strongest proof of the intention of the seller not to retain his hold on the property after it is taken by the carrier, as security for payment of the price." In Newmark, Sales, § 152, it is said: "For it has been declared to be perfectly well settled that if a consignor in such a case wishes to prevent the property in the goods, and the right to deal with the goods while at sea, from passing to the consignee, he must, by bill of lading, make the goods deliverable to his own order, and forward the bill of lading to an agent of his own. And if he does not do that, though he still retains the right of stopping the goods *in transitu*, yet, subject to that right, the property in the goods and the right to the possession of the goods is in the consignee."

In 2 Schouler, Pers. Prop. 3d ed. § 264, it is said: "Delivery is a circumstance often considered in connection with the appropriation of specific chattels under a contract. It is doubtless well established as the rule, both in England and America, that where—all other things being equal—a seller delivers goods to the buyer, or to a carrier by order of the buyer, the appropriation is determined beyond his power to recall it, for the property has thus presumably vested in the buyer. The rule, however, is subject to the principle of *jus disponendi*. 'But the delivery of goods to the buyer or his agent, or to some carrier for him, is a palpable act of appropriation and tender by the seller, whose intent, thus evinced, to transfer the title absolutely to the buyer, can hardly be disputed, if the bill of lading be taken out in the consignee's name, or indorsed over to him without restriction.' And the same author, in § 273, uses this language: 'Now, supposing the seller, in sending goods by a vessel or other carrier, to have taken out a bill of lading or similar document, a new circumstance is presented. The rule of presumption becomes this: That the carrier thereby agrees to take the goods as bailee for the person whose name is therein indicated as the one for whom the goods are to be carried; and, this bill being made out to the seller or order, the carrier's engagement is *prima facie* to carry the goods for and on account of the seller, to be delivered to him in case it should not be assigned or indorsed. . . . On the other hand, taking out the bill of lading in the buyer's name affords presumptive evidence on the seller's part of an intent to transfer the title.'"

In *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299, it was said: "If the consignment be made by a vendor to a vendee, the question whether the consignor reserved the *jus disponendi* is one of intention to be gathered from all the facts and circumstances of the transaction. . . . On such question of intention, the terms of the bill of lading are to

be taken as admissions of the consignor, and are entitled to great weight, but are not conclusive." To the same effect are *Straus v. Wesel*, 30 Ohio St. 211; *Runney v. Higby*, 5 Wis. 62; *Finch v. Mansfield*, 97 Mass. 89; *Kline v. Baker*, 99 Mass. 253; *Stanton v. Eager*, 16 Pick. 467; *Prince v. Boston & L. R. Corp.* 101 Mass. 542, 100 Am. Dec. 129; *Hullinay v. Hamilton*, 11 Wall. 560, 20 L. ed. 214; *Merchants' Exch. Bank v. McGraw*, 48 U. S. App. 53, 76 Fed. Rep. 930, 22 C. C. A. 622; *Webb v. Winter*, 1 Cal. 417; *Putnam v. Tillotson*, 13 Met. 517; *Grove v. Brien*, 8 How. 429, 12 L. ed. 1142; *Glidden v. Lucas*, 7 Cal. 26; *Hope Lumber Co. v. Foster & L. Hardware Co.* 53 Ark. 196; *Robinson v. Pogue*, 86 Ala. 257.

A. J. Neimeyer, the president of Neimeyer & Co., testified on the trial of this case, and, on the subject of the delivery of the lumber,—that is, whether its delivery to his vendee, Simpson & Co., was to take place at Omaha or at the place of shipment,—said:

Q. Who were you looking to for the payment of this lumber?

A. When the delivery was made,—when we commenced shipping,—we looked to Simpson & Perkins, of course.

Q. Did you consider when you delivered to the railroad company you had complied with the terms of the agreement between you and Simpson under which you sold?

A. We would—

Q. I ask you the simple question, Did you not consider, when you delivered this lumber to the railroad company at Waldo, you had fully performed your contract with Simpson & Co.?

A. As far as delivering the lumber was concerned.

Here, then, is the president of the plaintiff in error admitting on oath that he understood he had complied with his contract with Simpson & Co. when he delivered the lumber they ordered on board the cars at the place of its shipment. In other words, he admits that it was his intention that delivery of this lumber to Simpson & Co. should take place when it was put on board the cars at Waldo. Thus far no act of Neimeyer & Co., in the sale and shipment of this lumber, evinces an intention on their part to retain title to the lumber in themselves until its arrival at Omaha; but every act of theirs authorizes the presumption that they never entertained such an intention, but, on the contrary, intended the delivery of the goods to take place in the usual and ordinary manner of delivery of goods ordered by a party at a distance, namely, by a delivery to a carrier for transit to such a buyer. But by the contract between Neimeyer & Co. and Simpson & Co. the former were to pay the freight on this lumber from its place of shipment to Omaha, and it is insisted that this fact overturns all the other presumptions which Neimeyer & Co.'s conduct raises against them, that the title did pass on delivery to the carrier at Waldo, and affords conclusive evidence that they retained the title in the goods shipped, and that the carrier held them as their bailee. We have been cited to no case, nor do we think one can be found, which holds that the payment of freight

by a vendor is conclusive evidence that he thereby intended to retain the title in the goods, or that the delivery of the goods was to take place, not at their point of shipment, but at their destination. It is not doubted that a vendor might, by express contract, agree to deliver goods at their place of destination, and that this contract would control; but it is not claimed that any such express contract exists here. The claim here is that, because the vendor paid the freight, this fact is conclusive evidence that he retained the title. It may be safely conceded that the payment of freight by the vendor is a circumstance which affords some evidence that the vendor intended to retain the *jus disponendi* of the goods shipped, but it is not conclusive; and there is no case, we repeat, which holds that it is, unless it be a case in Illinois, to be presently noticed. The cases, and all the cases, upon the subject, are to the effect that the payment of the freight by the vendor is evidence of an intention upon his part to retain title in the goods. See the rule stated and the authorities cited in Benj. Sales, p. 87.

In *Devine v. Edwards*, 101 Ill. 138, it is said in the syllabus: "Where a contract for the sale and delivery of personally . . . expressly provides that it is to be shipped by the seller to the place of business of the purchaser, at the expense of the seller, the place of delivery is the business place of the purchaser, and any loss on the way must fall upon the seller." In that case a seller of milk lived in Dundee, Illinois, and the purchaser lived at Chicago. The seller sued the purchaser to recover for the price of milk which he claimed to have sold and delivered to him. The purchaser interposed a defense to the action and set-off based on this state of facts: He claimed that he had been buying milk from the plaintiff for some five years; that the milk was shipped in what both parties supposed to be eight-gallon cans, but that as a matter of fact the cans did not hold eight gallons; that, in consequence of the mistake as to the capacity of the cans, he had overpaid the milk seller. On the trial the district court refused to give to the jury the following instruction: "The jury are instructed that if they believe, from the evidence, that during the five years immediately prior to the commencement of this suit the defendant purchased milk of the plaintiff by the gallon, to be shipped from Dundee to Chicago, and that the plaintiff agreed to pay the freight on such milk, and that nothing was said by either the plaintiff or defendant in regard to its place of delivery, then the law makes Chicago the place of delivery." The supreme court held that this instruction should have been given, thus ruling in fact that the payment of freight by the seller of the milk made the place of delivery, Chicago, the destination of the milk. We are unable to see how the place of the delivery of this milk was material in that action, as the only two questions litigated were (1) a question of fact as to whether the milk cans were short in capacity; and (2) a question of law, if the cans were deficient in capacity, whether the purchaser could set off overpayments against what he was owing. The court in support of its decision cites *Dunlop v. Lambert*, 6 Clark & F. 600. But in that case the

seller of the property did not pay the freight. The vendee paid it, and the case, therefore, is not authority for the conclusion reached by the supreme court of Illinois. Furthermore, if the Illinois case is to be regarded as holding that the payment of freight by the vendor is conclusive evidence that he retained title to the goods shipped while in transit, or, in other words, that such payment of the freight made the delivery take place at the destination of the goods, then the case stands alone.

A case exactly in point here, and against the contention of plaintiff in error, is *Tregelles v. Seurell*, 7 Hurlst. & N. 574. In that case the plaintiff sold "300 tons of old bridge iron rails, at £5, 14s. 6d. per ton, to be delivered at Harburgh, cost, freight, and insurance." Payment was to be made for the rails in London, less the freight, upon delivery to the purchaser of the bill of lading for the rails and a policy of insurance; and it was held that the true construction of the contract was that the vendor was not to make delivery of the rails at Harburgh, but only to ship them to that place at his own cost free of any charge to the vendee, and that the property in the rails passed to the vendee on the delivery to him of the carrier's bill of lading and the policy of insurance. In *Daves v. Peck*, 8 T. R. 380, it was ruled that "if the consignor of goods deliver them to a particular carrier, by order of the consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for booking the goods." In *King v. Meredith*, 2 Campb. 639, the vendor sold a quantity of brandy and wine, and delivered it to a carrier to be conveyed to the vendee, the vendor paying the freight. The goods never reached the vendee. His defense was that the title to the goods remained in the vendor, and that this was evidenced by the fact that he paid the freight. But the court said: "As soon as goods are delivered to a carrier, they are at the risk of the purchaser, although the carrier be paid by the vendor." In *McLaughlin v. Marston*, 78 Wis. 670, it was ruled that where a customer has a continuing contract with a wholesale merchant to ship on order coffee, freight prepaid, and during the continuance of such contract gives a written order to "ship at once ten cases coffee," which is done, the seller prepaying the freight, and five cases of the coffee are attached by a creditor of the purchaser before delivery to him by the carrier, it is a question for the jury whether the coffee was to be delivered by the seller at the purchaser's place of business or to the carrier only. In *Harens v. Grand Island Light & Fuel Co.* 41 Neb. 153, the vendor sold to his vendee "... coal at \$9.85 per ton, f. o. b. Grand Island;" and it was in effect held that the fact that the price at Grand Island included freight—i. e., the vendor paid freight—was a circumstance affording some evidence that the coal was to be delivered at Grand Island. But the case does not hold that the vendor's paying freight is conclusive evidence of delivery at destination. *Wagner v. Breed*, 29 Neb. 720, is, however, decisive of the question under consideration, and against the contention of the plaintiff in error. In that case Wagner was a wholesale dealer in beer, and

resided in Rock Island, Illinois. Breed was a dealer in beer in Hastings, Nebraska. Wagner sold and shipped to Breed large quantities of beer, and paid the freight from Rock Island to Hastings. He took Breed's note, secured by mortgage, for the beer furnished him, and this suit was brought to foreclose that mortgage. Breed defended the action upon the ground that Wagner had no license to sell intoxicating liquors in the state of Nebraska; that the consideration for the note in suit was beer sold and delivered by him (Wagner) to him (Breed), and that the delivery took place at Hastings, Nebraska; and that, therefore, Wagner could not enforce the note and mortgage. And the district court ruled that the delivery of the beer furnished by Wagner to Breed took place in Hastings, Nebraska; that the note and mortgage were unenforceable, and dismissed Wagner's action. On appeal to this court the decree of the district court was reversed, this court holding that, notwithstanding the fact that Wagner paid the freight on the beer from Rock Island, Illinois, to Hastings, Nebraska, the delivery of the beer took place in Rock Island, Illinois. In this case the only evidence on the subject that the delivery of the beer took place in Hastings was the fact that Wagner paid the freight thereon. This case, then, is a solemn adjudication of this court that the mere fact that a vendor pays the freight is of itself not sufficient evidence to overthrow the presumption that where a purchaser orders goods from a distant seller, and he, in pursuance of the order, delivers the goods to a carrier for shipment to the vendee, such delivery is a delivery to the vendee, and that his title at once attaches. To the same effect is *Mee v. McNider*, 109 N. Y. 500.

Conceding, then, that Neimeyer & Co.'s paying the freight on the lumber in controversy raises the presumption that they retained title to the lumber while it was in transit, and that its delivery was to take place at Omaha, we think the district court was right in holding that the effect of this presumption was destroyed by the other evidence in the case. Whether the delivery of this lumber took place at Waldo or Omaha was a question of fact for the trial court sitting without a jury. That fact was to be determined from the intention of the vendor, and this intention was to be ascertained from all the facts and circumstances in evidence in the case. But, when the district court came to weigh and consider the conduct of the vendor, it had before it a sale and shipment made by a vendor, in the ordinary manner, of goods ordered by a distant buyer, the contract specially referring only to quality, quantity, and price of the goods; the contract containing nothing in reference to the place where the goods were to be delivered; the sale made by one party, and the goods shipped to his vendee; a sale made on 60 days' time; the vendor taking a bill of lading from the initial carrier, in which neither he nor his agent was named as consignee of the goods, and which by his contract was to be sent to his vendee, Simpson & Co., and in which bill of lading the vendee was named as consignee; the evidence of the plaintiff in error that, in so far as delivery of the lumber was concerned, he understood that he had complied with his

contract with Simpson & Co. when he delivered the lumber to a carrier at Waldo for transit to their vendee, and that the lumber was sold to Simpson & Co., and the seller looked to them to pay for it. From these facts, and each one of them, the law raised the presumption that the delivery of the goods took place and the title vested in the vendee when the goods were delivered to the initial carrier. Against all these presumptions stood, and stands, singly, the fact that the vendor paid the freight.

The district court was of opinion, and in that opinion we entirely concur, that the presumption that the title remained in the vendor because he paid the freight was overthrown by the other facts in evidence in the case and the presumptions which flowed therefrom.

2. This brings us to the consideration of the question of Neimeyer & Co.'s right to stop these goods *in transitu* because of the insolvency of their vendee, Simpson & Co. In order that a vendor may exercise the right of stoppage *in transitu* of goods sold, they must, at the time, be in the possession of some person intervening between the vendor who has parted with and the purchaser who has not yet received them; that is, they must be in transit from the vendor to his immediate vendee. In the case at bar we have already seen that Neimeyer & Co., the vendors of these goods, delivered them at Waldo, Arkansas, to their vendee, Simpson & Co.; and when the goods left Waldo, Arkansas, for Omaha, Nebraska, they were in transit, not from their original vendors, Neimeyer & Co., to their original vendee, Simpson & Co., but from Simpson & Co., who had become vendors of the goods, to their vendee, Dietz. The sale of these goods by Neimeyer & Co. to Simpson & Co., and their delivery to the latter at Waldo consigned to Simpson & Co.'s vendee, Dietz, was, in effect, the same as if Neimeyer & Co., after selling the goods, had shipped and delivered them to Simpson & Co. at Dallas, Texas, and they had then sold and shipped them to Dietz. So that the question is, May a vendor of goods exercise the right of stoppage *in transitu* after they have been received and sold by his immediate vendee and are *in transitu* to that vendee's vendee? We think that all the authorities answer this question in the negative. In 1 Jones, Liens, § 870, it is said: "The right [that is, to stop goods *in transitu*] can be exercised only by one who holds the relation of vendor to the consignee. If one buys goods and directs his vendor to consign them to a customer of his own with whom the vendor has no privity, and the vendor accordingly ships the goods to such third person, he cannot stop them *in transitu* to him upon the insolvency of his immediate purchaser." A case precisely in point here is *Memphis & L. R. R. Co. v. Freed*, 38 Ark. 614. In that case Freed was a merchant at Dardanelle, and ordered of Walker Bros. & Co., at St. Louis, a bill of goods. The latter transmitted the order to Lehman & Co., at New Orleans, with directions to ship the goods to Freed, and send the invoice and bill of lading to them (Walker Bros.). This was all done. While the goods were

in transitu from New Orleans to Freed, Walker Bros. & Co. failed, and Lehman & Co., claiming to exercise the right of stoppage *in transitu*, demanded and received from the carrier the goods. Freed then sued the railway company for the value of the goods, claiming that he was the vendee of Walker Bros. & Co., and not the vendee of Lehman & Co., but merely their consignee, and that there was no privity of contract between him and Lehman & Co., and therefore, as against him, they had no right to stop the goods in transit. And the court held the railway company liable to Freed for the value of the goods. To the same effect are *Rowley v. Bigelow*, 12 Pick. 306, 23 Am. Dec. 607; *Eaton v. Cook*, 32 Vt. 58; *Noble v. Adams*, 7 Taunt. 59. We think, therefore, that the insolvency of Simpson & Co. did not invest Neimeyer & Co. with the right to stop these goods in transit, nor render the railway company liable to Neimeyer & Co., for delivering them to Dietz, the consignee thereof, since Dietz was not the vendee of Neimeyer & Co., but their consignee merely; he was the vendee of Simpson & Co. The only transit of these goods that took place, as between Neimeyer & Co. and Simpson & Co., was the transit that occurred of the goods between the lumber yard in Waldo, Arkansas, and the railway cars at that station; and when the goods were delivered to the carrier there, and billed to Dietz, it was the same as a sale and delivery of the goods at that place to Simpson & Co., and a resale and redelivery of the goods there by Simpson & Co. to Dietz.

3. But it is insisted by counsel for the plaintiff in error that this judgment must be reversed because of the condition of the pleadings. This we will now proceed to notice. Neimeyer & Co. in their petition alleged "that on or about the 8th day of January, 1892, the plaintiff agreed to sell unto Simpson, Perkins, & Co., of Dallas, Texas, seventeen car loads of lumber of the plaintiff's manufacture at its mills in Waldo, Arkansas, to be delivered at Omaha, Nebraska, free of freight on board the cars at Omaha, Nebraska, for the sum of \$3,432.96, less the freight from Waldo, Arkansas, to Omaha, Nebraska." The railway company, answering this allegation of the petition, used the following language: "It admits that the plaintiff agreed to and did, on the date stated, sell to Simpson & Co., of Dallas, Texas, seventeen car loads of lumber as therein alleged." Now, it is said by the plaintiff in error that the railway company, by this answer, has admitted that the delivery of the lumber in controversy was to take place in Omaha, Nebraska. If the foregoing quotation from the pleadings was all they contained upon the subject, we should feel obliged to reverse this case because of this admission in the answer. But the answer of the railway company, in addition to the admission just quoted, sets out the contract between Simpson & Co. and Neimeyer & Co. in full; and Neimeyer & Co., in their reply to this answer, admit that the contract between them and Simpson & Co., pleaded by the railway company in its answer, is the actual contract made between those parties. Neimeyer & Co., by their reply, have admitted that the contract existing between

them and Simpson & Co. was not the contract which they pleaded in their petition, but the contract set up in the railway company's answer; and the question litigated in the district court was as to the proper construction of the contract pleaded in the answer and admitted to be the contract by the reply. Under these circumstances, we do not think this judgment should be reversed because of the admission made by the railway company in its answer.

The judgment of the District Court is right, and is affirmed.

Harrison, Ch. J., and Sullivan, J., and Irvine and Ryan, CC.:

We concur in the conclusion reached by Commissioner Ragan, on the ground that, conceding, for the purposes of this case, that the use of the expression, "Prices f. o. b. Omaha," might of itself afford a presumption that the delivery was to be made at Omaha, and that title should there pass, the other evidential facts were sufficient to ground an inference that title should pass at the place of shipment, and the question being one of fact, the finding is sustained by the evidence.

Norval, J., dissenting:

I do not concur in the judgment just rendered. There is no controversy as to the material facts. Simpson, Perkins, & Co. were wholesale dealers in lumber at Dallas, Texas, from whom said Dietz, without plaintiff's knowledge, before January 8, 1892, ordered twenty cars of lumber, to be delivered to himself at Omaha. Simpson, Perkins, & Co. thereupon sent a letter, inclosing order for the twenty cars of lumber, to the plaintiff, the A. J. Neimeyer Lumber Company, at Waldo, Arkansas. The letter is as follows:

Dallas, Texas, Jan. 8, 1892.

A. J. Neimeyer Lumber Company, Waldo, Ark.—

Gentlemen: We received your stock sheet some time since, and herewith send you two orders, which you will find are very nice ones. Please name your figures as low as possible on these orders. Kindly advise us how you are fixed for clear flooring and finished stuff, and we may hand you some orders at an early date. Also inclose us your lowest f. o. b. price list.

Yours very truly, Simpson, Perkins, & Co.

The orders inclosed in said letter were alike, except as to number of cars and kind of lumber, and read as follows:

Dallas, Texas, Jan. 8, 1892.

A. J. Neimeyer Lumber Co., Waldo, Ark.:

Ship to C. N. Dietz, Omaha, Neb., via _____ R. R., care _____ R. R., rate 22 [here follow the number of cars and description of lumber required], as soon as you can. If for any reason you cannot ship promptly, advise. Please always send bill of lading and invoice to us at Dallas.

Yours truly, Simpson, Perkins, & Co.

On January 9, 1892, the plaintiff sent the following reply:

40 L. R. A.

A. J. Neimeyer Lumber Company, Mills, Waldo, Ark. St. Louis, Jan. 9, 1892.

Messrs. Simpson, Perkins, & Co., Dallas, Tex.—

Gentlemen: Your valued orders of January 8th received and filed for prompt shipment, with the exception of two items. The 2x4 20 ft. and 2x12—20 we have not now in stock. We have filled orders as follows:

One car 2x10—12, No. 1 common, S. I. S. I. E.	\$13 00
" 2x10—14, " " " "	" 13 00
" 2x10—16, " " " "	" 13 00
" 2x10—18, " " " "	" 14 00
" 2x10—20, " " " "	" 14 00
" 2x12—12, " " " "	" 12 25
" 2x12—14, " " " "	" 13 25
" 2x12—16, " " " "	" 13 25
" 2x12—18, " " " "	" 14 25

Prices f. o. b. Omaha, Nebraska.

Also:

Two cars 2x4—12, No. 1 common, S. I. S. I. E.	\$13 00
" 2x4—14, " " " "	" 13 00
" 2x4—16, " " " "	" 13 00
" 2x4—18, " " " "	" 14 00

Prices f. o. b. Omaha, Nebraska.

Also:

On flooring we beg to name you price, f. o. b. Waldo, Ark.	\$15 80
On finish lumber S. 2 S., 1x4, and 1st and 2nd	15 80
1x8, 10 and 12, 1st and 2nd	16 80
1½x8, 10 and 12, 1st and 2nd	19 80
1½x8, 10 and 12, 1st and 2nd	20 80
2x6—8, 10 and 12, 1st and 2nd	21 80

1-inch Star Finish, \$3.00 less than 1st and 2nd.

1½, 1½, and 2 inch Star Finish, \$4.00 less than 1st and 2nd clear.

Trusting that these figures will be satisfactory to you, assuring you that our material is well manufactured, and we feel confident we can please you, we solicit your trade in our line. Awaiting your further commands, and thanking you for the orders, we remain, Yours truly,

A. J. Neimeyer, Lumber Co.,
by E. B. Eckhard.

Plaintiff, in compliance with the contract contained in the foregoing letters, sold to Simpson, Perkins, & Co. seventeen of the twenty cars of lumber so ordered, and shipped the same from Waldo, Arkansas, consigned to C. N. Dietz, at Omaha, on different dates between January 15, 1892, and January 21, the same year. The cars of lumber were delivered for shipment to the St. Louis & Southwestern Railway Company at Waldo, Arkansas, by which company they were delivered to a connecting carrier, and by the latter delivered to the defendant company, to be transported to Omaha, this state, for delivery to the consignee, Dietz. Invoices of the lumber were made by plaintiff, and sent to Simpson, Perkins, & Co., Dallas, Texas. After the delivery of cars for shipment, and before they had reached their destination, Simpson, Perkins, & Co. failed without having paid for the lumber. Thereupon plaintiff notified the initial carrier to stop the delivery of the cars to Dietz, and the defendant likewise received similar notice after a portion of the lumber had been received by the consignee, but before at least eleven cars had reached their destination. Plaintiff demanded from defendant that the

remaining cars of lumber be delivered to it, with which request the company refused to comply, but delivered the same to Dietz. Thereupon this suit was brought for the value of the lumber, less freight. The bills of lading were issued by the initial carrier to plaintiff; which were retained by the latter, and were never sent or delivered to either the consignee or to Simpson, Perkins, & Co. The shipments already mentioned constituted the only transactions between said firm and plaintiff. The latter knew nothing about the deal between Simpson, Perkins, & Co. and Dietz, and had no knowledge as to how or why the lumber was to be sent to Dietz, except that the orders so directed the shipping to be made.

A. J. Neimeyer, president and manager of plaintiff's company, testified, on direct examination, concerning the meaning of the words, "Prices f. o. b. Omaha," as used in the correspondence above set out, that the "initials 'f. o. b.' have a well understood meaning among railroad men and shippers. They mean 'free on board at the point of delivery.' If we say 'f. o. b. Omaha,' that means that is the price delivered at Omaha." The witness on cross-examination further testified that:

Q. Now, this "f. o. b." means simply the price at the place named, does it not?

A. We agree to deliver the lumber at that price at the point of destination.

Q. Do you agree to ship the lumber to the consignee at your own risk?

A. Yes, sir.

Q. You assume the risk?

A. We assume the risk. If there is any damage in transit, we look to the railroad company.

Q. That is your understanding of those terms?

A. Yes, sir.

Q. Isn't it your understanding, Mr. Neimeyer, that "f. o. b." simply means the price to the consignee or the purchaser at a certain place?

A. No, sir.

Q. It is a form of expression of where the delivery shall be made,—is that your understanding?

A. That is our understanding; and the price, of course, attached to it.

Q. Don't you know, as a matter of fact, that in railroad parlance the term "f. o. b." has no reference to the question of delivery, but purely the question of price?

A. In railroad parlance.

Q. And in business parlance?

A. We do not consider it so.

Q. What does the general public consider it?

A. Men in similar business do not consider it so either.

Q. I ask you the simple question, Did you not consider, when you delivered to the railroad company at Waldo, you had fully performed your contract with Perkins, Simpson, & Co.?

A. As far as delivering the lumber was concerned.

Q. Whatever the contract was?

A. We had not fulfilled our contract until we did what we agreed to do.

40 L. R. A.

Q. I want to know— You say you had not — You would not consider you had?

A. No, sir; I would not consider I had.

Q. When would you consider you had fulfilled your contract?

A. When the lumber arrived at destination all satisfactory.

Q. When it arrived at its destination?

A. Yes, sir.

Q. Then that consideration is based upon what? What terms or writing or expression in the contract do you base the construction?

A. On simply the reason that we agreed to deliver it at Omaha.

Q. What expression?

A. Free on board cars at Omaha.

Q. Then because that letter said f. o. b. at Omaha, 22 cent rate, you interpret it as meaning you had not performed your contract with Simpson, Perkins, & Co. until the goods reached Omaha.

A. That would be our interpretation of it.

John A. Sargent, the assistant general freight agent of the Kansas City, Ft. Scott, & Memphis Railway Company, testified by deposition, *inter alia*, that he had been engaged in railroad business about seven years. Knew the meaning of the initial letters "f. o. b.," as used in commercial and railroad transactions, and that the expression "f. o. b. at Omaha" means "to be delivered at Omaha free on board cars." The foregoing testimony of the two witnesses named stands uncontradicted in the record.

The chief question presented in this case is, In whom was the title to the lumber while being transported by the carrier to Omaha, the final place of destination? If the title passed from plaintiff upon the delivery of the lumber to the railroad company for carriage at Waldo, Arkansas, as the defendant asserts, then there can be no recovery in this action. Ordinarily, in the absence of an agreement, express or implied, to the contrary, personal property is deliverable at the place where it is when sold. Where, however, a different place of delivery is fixed by the contracting parties, that will govern. In this case there is no claim that the delivery of the lumber was to be made at plaintiff's mills in Waldo, or that the title passed there. The correspondence between Simpson, Perkins, & Co. and plaintiff, which constitutes the contract of sale, discloses that the lumber was sold and purchased for the purpose of being shipped to Omaha, and that plaintiff was to make delivery elsewhere than at its mills. The lumber was to be selected by plaintiff, and placed on the cars for transportation, and the contract price was a certain sum per 1,000 feet, varying according to the kind of lumber, "f. o. b. Omaha." The authorities unite in stating that the delivery of goods by a seller to a common carrier for conveyance to the buyer, when the transportation is to be made in that manner, and the contract is silent on the subject, is delivery to the purchaser, and *prima facie* the title to the property at once vests in the latter, subject to the exercise by the vendor of the right of stoppage *in transitu*, since the carrier is regarded as bailee or agent of the vendee, and not of the vendor. But, if the contract requires the seller to make the deliv-

ery at a distant point, the carrier is his bailee or agent, and usually the title does not pass until the property has been delivered at the point designated by the parties. *Sneathen v. Grubbs*, 88 Pa. 147; *Braddock Glass Co. v. Irwin*, 153 Pa. 440; *Hanauer v. Bartels*, 2 Colo. 514; *Benjamin, Sales*, § 1040.

R. M. Benjamin, in his work on the Principles of Sales, at page 87, states: "If it appear that the seller undertakes to deliver the goods at the place of their destination, assuming the risk of their transmission, the carrier is the bailee of the seller, and the property in the goods does not vest in the buyer until they are delivered at such a place." The author, at page 145, in speaking of the general doctrine that the delivery of goods to a carrier by a vendor for the purpose of transportation to the vendee is prima facie delivery to the latter, says: "The rule does not obtain when it appears that the seller undertakes to deliver the goods at the place of destination. In such case the carrier is the agent of the seller." In *Newmark, Sales*, § 166, the author says: "The general rule is that title will not pass until delivery, if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified, and receive payment on delivery. . . . And that if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that in the meantime the thing sold was to be at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly." *Boyd v. Pollock*, 27 W. Va. 75; *Devine v. Edwards*, 101 Ill. 138; *Suit v. Woodhall*, 113 Mass. 391; *Weil v. Golden*, 141 Mass. 364; 21 Am. & Eng. Enc. Law, pp. 528-530. *McNeal v. Braun*, 53 N. J. L. 617, was an action to recover the contract price of a quantity of coal shipped by plaintiff from Philadelphia to the defendant at Burlington, under a contract fixing the price at \$4.10 a ton, delivered at Burlington. The coal was shipped in a barge selected by the seller, and, reaching in the evening the last named place, was moored alongside of defendant's wharf for the purpose of unloading. During the night the barge sank, and the coal was lost. The court in the opinion say: "Under a contract of this sort, delivery of the coal on board the barge was delivery to the master as the plaintiff's bailee or agent to perform for him the act of delivery in execution of his contract. 1 Benjamin, Sales, Corbin's ed. § 556. Meanwhile, and until delivery was consummated in such a manner as to be effectual as between vendor and purchaser, the coal was at the plaintiff's risk. . . . But the plaintiff, instead of being an agent to procure transportation, had himself contracted to deliver the coal, and these instructions ignore the fact that under a contract of that sort the undertaking to deliver is absolute and unqualified, and delivery of the goods is a condition precedent to the right of the vendor to sue for the contract price. If the goods be lost or destroyed before delivery is consummated, the vendor must bear the loss. Under such a contract the carrier selected by the vendor is his agent to perform the contract to deliver, and the vessel in which the goods are carried is *pro hac vice* the vendor's vessel. For the negligence of the one and the con-

dition of the other, and, indeed, for failure to make delivery of the coal according to contract for any cause not due to the fault of the purchaser, the responsibility is upon the vendor." *A. Westman Mercantile Co. v. Park*, 2 Colo. App. 545, was to recover the contract price of two cars of hay shipped by plaintiff to defendant at Denver. It was held the delivery was complete, and the title to the hay passed to the buyer, when the cars containing the hay were left in the general receiving yards of the carrier at the final place of destination.

It is argued that the place of delivery of this lumber was on board the cars at Waldo, and that the title passed when the lumber was put on the cars for shipment. The soundness of this contention depends upon the construction given to the clause in the contract, "Prices f. o. b. Omaha," as there is no other provision relating to the subject of delivery. The initial letters "f. o. b." in contracts of sale, when the property is to be transported, mean "free on board" the cars at a designated place, whether that be the initial point of shipment or place of final destination. They imply that the buyer shall be free from all the expenses and risks attending the delivery of the property at the point named in the contract for such purpose. This contract should be interpreted precisely the same as if it read, "Prices free on board cars at Omaha," and the plain and obvious meaning of those words is that plaintiff was required to pay all freight and expenses, assume all risk of transportation, and that the title did not pass from the seller until the lumber arrived at Omaha. Had the contract named, "Prices f. o. b. Waldo," then delivery to the carrier at Waldo would have been delivery to the purchasers, and title would at once have passed. *Congdon v. Kendall* (Neb.) 78 N. W. 659. But the contract before us reads "f. o. b." place of destination, which is materially different from a clause which provides for the delivery of property at the initial point of transportation. Had this lumber been lost while in transit, plaintiff could not have recovered the purchase price from the vendees, since the sale was not complete without delivery of the property free on board the cars at Omaha. This is the construction placed on the contract by plaintiff and defendants in the pleadings, as a reference thereto will show. Each party has pleaded *in hac verba* the correspondence which constitutes the contract under which the consignments were made. The petition avers that the lumber was sold "to be delivered at Omaha, Nebraska, free of freight on board the cars at Omaha," and the answer expressly admits the sale of the lumber as alleged in the petition. Each party, therefore, has construed the contract as calling for the delivery of the lumber at Omaha, and not Waldo, and the court is certainly justified in adopting the construction which the parties themselves have admitted to be the proper one. That the delivery was not to be made in Omaha is emphasized by the following averment in the answer: "The defendant, further answering, alleges that before the time mentioned in the petition, and before Simpson, Perkins, & Co. had purchased the lumber referred to from the plaintiff, they had entered into an agreement with the said C. N. Dietz

of Omaha, to sell and deliver to him at said city, at certain agreed prices, a large quantity of lumber of the kind described in the petition, and that the said Simpson, Perkins, & Co., to carry out the agreement, purchased of the plaintiff the lumber aforesaid, and at the same time requested the plaintiff to promptly ship it to C. M. Dietz; that the plaintiff, in compliance with such request, delivered the lumber to the said St. Louis & Southwestern Railroad Company, to be transported by it and other connecting carriers to Omaha, and there deliver to C. N. Dietz." This is an admission that Omaha was the place of delivery of the lumber. The delivery to a carrier is regarded as delivery to the buyer only when and as it is in accord with the terms and intention of the shipment. In the case at bar the carrier was the bailee or agent of plaintiff, and not of Simpson, Perkins, & Co., and the title to the lumber did not vest in them until its arrival in Omaha free of expense of transportation to the purchasers. This conclusion is not without abundant support in the authorities.

In Benjamin, Sales, 6th ed. § 682, the author says: "In many mercantile contracts it is stipulated that the vendor shall deliver the goods 'f. o. b.,' i. e., 'free on board.' The meaning of these words is that the seller is to put the goods on board at his own expense, on account of the person for whom they are shipped, and the goods are at the risk of the buyer from the time when they are so put on board." At § 693 it is stated: "If, however, the vendor should sell goods, undertaking to make the delivery himself at a distant place, thus assuming the risks of the carriage, the carrier is the vendor's agent."

In *Knapp Electrical Works v. New York Insulated Wire Co.* 157 Ill. 456, it was held that a contract for the consignment of goods "f. o. b." place of shipment implies that the consignee is to pay the freight to the place of destination.

In *Miller v. Seaman*, 176 Pa. 291, the facts were these: February 21, 1894, one Miller contracted for the sale to the defendants of eleven piles of lumber in the yards of the Dent Lumber Company at Duboisstown, Pennsylvania, marked "A. G. M.," and numbered and mentioned in a schedule annexed to the contract, "at and for the price of \$8.25 per 1,000 shipping count, f. o. b. cars, Williamsport, to be loaded, inspected, and measured, as ordered by said purchasers, by Mr. Sam Aurand for the sellers." The contract further stipulated for inspection and measuring all lumber not loaded on cars prior to June 1, 1894, and the same to be paid for on that date at \$8 per 1,000 feet, less 2 per cent discount, the expenses of the inspection and measurement of lumber in yard on said date to be borne by the purchasers. Before June 1st a portion of the lumber was destroyed by flood, and Miller brought suit to recover the value of the lumber thus lost. A nonsuit was entered, the trial court holding that the title did not pass from Miller, under the contract, until the lumber was measured and inspected, and delivered at his expense f. o. b. cars Williamsport, to the purchasers. The judgment was affirmed, the court in the opinion saying: "It is clear that the defendants had no right to

take possession of these piles, as piles of lumber. If they had attempted it, Miller could have proceeded either by replevin or trespass against them. They could not have sold the lumber in a lump, and delivered it to a purchaser. They could only take or sell in accordance with their contract. Their title to each shipment vested on its delivery f. o. b. to them at Williamsport. The lumber swept away by the flood had not been ordered by the purchaser; it had not been inspected, measured, or loaded by the seller and delivered at Williamsport for the buyer. . . . The title had left the plaintiff only as orders had been filled and shipped, and, as to all that remained on the yard, it had never left him."

In *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 446, there was under consideration a contract containing a provision for the sale and purchase of "Flat Top coke at \$5 10 per net ton (2,000 lbs.), f. o. b. cars Sheffield, Ala.," which was the place of destination of the coke. The court, in discussing the meaning of the letters "f. o. b." in contracts of sale, observed: "They import that the purchaser shall be free from all expense which may have attended the shipment and transportation to the point named. Had the provision related to the initial point of the transportation, the buyer would have been entitled to the shipment at that place free from all expense incident to loading the cars,—all expense, indeed, incurred in the premises up to and including the loading of the cars. Then it would have been upon the buyer to pay the freight—the costs of transportation—to the final destination of the consignment. The provision here having relation to the point of final delivery, it can mean nothing else than that the seller is to pay all costs and charges up to that point, and that the buyer is entitled to receive the consignment free from all such costs and expenses."

Capehart v. Furman Farm Improv. Co. 103 Ala. 671, was an action by a consignor against a carrier to recover damages for loss and injury sustained in the transportation of certain goods which were purchased by Scott & Ray from plaintiff, to be shipped from Atlanta, Georgia, to Guntersville, Alabama, consigned to purchasers. The contract of sale provided the goods were to be "delivered f. o. b. at Guntersville, Ala." The court in the opinion says: "It is admitted that 'f. o. b.' means 'free on board.' Indeed, we judicially know the fact. *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 446. The effect of the stipulation is that the consignor will place the goods, loaded on the car or vessel wherein transported, at the designated point of destination, free of all expense to the consignee. *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 446. When, therefore, the plaintiff paid the freight charges and caused the boat to be landed at Guntersville, with the goods safely thereon, properly consigned to Scott & Ray, it completely fulfilled its contract. The carriers ceased to be its agents for the custody and care of the goods, and immediately became the agents of the consignees. The relations of the parties then became precisely the same, in effect, as if the contract of the plaintiff had been to deliver f. o. b. at Atlanta, and the loss or injury had occurred *en route*, before reach-

ing Guntersville. In such case, the carriers would have been regarded as the agents of the consignees, and the delivery to them f. o. b. at Atlanta would have passed the title to the consignee. This contract is not susceptible of any other construction."

There is no question that, under the contract, plaintiff was required to pay the freight on the lumber from Waldo to Omaha, which fact raises the presumption that the intention was that delivery was to be made by the seller, and at its risk, at Omaha, and that the title did not vest in the vendee until the lumber arrived in that city.

In *Murray v. J. J. Nichols*, 34 N. Y. S. R. 62, glassware was shipped by plaintiff in Connecticut for delivery to defendant in New York, the seller paying the freight. It was ruled that the risk of transportation was on the latter, and no recovery could be had for the goods broken before their arrival at place of destination.

Devine v. Edwards, 101 Ill. 188, was an action to recover a sum alleged to be due for a quantity of milk shipped by plaintiff to defendant from Dundee, Illinois, to Chicago, under a contract whereby plaintiff was to pay the freight. There was evidence tending to show that some of the milk spilled from the cans while on the cars, and one of the questions was who was to stand this loss. The decision of the court is expressed in the second subdivision of the syllabus, as follows: "Where a contract for the sale and delivery of personalty, such as milk, expressly provides that it is to be shipped by the seller to the place of business of the purchaser, . . . and any loss on the way must fall upon the seller."

In *Suit v. Woodhall*, 113 Mass. 391, a traveling salesman for plaintiffs, who were wholesale liquor dealers in Louisville, Kentucky, took the order of the defendants at Lawrence, Massachusetts, for a quantity of liquors, at a stipulated price, subject to the order of plaintiffs. It was agreed that there should be deducted from the price all sums which defendants should pay for freight upon the liquors from Louisville to Lawrence. The liquors were delivered to the carrier for transportation as agreed, and it was held that the title remained in the vendors during the course of transportation, and the sale was not completed until the delivery of the liquors at the place of destination in Lawrence. To the same effect, as to completion of sale at place of delivery, is *Weil v. Golden*, 141 Mass. 364.

The third and fourth paragraphs of the syllabus in *Julius Winkelmeyer Brewing Assn. v. Nipp*, 6 Kan. App. 730, are as follows: "(3) Ordinarily, a delivery of merchandise to the carrier is a delivery to the purchaser, but when the seller pays the freight the carrier is his agent, and the delivery is made at the place of its destination. (4) Where the freight charges are to be paid in the first instance by the purchaser, but are to be charged to the seller, and deducted from the price of the merchandise, held, that the seller pays the freight."

It is asserted that *Wagner v. Breed*, 29 Neb. 720, is decisive of the question, against the contention of plaintiff, and that it was therein solemnly adjudicated: "The mere fact that a vendor pays the freight is of itself not sufficient

evidence to overthrow the presumption that, where a purchaser orders goods from a distant seller, and he, in pursuance of the order, delivers the goods to a carrier for shipment to the vendee, such delivery is a delivery to the vendee, and that his title at once attaches."

This doctrine was not announced in that case, as an examination of the decision will disclose. The suit was to foreclose a real-estate mortgage given for the purchase price of beer sold and shipped by Wagner, a wholesale dealer in liquors in Rock Island, Illinois, to one Breed, the mortgagor, at Hastings, this state. The defense interposed was that the sale was made in Nebraska, and therefore void, inasmuch as Wagner had no license to sell intoxicating liquors here. The beer was shipped to Breed from Rock Island to Hastings in carload lots by a common carrier of his own selection and designation, and the vendee uniformly paid freight on the shipment, which was afterwards credited back to him in his account by plaintiff, for the purpose of reducing the price of the beer to conform to the usual price then obtaining. The court in the opinion say: "These sales of beer by the plaintiff to the defendant, William Breed, upon which the indebtedness sued on arose, were made and concluded at Rock Island, in the state of Illinois." That case is not an authority for the proposition that the title of this lumber passed from the vendor at the place of shipment, because it was shipped under an agreement requiring the plaintiff therein to pay the freight to Omaha, who selected the carrier, and contracted to deliver the lumber free of expense on board cars at that point. The beer was not shipped under a contract containing any such provisions. In that case the vendee, and not the vendor, designated the carrier and paid the freight, and the court properly held that the sales were made in Illinois, and not in this state.

Of the cases decided by this court, the one which more nearly fits the one at bar is *Havens v. Grand Island Light & Fuel Co.* 41 Neb. 153. That was an action to recover the contract price of a car of coal shipped by plaintiff from Omaha to defendant at Grand Island. One of the defenses was that the quantity of coal sued for was not received at the place of destination. Plaintiff insisted that the title of the coal vested in the fuel company upon the delivery to the carrier at Omaha, and, if a less amount of coal was received by purchasers than was delivered to the carrier, the loss must be borne by the defendant. The court held the evidence supported by the findings of the jury that the coal was to be delivered at Grand Island, saying: "The general rule doubtless is that the delivery of goods to a carrier consigned to the purchaser is a delivery to the purchaser, and that the title of the goods so delivered to the carrier at once vests in the purchaser; but this rule is by no means universal, and whether applicable in any case depends upon the facts, circumstances, and the contract between the seller and the purchaser in the case. . . . It is not stated in any of the pleadings in the case at what place this coal was to be delivered, and if the jury found from the evidence that the coal was to be delivered at Grand Island, we think the evidence ample to sustain that

finding. By the letter of October 16, written by Havens & Co. to the fuel company, it is stated: 'We have your favor of the 15th, and have entered your order for two cars of grate coal at \$9.85 per ton, f. o. b. Grand Island,' . . . and it also appears from the record that Havens & Co. accepted from the fuel company, as part payment of the other car of coal shipped with the one in suit, the freight bills for the coal turned over by the carrier to the fuel company. To adopt the contention of counsel that by the terms of the contract the fuel company was to pay \$9.85 a ton for the coal at the place of delivery, and that that place of delivery was Omaha, would make the coal cost the fuel company in Grand Island about \$16 per ton, as the evidence shows that the carrier's charges amounted to about \$6 per ton."

Tregelles v. Sewell, 7 Hurlst. & N. 543, is distinguishable from the case at bar. That was an action to recover damages for the nondelivery of a quantity of bridge rails purchased under a contract whereby the buyer agreed to pay therefor "£5.14s. 6d. per ton, to be delivered at Harburgh, cost, freight, and insurance, payment by net cash in London, less freight, upon handing bill of lading and policy of insurance." The seller delivered the rails on boat at London, received the usual bill of lading, making the shipment deliverable at Harburgh; procured at his own expense a policy of insurance on the shipment, which, with the bill of lading indorsed in blank, was delivered to the buyer, and the latter then paid the contract price of the iron, less the amount of the freight payable under the bill of lading. It was decided that the seller was not required to make delivery at the final place of destination, and that the title passed on the delivery of the bill of lading and policy of insurance to the vendee. That case is in many respects unlike the one before us. There the vendee was to and did pay the purchase money on delivery of the iron to the carrier, and the vendor then paid the freight to the buyer, and delivered the bill of lading to him, so that there was nothing left for the seller to do to vest the title in the other party. In the present case the purchase money was not paid, nor the freight on the lumber, and the consignor retained possession of the bills of lading. The contract, therefore, had not been fully performed by the plaintiff.

It is urged that inasmuch as the lumber was not consigned to the plaintiff or its order, and that the bills of lading were taken in the name of the consignee, the inference may be drawn therefrom that it was the intention of plaintiff that the title to the lumber should pass immediately upon delivery to the carrier at Waldo. This argument is not tenable, because the bills of lading were never surrendered to the consignee or purchaser, but at all times remained in the possession of plaintiff. Although, ordinarily, the rule is, when not rebutted by evidence to the contrary, that the title to goods prima facie passes to a vendee upon their delivery by the vendor to a com-

mon carrier for transportation to the buyer, yet where a bill of lading is taken in the name of the seller it is presumptive evidence of his intention to retain control of the property, and that delivery to the carrier is not a delivery to the buyer, but that the carrier is the bailee or agent of the vendor. *Newmark, Sales*, § 147; *Benjamin, Sales*, § 899. On the other hand, if the bill of lading, by direction of vendor, is issued in the name of the consignee, and is sent or delivered to him, this is evidence of an intention to transfer the title to the purchaser. "But the fact that the bill of lading is taken in the buyer's name, if it is not delivered, creates no presumption of an intention to transfer the property unconditionally." *Newmark, Sales*, § 150; *Sheridan v. New Quay Co.* 4 C. B. N. S. 618; *Usher, Sales*, § 233; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; 2 Am. & Eng. Enc. Law, pp. 243, 244; *Thomas v. First Nat. Bank*, 66 Ill. App. 56; *Michigan C. R. Co. v. Phillips*, 60 Ill. App. 190.

In 2 Am. & Eng. Enc. Law, p. 242, it is said: "Where goods are consigned without reservation on the part of the consignor, the prima facie legal presumption is that the consignee is the owner. The fact of consignment does not vest an absolute title in the consignee. His title is not complete until the bill of lading comes into his hands."

Lord Denman, in *Mitchel v. Ede*, 11 Ad. & El. 888, with reference to a bill of lading, says: "As between the owner and shipper of the goods and the captain, it fixes and determines the duty of the latter as to the person to whom it is (at the time) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose, at any rate before the delivery of the goods themselves or the bill of lading to the party named in it, and may order the delivery to be to some other person, to B instead of to A."

It is obvious that the true construction of the contract of purchase and sale involved in the present case is that plaintiff's agreement was not performed until the delivery of the lumber free on board the cars in Omaha, and that the title was not divested until the shipment arrived in that city. Plaintiff, therefore, without regard to the solvency or insolvency of Simpson, Perkins, & Co., had the undoubted right to stop the delivery of the lumber at any time during the course of transportation, which right was duly exercised before at least eleven cars had arrived at the place of their final destination. The defendant, however, delivered the lumber to the consignee, Dietz, notwithstanding it had received timely notice not to do so. Such delivery was, therefore, at the risk of the carrier, and it is liable as for conversion. *Gates v. Chicago, B. & Q. R. Co.* 42 Neb. 379; *Shellenberg v. Fremont, E. & M. Valley R. Co.* 45 Neb. 487.

The judgment should be reversed and the cause remanded.

Rehearing denied.

PENNSYLVANIA SUPREME COURT.

Laura GERNERD

v.

Charles A. GERNERD, *Appt.*

(185 Pa. 238.)

1. **A wife can maintain an action** against one who has wrongfully induced her husband to leave her, where she is freed from common-law disabilities and entitled to sue in her own name and right for torts done to her.
2. **Advice to a son as to separating from his wife**, given in good faith and with a proper motive, will not render the parent liable to her, unless it was clearly unjustifiable.

(March 28, 1898.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Lehigh County in favor of plaintiff in an action brought to recover damages for inducing plaintiff's husband to leave her. *Affirmed.*

The facts are stated in the opinion.

Messrs. Evan Holben and R. E. Wright, for appellant:

Damages are sought to be recovered for words uttered by the defendant. The charge is denied. The action is founded upon alleged injurious words spoken by the defendant. The gist of the action is the special damage that followed in consequence of the speaking and publication of the alleged injurious words.

Phillips v. Hofer, 1 Pa. 62, 44 Am. Dec. 111; *Pollock, Torts*, p. 162; *Lynch v. Knight*, 9 H. L. Cas. 589.

If the words spoken by the defendant had the legal and natural result complained of, then the cause of action was complete when the plaintiff left her husband.

Pollock, Torts, p. 164.

The action was not brought within a year after the plaintiff had left her husband.

Com. v. Haas, 57 Pa. 445.

The statutes of limitation, which enact that actions shall not be brought after the lapse of certain periods from the time when the cause of action accrued, bar actions brought after the time so limited, though the cause of action was not discovered, or practically discoverable, by the injured party when it accrued, or was even fraudulently concealed from him by the wrongdoer until after the time limited by the act had expired.

Endlich, *Interpretation of Statutes*, p. 18.

The defendant had a right to speak, and even if he did call plaintiff vile names he cannot be held in damages for having done so. The simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private.

NOTE.—As to wife's right of action for inducing her husband to leave her, see *Tucker v. Tucker* (Miss.) 82 L. R. A. 623, and authorities in footnote thereto. See also *Brown v. Brown* (N. C.) 38 L. R. A. 242.

40 L. R. A.

Smith, Mast. & S. pp. 410, 411, **460, 461. The special damage alleged must be the natural and probable result of the defendant's wrongful conduct.

18 Am. & Eng. Enc. Law, p. 446.

Messrs. E. J. Lichtenwalner and Edward Harvey, for appellee:

It was a fiction of the common law that by marriage the husband and wife became one legal person. It was also assumed that the wife lost her identity by marriage and became merged in her husband. This fiction was unknown to the civil law.

Story, Eq. § 1867.

There is no doubt that at common law a husband had a right of action against another for enticing away his wife and for depriving him of her consortium. And it is by no means clear that the same law denied a remedy to the wife if deprived of the support and association of her spouse.

Lynch v. Knight, 9 H. L. Cas. 577.

Under the act of April 11, 1856 (Pub. Laws, 315), she can, under certain limitations, sustain an action of slander or libel or for the recovery of her separate earnings. And she can, under this last act, maintain a suit against her husband.

May v. May, 62 Pa. 206.

For personal injuries she may maintain an action in her own name.

Carr v. Easton, 142 Pa. 139; *Kelley v. Mayberry Twp.* 154 Pa. 440.

A married woman has a pecuniary interest in the life of her husband. She may insure his life and recover the loss because of her interest in his life. She may maintain an action for damages for any injury causing the death of her husband, and her pecuniary interest in the damages recovered is measured by the rules of distribution under the intestate laws.

Delaware, L. & W. R. Co. v. Jones, 128 Pa. 308; *Fink v. Garman*, 40 Pa. 95.

At common law the right of action for a tort committed upon a married woman belonged to her.

Bishop, Married Women, § 705; *Reeves, Dom. Rel.* 87.

The action dies with her.

Bacon, Abr. Baron and Feme. K.

But the death of the husband, or a divorce, will not abate the action.

Lodge v. Hamilton, 2 Serg. & R. 491.

To entice away or corrupt the morals and affections of one's consort is a civil wrong for which the offender is liable to the injured husband or wife.

Bigelow, Torts, 153; *Cooley, Torts*, 227; *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Clovo v. Chayman*, 125 Mo. 101, 26 L. R. A. 412; *Price v. Price*, 91 Iowa, 698, 29 L. R. A. 150; *Foot v. Card*, 58 Conn. 1, 6 L. R. A. 829; *Haynes v. Nowlin*, 129 Ind. 581, 14 L. R. A. 787; *Overruling Logan v. Logan*, 77 Ind. 558.

A married woman can maintain an action against persons who wrongfully entice her husband from her and alienate his affections, and thereby cause a separation between them.

Lockwood v. Lockwood, 67 Minn. 476; *Warren v. Warren*, 89 Mich. 123, 14 L. R. A. 545;

Mehrhoff v. Mehrhoff, 26 Fed. Rep. 13; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Clark v. Harlan*, 1 Cin. Sup. Ct. Rep. 418; *Baker v. Baker*, 16 Abb. N. C. 293; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, 17 Abb. N. C. 226; *Jaynes v. Jaynes*, 39 Hun. 40.

The law will never suffer an injury and a damage without a remedy.

Winsmore v. Greenbank, Willes, Rep. 577.

Where there is any evidence which alone would justify an inference of the disputed fact, the case must go to the jury, however strong or persuasive may be the countervailing proof.

Howard Exp. Co. v. Wile, 64 Pa. 201.

It is their exclusive province to pass upon the credibility of the witnesses, weigh the evidence, and ascertain the facts.

Lerch v. Bard, 153 Pa. 575; *Egbert v. Payne*, 99 Pa. 289.

When a case depends on oral testimony, such testimony must be submitted to the jury.

Lehigh Coal & Nav. Co. v. Evans, 176 Pa. 28.

Fell, J., delivered the opinion of the court: The right of a husband to maintain an action against one who has wrongfully induced his wife to separate from him seems not to have been doubted since the case of *Winsmore v. Greenback* (decided in 1745) Willes Rep. 577. The right of a wife to maintain an action for the same cause has been denied, because of the common-law unity of husband and wife, and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery when her husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship, and aid of the other, and the injury is the same whether it affects the husband or the wife. Where the wife has been freed from her common-law disabilities, and may sue in her own name and right for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognized and sustained in jurisdictions where she has the capacity to sue, notably in the cases of *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Foot v. Card*, 58 Conn. 4, 6 L. R. A. 829; *Seater v. Adams*, 66 N. H. 142; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Haynes v. Nowlin*, 129 Ind. 581, 14 L. R. A. 787; *Warren v. Warren*, 89 Mich. 128, 14 L. R. A. 546; *Bassett v. Bassett*, 20 Ill. App. 543; *Price v. Price*, 91 Iowa, 693, 29 L. R. A. 150; *Clow v. Chapman*, 125 Mo. 101, 26 L. R. A. 412; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13. The New York and Indiana cases cited overrule the earlier cases in those states in which a different conclusion had been reached. The only decisions in which we find the right denied are *Duffies v. Duffies*, 76 Wis. 374, 8 L. R. A. 420; and *Doe v. Roe*, 82 Me. 503, 8 L. R. A. 833. Of late years, the right of the wife to sue has generally been maintained by text-writers. It is said in Bigelow, Torts, 158: "To entice 40 L. R. A.

away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife." And in Cooley, Torts, 228: "We see no reason why such an action should not be supported, where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her." In 1 Jaggard, Torts, p. 467, many of the cases on the subject are referred to, and the conclusion is thus stated: "On the other hand, it has been insisted that in natural justice no reason exists why the right of the wife to maintain an action against the seducer of her husband should not be co-extensive with the right of action against her seducer. The weight of authorities and the tendency of the legislation strongly incline to the latter opinion." The same proposition is stated in 1 Am. & Eng. Enc. Law, 2d ed. p. 166, and in 1 Bishop, Mar. & Div. § 1358. The defendant in this action was the father of the plaintiff's husband, and the case was one to be carefully guarded at the trial. The intent with which he acted was material in determining his liability. It was his right to advise his son, and in so doing, in good faith and with a proper motive, he should not be regarded in the same light as a mere intermeddler. A clear case of want of justification on the part of the parents should be shown before they should be held responsible. Cooley, Torts, 265; *Hutcheon v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb. 439; *Huling v. Huling*, 32 Ill. App. 519; *Tasker v. Stanley*, 153 Mass. 148, 10 L. R. A. 468; *Fratini v. Caslini*, 44 Am. St. Rep. 850, note (66 Vt. 273). On the trial the plaintiff was held to distinct and clear proof that the defendant wrongfully and maliciously caused her husband to abandon her. Every right which the defendant could properly claim in this regard was carefully stated in a very clear and adequate charge. The claim that the action was, in effect, an action for words spoken, and consequently barred by the statute of limitations, cannot be sustained. It was not either in form or in substance an action of slander, and the words proved were only one of the many means employed by the defendant to effect his purpose.

The judgment is affirmed.

John W. DEMPSEY, Appt.,
v.

John DOBSON et al.

(184 Pa. 588.)

A custom or usage of carpet making which would give the color mixer an exclusive title as against his employer to the various combinations and shades of color devised by him for use in the manufacture of carpets in his employer's mill is unreasonable, and cannot be sustained.

(February 21, 1898.)

NOTE.—For prior appeal in this case, see Dempsey v. Dobson (Pa.) 82 L. R. A. 761.

As to property in secret processes, recipes, etc., see note to Tode v. Gross (N. Y.) 13 L. R. A. 652. See also Watkins v. Landon (Minn.) 19 L. R. A. 236.

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of defendants in an action brought to recover damages for unlawful detention and copying of plaintiff's color books. *Affirmed.*

The facts are stated in the opinion.

Messrs. F. Carroll Brewster and George W. Harkins for appellant.

Mr. Richard P. White, for appellees:

Usage is never admissible to oppose or alter a general principle of law, and upon a fixed state of facts to make the legal rights or liabilities of the parties other than they are at common law.

Barnard v. Kellogg, 10 Wall. 384, 19 L. ed. 987; *Rapp v. Palmer*, 3 Watts, 178.

Nothing should be more pertinaciously resisted than these attempts to transfer the functions of the judge from the bench to the witness-stand, by evidence of customs in derogation of the general law, that would involve the responsibilities of the parties in rules whose existence, perhaps, they had no reason to suspect before they came to be applied to their rights.

Bolton v. Colder, 1 Watts, 368; *Wigglesworth v. Dallison*, 1 Dougl. 201; 1 Smith, Lead. Cas. pt. 2, pp. 928-954.

The recipes prepared by the color-mixer for the use of his employers in the manufacture of their carpets belonged to them, so far, at least, as to give them the right to continue the use of the various colors and shades produced by them.

Dempsey v. Dobson, 174 Pa. 122, 32 L. R. A. 761; *Makepeace v. Jackson*, 4 Taunt. 770.

Vindictive damages could not be allowed, no injury was shown, and for a bare technical right to nominal damages this court would not reverse.

Ely v. Parsons, 55 Conn. 83.

Where an employee uses his own books to make entries in the course of his employment, which it was his duty to make and to keep for his employers' information, the books so used become the property of the master.

See Wood, Mast. & S. 2d ed. p. 202.

Williams, J., delivered the opinion of the court:

This case was in this court in 1896, and is reported in 174 Pa. 122, 32 L. R. A. 761. A verdict and judgment had been obtained in the court below against the defendants, from which they appealed. We reversed the judgment, holding that a color mixer could not assert, as against his employer, an exclusive title to the various combinations and shades of color devised by him for use in the manufacture of carpets in his employer's mill. But we awarded a *venire facias de novo*, because of an allegation that violence had been used by the defendants in the detention of the plaintiff, and in preventing him from carrying away from the mill his color books. A new trial has now been had. The charges of the use of unlawful violence do not seem to have been pressed, but the plaintiff attempted on the trial to prove a custom or usage prevailing in

the business of carpet making, by which the results of the color mixer's skill and labor in the service of his employer are recognized as belonging exclusively to the employee, the color mixer; the employer, the manufacturer, for whose use the colors were devised, having no title whatever to them. The several assignments of error relate to the rejection of the evidence offered to establish such a custom. It is one of the requisites of a good custom that it must be reasonable. Another is that it must not be contrary to law. The custom sought to be set up was an unreasonable one. The color mixer, like the designer and the weaver, is employed because of his supposed ability to serve his employer in the particular line of labor which he is expected to follow. First comes the work of the designer, who prepares, or invents, it may be, the pattern after which the carpet is to be made. Then comes the color mixer, who is to mix his employer's colors in such proportions as to produce the necessary shades required by the pattern that has been adopted. Finally come the application of the colors and the weaving. The services of each and all these mechanics are requisite to the production of the carpet. The employer has an equal right to the faithful service of each, and is equally, so far as his own business is concerned, entitled to the results of the labor of each. If a color mixer could at his pleasure carry off the recipes and color books from his employer's factory, and refuse to permit their further use except upon his own terms, it would be in his power to inflict enormous loss on the manufacturer at any moment, and not merely to disturb, but to destroy, his business. Such a custom would not be reasonable, and could not be sustained. But it is against the law. The courts of the United States, of this state, and, so far as I have been able to examine, of all the states in the Union, recognize the rule laid down when this case was here in 1896, that "the designs and recipes so made for him [an employer] are, as between his employees and himself, his, for the purposes of his own manufacturing business. Even if his employee had obtained letters patent for his formula, protecting himself thereby against the public, still the employer's right to continue its use [in his own business] would be protected by the United States courts." *Solomons v. United States*, 187 U. S. 342, 34 L. ed. 687. To the same effect are *Stemmer's Appeal*, 58 Pa. 155, 98 Am. Dec. 243; *Dempsey v. Dobson*, 174 Pa. 122, 32 L. R. A. 761.

The several offers made for the purpose of showing the existence of the alleged custom were properly rejected. In the absence of proof of the alleged acts of violence, we fully concur with the learned judge of the court below that there was nothing shown by the evidence on the part of the plaintiff sufficient to sustain a verdict against the defendants, and that the case was a proper one for a compulsory nonsuit.

The judgment is affirmed, and judgment is now entered in favor of the defendants.

Re Estate of Susan E. DU PLAINE, Deceased.

(185 Pa. 832.)

A mortgage for one half the trust estate, obtained for himself alone by one of the cestuis que trust from the trustee in a joint trust to pay one half of the income to such *cestui que trust* and the other half to his sister, will inure to the benefit of his sister as well as himself, where he obtained the mortgage by pressure when the trustee was financially embarrassed, but concealed these facts from his sister, although it is not shown that any of the trust funds went into the mortgaged property.

(April 4, 1898.)

A PPEAL by Benoni C. Du Plaine from a decree of the Orphans' Court for Philadelphia County adjudging his sister Helen Augusta C. Childs entitled to the benefit of securities which he had obtained for his share of a trust estate which had been left to the brother and sister, but which was in danger of loss because of the financial embarrassment of the trustee. *Affirmed.*

The opinion of the orphans' court, which was adopted by the supreme court, is as follows:

"The petitioner and respondent are brother and sister. Their mother by her will gave all the rest, residue, and remainder of her estate to a trustee in trust to manage the same, and collect and receive the rents, issues, and profits thereof, and 'pay in semiannual instalments one full one half part of net rents, income, interest, dividends, and profits unto my son, Benoni C. Du Plaine, for and during all the term of his natural life,' etc. And the 'said trustee shall pay the remaining one half part of the said net rents, interest, income, dividends, and profits, in semiannual instalments, unto my said daughter, Helen Augusta C. Childs, for and during the full term of her natural life,' etc. In the case of the death of either of the said life tenants, the principal was to go to their children, with, however, a power of disposition otherwise by will; and, in default of children or a will, then cross remainders from one to the other. The brother had accidentally learned that the trustee was in an embarrassed condition financially, and went to him, and insisted upon a settlement for his one half of the principal sum which was in his hands as trustee, and under pressure of threatened arrest, etc., received from him a mortgage upon some real estate for exactly one half of the trust estate. The brother for several years concealed all knowledge of the insolvent condition of the trustee from his sister, and also the fact that he had tried to protect himself by securing this mortgage. This he now claims he holds for his own benefit alone, and that his sister has no interest therein. Such are, briefly stated, the facts.

"It is hard to find language sufficiently strong to condemn the conduct of a brother who would thus try to secure himself and leave his sister in the lurch, and, after he supposed he

was himself secure, not to give her the knowledge by which she might have been able to secure herself, also; but the case is not to be decided upon any sentimental considerations, but upon the law as applicable to the facts as they are presented. It will be observed that the trust is a joint one, and although the trustee, in an account filed, divided the fund in half, and stated that he held one half for one, and the other half for the other, of the *cestuis que trust*, there was no distribution so decreed; and in fact there could not be any separation of this fund, under the will of the testatrix, until one or the other of the *cestuis que trust* died, when other interests might intervene. The mother gave all her residuary estate to this trustee, to pay one half of the income to the son, and one half of the income to the daughter. She did not give one half of the principal, to be held for each, but it all is to be held jointly in trust for both. In *Aubert's Appeal*, 119 Pa. 52, and in *Wilen's Appeal*, 105 Pa. 121, the supreme court laid down the law that, where an estate is so given for two persons, it is to remain intact until the time for distribution arrives, because 'we cannot say,' to use their language, 'that a moiety of the income of the whole may not be more valuable to the surviving life tenant than the whole of the income of a moiety.' The time for the distribution of this fund has not arrived, and therefore there can be no distribution or division of it; and in case of a devastavit, as has here happened, anything that the vigilance of either of the *cestuis que trust*, or anyone else, has rescued from the wreck, must inure to the benefit of both of them. It has been settled that where there is a community of interest there is a community of duty; each of those interested must be faithful to himself, and equally as well to all the others interested. He can secure no advantage over the others because he has found out something they do not know, or because perhaps he is in a better position to protect himself than are they. The rule of law as stated in *Keech v. Sandford*, 1 White & T. Lead. Cas. Eq. 4th Am. ed. 64, has been followed in numerous cases in this state. 'Whenever one person is placed in such relations to another, by the act or consent of that other, or by the act of a third person, or by the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated.' This doctrine was enforced in *Weaver v. Wible*, 25 Pa. 270, 64 Am. Dec. 696, the syllabus of which is as follows: 'When several persons have a joint or common interest in an estate, one cannot purchase an encumbrance or an outstanding title, and set it up against the rest, for the purpose of depriving them of their interests.' Chief Justice Lewis, in delivering the opinion, said: 'Community of interest produces community of duty. . . . A conveyance to one of several tenants in common, or a deed to one of two devisees of the same land, shall inure to the benefit of all who came in under the same title, and are holding jointly or in common. . . . Where several persons have a joint or common interest in an estate, it is not to be tolerated that one shall purchase an encumbrance or an

NOTE.—As somewhat connected with the subject of the present unusual case, see, as to tracing trust funds, the case of *Ferchen v. Arndt* (Or.) 29 L. R. A. 664, and cases cited in footnote thereto.
40 L. R. A.

outstanding title, and set it up against the rest, for the purpose of depriving them of their interests. Chancellor Kent, with great truth, remarked that such a proceeding would be 'repugnant to a sense of refined and accurate justice, and would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties created.' It is the duty of all to deal candidly and benevolently with each other, and to cause no harm to their joint interests." To the same purpose, see *Lloyd v. Lynch*, 28 Pa. 419, 70 Am. Dec. 137; *Gibson v. Winslow*, 46 Pa. 380, 84 Am. Dec. 552; *Kennedy v. Borie*, 166 Pa. 360; *McOutcheon v. Smith*, 173 Pa. 101; *Powell v. Lantzy*, 178 Pa. 543.

The fact which was so urgently pressed at the argument, that it was not proved that any portion of these trust funds went into the particular property upon which the mortgage was given, can make no difference. Whether they

did or did not is immaterial. The only claim the respondent had upon the trustee was as a *cestui que trust* under this will. He was not a creditor in any other way. When this mortgage was given to him, the consideration passing was that the trustee owed this trust-estate money. Therefore anything that he received upon that account must, in law, equity, morals, and common decency, be held by him in trust for his sister as well as himself. The petition in this case is granted.

Mr. B. F. Fisher for appellant.

Mr. William C. Hannis for appellee.

Per Curiam:

There is no substantial error in the findings of fact in this case, and on the facts thus established the decree complained of is free from error. The questions involved were well considered and correctly decided by the orphans' court, and on its opinion the decree is affirmed, and appeal dismissed, at appellant's costs.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

UNION PACIFIC RAILWAY COMPANY
et al., *Piffs. in Err.*,
v.

Horace W. YATES.

(49 U. S. App. 241, 79 Fed. Rep. 584, 25 C. C. A. 103.)

1. Medical books cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated.
2. The Federal court will not follow the state court decisions as to the admissibility in evidence at common law of extracts from medical books.

3. A statute making books of science or art presumptive evidence of facts of general notoriety or interest does not include medical works so as to make them evidence of the opinions or theories therein expressed.

4. A treatise on concussion of the spine, about the extent and character of which there is some difference of opinion among the medical profession, is not admissible in evidence to establish the fact that an ailment from which a person appears to be suffering is a result of nervous shock sustained some years previously in a railway collision.

(March 22, 1897.)

NOTE.—Scientific books and treatises as evidence.

- I. Exact sciences.
 - a. General rule as to admissibility.
 - b. Tables of expectancy of life.
 1. Admissibility generally.
 2. In accident cases.
 3. In other cases generally.
 4. Conclusiveness and effect.
 - c. The almanac.
- II. Inexact sciences.
 - a. General rule as to admissibility.
 - b. Reasons for the rule.
 - c. The contrary rule.
 - d. Opinions founded on books.
 - e. Use of, on examination.
 - f. Use to sustain or discredit expert.
 - g. Use of, on cross-examination.
 - h. Use of, in argument.
- III. Law.
- IV. Miscellaneous matters.
 - I. Exact sciences.

a. General rule as to admissibility.

The books which are admitted before a jury as primary evidence are those which relate to science deemed exact, or such as by long use in the practical affairs of life have come to be accepted as standard and unvarying authority in determining the action of those who use them. *Tucker v. Donald*, 60 Miss. 460, 45 Am. Rep. 416.

Books of exact science in which conclusions

from certain and consistent data are reached by processes too intricate to be elucidated by a witness, when shown to have been accepted as standards upon the particular subject under examination, are admitted in evidence. *Shover v. Myrick*, 4 Ind. App. 7.

Almanacs, astronomical calculations, tables of logarithms and the like, and tables of life expectations in matters of insurance, are among the exact sciences which are admissible as *prima facie* evidence. *Tucker v. Donald*, 60 Miss. 460, 45 Am. Rep. 416.

When the scientific work is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, where such statistics and tabulations are generally relied upon by experts in the particular field of the mechanic arts with which such statistics and tabulations are concerned. *WESTERN ASSUR. CO. v. J. H. MOHLMAN CO.*

b. Tables of expectancy of life.

1. Admissibility generally.

A table showing the expectancy of life in healthy persons of different ages, printed in books of general acceptance and authority in the courts, such as the *Carlisle* and *Northampton* and other tables of expectancy, is admissible in evidence in cases where such evidence is applicable. *Sellers v. Foster*, 27

ERROR to the Circuit Court of the United States for the Southern District of Iowa to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendants' negligence. *Reversed.*

Before *Sanborn* and *Thayer*, Circuit Judges, and *Lochren*, District Judge.

The facts are stated in the opinion.

Mr. John N. Baldwin, for plaintiffs in error:

Under common-law procedure it was not competent to read books of science to a jury as evidence, because the statements therein contained were not only wanting in the sanctity of an oath, but were made by one who was not present and was not liable to cross-examination. For that reason they were excluded, notwithstanding the opinion under oath of scientific men, that they were books of authority.

Gallagher v. Market Street R. Co. 67 Cal. 18, 56 Am. Rep. 718; *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178; *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171; *Carter v. State*, 2 Ind. 617; *Fowler v. Lewis*, 25 Tex. Supp. 380.

■ This book was not admissible under the statutes of the state of Iowa.

Ashworth v. Kittridge, 12 Cush. 193, 59 Am. Dec. 178; *Whiton v. Albany City Ins. Co.* 109 Mass. 24; *Com. v. Sturtevant*, 117 Mass. 132, 19 Am. Rep. 401; *Com. v. Brown*, 121 Mass. 69; *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477; *Pinney v. Cahill*, 48 Mich. 584; *Fraser v. Jennison*, 42 Mich. 206; *Gale v. Rector*, 5 Ill. App. 481; *St. Louis, A. & T. R. Co. v. Jones* (Tex.) 14 S. W. 309; *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Fowler v. Lewis*, 25 Tex. Supp. 380; *Ware v. Ware*, 8 Me. 42; *Harris v. Panama R. Co.* 3 Bosw.

Neb. 118; *Georgia R. & Bkg. Co. v. Oaks*, 52 Ga. 410; *Shover v. Myrick*, 4 Ind. App. 7.

And is proper evidence to establish the statements and estimates contained in it. *Shover v. Myrick*, 4 Ind. App. 7.

And expert witnesses may testify as to results and conclusions arrived at by them with reference to the probable length of life of a person, and refer to the tables and data upon which their knowledge is based in whole or in part, as a means of refreshing their memory. *Shover v. Myrick*, 4 Ind. App. 7.

Carlisle and other similar tables are to be received in evidence for the purpose of showing the expectation and proper duration of life, upon judicial notice of their genuineness and authoritativeness, and legal proof of such genuineness and authoritativeness is not required. *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 518.

And courts will take judicial notice of such standard tables as the *Carlisle* tables, read from the *Encyclopædia Britannica*; and they are not subject to the objection that no foundation had been laid for their introduction in evidence. *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533.

And the *Carlisle* tables contained in the *Encyclopædia Britannica* are admissible in evidence under Iowa Code, § 3853, without preliminary proofs. *Haden v. Sioux City & P. R. Co.* 90 Iowa, 735; *Worden v. Humeston & S. R. Co.* 78 Iowa, 310.

And so are the tables of expectancy of life contained in *Johnson's New Universal Encyclopædia*; *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380.

And evidence of a witness that he is acquainted 40 L. R. A.

7; *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171; *State v. O'Brien*, 7 R. I. 336; *Davis v. State*, 38 Md. 15; *Carter v. State*, 2 Ind. 617; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41; *Stilling v. Thorp*, 54 Wis. 534, 41 Am. Rep. 60; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676; *Epps v. State*, 102 Ind. 539; *People v. Sessions*, 58 Mich. 594; *Rogers, Expert Testimony*, pp. 237-273; 2 Rice, Ev. p. 1254; *Bradner, Ev.* p. 815; 15 Am. & Eng. Enc. Law, p. 207.

Messrs. George E. Hibner and Harl & McCabe, for defendant in error:

In actions at law in the courts of the United States, the rules of evidence and the law of evidence generally of the states prevail in those courts.

Ex parte Fisk, 113 U. S. 720, 28 L. ed. 1120; *Hinds v. Keith*, 13 U. S. App. 222, 57 Fed. Rep. 10, 6 C. C. A. 231.

In *Bowman v. Woods*, 1 G. Greene, 441, such works were held admissible under the common law.

So in *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391.

In *Brodhead v. Wittse*, 35 Iowa, 429, the statute is set out in the opinion, and it is distinctly ruled therein that medical works are within its provisions.

In *Quackenbush v. Chicago & N. W. R. Co.* 73 Iowa, 458, the admission of a work on diseases of throat and nose was held correct.

In *Peck v. Hutchinson*, 88 Iowa, 320, *Wells' Treatise on the Eye* was introduced.

On rehearing.

If we find that the supreme court of Iowa has adopted a radically different canon of construction than that of the California court, such canon of construction is obligatory upon this court. Such is the case.

Kuhns v. Chicago, M. & St. P. R. Co. 65 Iowa, 528. See as further illustrative *Craw-*

with *Johnson's New Universal Encyclopædia*, and that it was his impression that it was a standard work, is sufficient to identify it as a standard authority for the purpose of rendering it admissible in evidence to show the expectancy of life in an action against a railroad company for a personal injury causing death. *Gorman v. Minneapolis & St. L. R. Co.* 78 Iowa, 509.

So, the expectation of human life is a matter of experience, about which it is not error for the judge to instruct the jury in an action in which it is material. *Johnson v. Hudson River R. Co.* 6 Duer, 633.

A book containing tables of expectancy of life, however, which is not one of those standard works which courts take judicial notice of and recognize as authority, is not admissible in evidence in the absence of proof of its correctness. *Galveston, H. & S. A. R. Co. v. Arispe*, 81 Tex. 517.

But the admission in evidence of an excerpt in the form of a table of expectation of life which contains no intrinsic evidence of authenticity, in an action against a saloonkeeper under the civil damage act, is not reversible error where it was more favorable to the party excepting than were the *Carlisle* tables as contained in a law book which was properly admitted in evidence. *Sellers v. Foster*, 27 Neb. 118.

The American table of mortality has superseded the *Carlisle* tables in America, and should be resorted to by the courts as a basis for the calculation of annuities dependent upon the probability of human life. *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 818.

Jord v. Williams, 48 Iowa, 247; *Nosler v. Chicago, B. & Q. R. Co.* 73 Iowa, 271; *Worden v. Humeston & S. R. Co.* 76 Iowa, 314; *Gorman v. Minneapolis & St. L. R. Co.* 78 Iowa, 513.

Thayer, Circuit Judge, delivered the opinion of the court:

Horace W. Yates, the defendant in error, sued the Union Pacific Railway Company and its receivers, who are the plaintiffs in error, for injuries sustained in a railway collision which occurred on November 22, 1892, near the town of Alda, in the state of Nebraska, on the line of the Union Pacific Railroad. The plaintiff below was a mail agent in the service of the United States, and he was riding in that capacity on one of the trains at the time of the collision. The injuries which the plaintiff sustained in consequence of the collision, to all outward appearances, were not serious. One of his arms and one of his legs were bruised, but not broken, and his left ear was cut, but beyond this his body appears to have borne no visible marks of injury. It was contended at the trial, however, that the plaintiff sustained a severe shock, which affected the nerves of the spine, and had produced a dangerous and progressive disease of the spinal cord, which had permanently disabled him, and was liable to prove fatal. In support of this contention, the plaintiff offered in evidence, and was allowed to read to the jury, over the objection of the defendant company, certain extracts from a book or monograph, which was written by Dr. John Eric Erichsen, entitled "On Concussion of the Spine and Nervous Shock and Other Obscure Injuries to the Nervous System, in Their Clinical and Medico-Legal Aspects" (London, 1875). The material parts of the extracts thus read were as follows:

"It is well known to every surgeon of experience that no injury to the head is too

trifling to be despised. This observation made of old by Hippocrates may be applied with equal, if not greater, justice to injuries of the spine; for, if the brain is liable to suffer serious primary lesion and protracted secondary disease from the infliction of slight, and perhaps, at the time, apparently trivial, injuries to the head, the spinal cord is at least equally prone to become functionally disturbed and organically diseased from injuries sustained by the vertebral column. My object in these lectures will be to direct your attention to certain injuries of the spine that may arise from accidents that are often apparently slight, from shocks to the body generally, as well as from blows inflicted directly upon the back, and to describe the train of progressive symptoms that lead up to the obscure, protracted, and often dangerous diseases of the spinal cord and its membranes, that sooner or later are liable to supervene thereon. These injuries of the spine and spinal cord occur not unfrequently in the ordinary accidents of civil life, in falls, blows, horse and carriage accidents, injuries in gymnasiums, etc., but in none more frequently or with greater severity than in those which are sustained by persons who have been subjected to the violent shock of a railway collision. And if, in these lectures, I speak more of the injuries of the spine arising from this than from any other class of accidents, it is not because I wish to make a distinction in injuries of the spine according to their causes, and still less to establish anything like a specialty of 'railway surgery,' but rather because injuries of the nervous system of the kind we are about to discuss have become of much practical importance from the great frequency of their occurrence, consequent on the extension of railway traffic, and because they are so frequently the cause of litigation. There is also a special and painful interest attaching to them

But it detracts nothing from the value of a table of expectancy properly admitted in evidence that other tables are also recognized. *Boettger v. Scherpe & K. Architectural Iron Co.* 136 Mo. 531.

And the admission in evidence, in an action for personal injury resulting in death, of Dr. Farr's Tables, constructed from the official records of the registrar general for England and Wales, known as the English Tables, is not reversible error as against the defendant, though they differ from the tables based upon the American experience and recognized by statute, as they show a less number of years than that shown by the American experience. *Cooper v. Lake Shore & M. S. R. Co.* 66 Mich. 281.

2. In accident cases.

The Carlisle and Northampton tables are standard tables on the subject of duration of life, and they are admissible in evidence in an action for damages for alleged negligence causing death, as tending to show the probable duration of the life of the person injured if such injury had not happened, as an element of damages. *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391; *Worden v. Humeston & S. R. Co.* 76 Iowa, 310; *Chase v. Burlington, C. R. & N. R. Co.* 78 Iowa, 675; *Duval v. Hunt*, 34 Fla. 85; *Georgia R. & Bkg. Co. v. Oaks*, 52 Ga. 410; *Delsen v. Chicago, St. P. M. & O. R. Co.* 43 Minn. 454; *O'Mellia v. Kansas City, St. J. & C. B. R. Co.* 115 Mo. 205; *Sauter v. New York C. & H. R. R. Co.* 6 Hun, 448, 66 N. Y. 50, 23 Am. Rep. 18; *Steinbrunner v. Pittsburgh & W. R. Co.* 146 Pa. 504; *Gal-*
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veston, H. & S. A. R. Co. v. Leonard (Tex. Civ. App.) 29 S. W. 995; *Gulf, C. & S. F. R. Co. v. Smith* (Tex. Civ. App.) 26 S. W. 644; *Gulf, C. & S. F. R. Co. v. Johnson*, 10 Tex. Civ. App. 254; *McKeigue v. Janesville*, 68 Wis. 60; *Mulcairns v. Janesville*, 67 Wis. 24; *Friend v. Ingersoll*, 39 Neb. 717.

Though the person killed was in poor health. *Galveston, H. & S. A. R. Co. v. Leonard* (Tex. Civ. App.) 29 S. W. 955.

And the American Experience Table, which is a standard table and has been long recognized both by statute and by courts, is admissible in evidence in an action for a personal injury causing death, to show the expectancy of a deceased person's life. *Boettger v. Scherpe & K. Architectural Iron Co.* 136 Mo. 531.

And the mortuary tables contained in How. (Mich.) Stat. § 4245, are admissible in evidence in an action for a personal injury, as tending to show a person's expectancy of life at a certain age. *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L. R. A. 500.

So, a witness in an action for a personal injury resulting in death may testify as to the probable period of the natural life of the person injured, by reference to the recognized American life table. *Louisville, C. & L. R. Co. v. Mahoney*, 7 Bush, 236.

And a witness may be permitted to testify in such an action from tables prepared by the American Legion of Honor, showing estimates of the probable duration of lives of men at different ages, where it is not claimed that they were not approved or correct tables. *San Antonio & A. P. R. Co. v. Bennett*, 78 Tex. 151.

from the distressing character of the symptoms presented by the sufferers. Moreover, in these cases there is always a peculiar difficulty, which is often greatly increased by the absence of evidence of outward and direct physical injury, by the obscurity and insidious character of the early symptoms, the slowly progressive development of the secondary organic lesions, and the functional derangements entailed by them, and the very uncertain nature of the ultimate issues of the case. Thus, they constitute a class of injuries that often tax the diagnostic skill of the surgeon to the very utmost. [Lecture 1, pp. 1, 2.] I wish particularly and very specially to impress upon you that, although I shall have frequent occasion to speak of 'shocks' to the nervous system arising from railway accidents, I do not consider that these injuries stand in a different category from accidents occurring from other causes in civil life; and it will be one of the main objects of these lectures to show you that precisely the same effects may result from other and more ordinary injuries. It must, however, be evident to you all that in no ordinary accidents can the shock, physical and mental, be so great as those that occur on railways. The rapidity of the movement, the momentum of the persons injured and of the vehicle that carries them, the suddenness of its arrest, the helplessness of the sufferers, and the natural perturbation of mind that must disturb the bravest, are all circumstances which necessarily greatly increase the severity of the resulting injury to the nervous system, and which have led surgeons to consider these cases as somewhat exceptional and different from ordinary accidents. There is, in fact, much the same difference between these and the more ordinary injuries of the nervous system as there is between a gunshot wound and other contused and lacerated wounds of the limbs. The

cause is special, and the results are peculiar; but, though peculiar, they are not so unlike those arising from other accidents as to justify us in regarding them as being in any essential respect distinct and different. The peculiarity of those obscure injuries of the nervous system caused by railway shocks is sufficiently great, however, to warrant us in grouping them together and considering them as a whole in a separate chapter in the great book of surgery. Perhaps the one circumstance which more than any other gives a peculiar character to a railway accident is the thrill or jar—the '*ébranlement*' of French writers; the sharp vibration, in fact—that is transmitted through everything subjected to it. It is this vibratory shock or jar which by some is compared to an electric shock, by others to setting the teeth on edge, that causes a carriage to be shattered into splinters, and occasions the sharp, tremulous movement that runs through every fiber of its occupants, and that constitutes the shock. In addition to this, the body of the traveler is thrown to and fro often five or six times without any power of resistance or self-preservation. [pp. 5, 6.] In considering these injuries, I shall adopt the following arrangement: (1) The effects of severe blows directly applied to the spine, but without obvious lesion of the bone or ligament. (2) The consideration of the effects of slight and apparently trivial injuries applied directly to the spine. (3) The effects that injuries of distant parts of the body, or that shocks of the system unattended by any direct blow upon the back, have upon the spinal cord. (4) The effects produced by sprains, wrenches, or twists of the spine. [Lecture 2, pp. 14, 15.] My object in the present lecture is to direct your attention to a class of cases in which the injury inflicted upon the back is either very slight in degree, or in which the blow, if more severe, has fallen

And an accountant may give evidence in such an action, in which the deceased was under a covenant to pay his mother an annuity of £200 during their joint lives, after referring to the Carlisle tables, as to the average duration of life of two persons of the age of the mother and son respectively, and as to the price for which an annuity for the mother's life could be bought. *Rowley v. London & N. W. R. Co.* L. R. 8 Exch. 221, 42 L. J. Exch. N. S. 153, 29 L. T. N. S. 180, 21 Week. Rep. 899.

It has been held, however, that the Carlisle tables are immaterial and inadmissible in evidence in an action for injuries not resulting in the death of the person injured. *Nelson v. Chicago, R. I. & P. R. Co.* 38 Iowa, 564.

And that annuity tables are not admissible in evidence in an action for a personal injury, to show the probable duration of the life of the person injured in order to show how long she is likely to live to endure the pain and suffering caused by the injury. *Chicago, B. & Q. R. Co. v. Jounson*, 36 Ill. App. 564.

But in *Chase v. Burlington, C. R. & N. R. Co.* 76 Iowa, 675, *Nelson v. Chicago, R. I. & P. R. Co.* 38 Iowa, 564, *supra*, was said to have been overruled.

And the general rule would seem to be that the competency of standard life expectancy tables is not confined to a case of death of one sustaining personal injury by another's negligence, but that they are also admissible to show the probable duration of life of one suing for a personal injury, on the question of compensation for permanent in-

jury. Louisville, N. A. & C. R. Co. v. Miller, 141 Ind. 533; *Simmons v. Chicago, R. I. & P. R. Co.* 49 Iowa, 87; *McDonald v. Chicago & N. W. R. Co.* 23 Iowa, 124, 96 Am. Dec. 114; *Lincoln v. Smith*, 28 Neb. 762; *Friend v. Ingersoll*, 39 Neb. 717; *Kraut v. Frankfort & S. P. City Pass. R. Co.* 160 Pa. 329.

And that tables of life expectancies are admissible in evidence in an action for a personal injury on the question of damages, though death did not result. *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533; *Richmond & D. R. Co. v. Hissong*, 97 Ala. 187; *Louisville & N. R. Co. v. Hurt*, 101 Ala. 34; *Kansas P. R. Co. v. Lundin*, 3 Colo. 94; *Campbell v. York*, 172 Pa. 205; *Kraut v. Frankfort & S. P. City Pass. R. Co.* 160 Pa. 329; *Mississippi & T. R. Co. v. Ayres*, 16 Lea. 725.

And that a physician and surgeon who attended the person injured may testify as to the expectation of life of a healthy man of such injured person's age, as shown by the Carlisle mortality tables, in an action for alleged negligence causing such injury, where he has testified that the injuries were of a permanent character. *McCue v. Knoxville*, 146 Pa. 580; *Steinbrunner v. Pittsburgh & W. R. Co.* 146 Pa. 504.

Thus, standard mortality tables are admissible in evidence to show the probable duration of life of a healthy person sustaining personal injury by the negligence or wrongful act of another, where the injury has practically destroyed his earning capacity. *Townsend v. Briggs* (Cal.) 32 Pac. 307.

Or, where the injury was permanent and inca-

upon some other part of the body than the spine, and in which, consequently, its influence upon the cord has been of a less direct and often of a less instantaneous character. Nothing is more common than that the symptoms of spinal mischief do not develop for several days after heavy falls on the back. The symptoms arising from these accidents have been very variously interpreted by surgeons, some ignoring them entirely, believing that they exist only in the imagination of the patient, or, if they do admit their existence, they attribute them to other conditions of the nervous system than any that could arise from the alleged accident. And when their connection with and dependence upon an injury have been incontestably proved, no little discrepancy of opinion has arisen as to the ultimate results of the case, the permanence of the symptoms, and the curability, or not, of the patient. [Lecture 4, pp. 77, 78, 79.] I have often remarked that in railway accidents those passengers suffer most seriously from concussion of the nervous system who sit with their backs turned towards the end of the train which is struck. Thus, when a train runs into an obstruction on the line, those who are sitting with their backs to the engine will probably suffer most; whilst if a train is run into from behind, those who are facing the engine will most frequently be the greatest sufferers. Those who are facing the engine are in the first instance thrown suddenly and violently forward off their seats against the opposite side of the compartment; hence they will frequently be found to be cut about the head and face, and more especially across the knees and legs, by coming in contact with the edges of the opposite seats. They then rebound, and in the rebound may sustain that concussion of the spine which they escape in the first shock. Those, on the other hand, who are sitting with their backs to the engine,

being carried backward, when the momentum of the carriage is suddenly arrested, are struck at once, and, if traveling rapidly, are jerked violently against the backs of their seats, and thus suffer, in the first instance and by the first shock, from concussion of the spine. The force with which they strike the partition between the compartments with their shoulders or loins is greatly augmented by their opposite fellow travelers being thrown upon them. In the oscillation and to and fro movements to which the carriage is subjected, they are apt to be thrown forward, and, rebounding, to be struck again about the posterior part of the body. They are more helpless than those who are facing the engine, who frequently have time to stretch out their hands in order to save themselves, or to clutch hold of the sides of the carriage when in the act of being thrown forward. When a carriage is run into from behind, the reverse of this takes place, and the carriage is driven, as it were, against those passengers who have got their backs turned towards the hind part of the train. In the violent oscillations that take place, a passenger is thrown backward and forward by a kind of shuttlecock action, and frequently, coming in contact with others on the opposite side, may become seriously injured, especially by contusions about the head. The oscillations to which the body is subjected in these accidents are chiefly felt in those parts of the vertebral column that admit of most movement, *viz.*, at the junction of the head and neck, of the neck and shoulders, and of the trunk and pelvis. Hence it is that the spine so frequently becomes strained and injured in these regions by railway injuries." Lecture 5, pp. 121, 122.

The admission of the aforesaid extracts from the writings of Dr. Erichsen constitutes the chief error that has been assigned. We

pacitated the person injured from earning compensation which he otherwise would have received. Knapp v. Sioux City & P. R. Co. 71 Iowa, 41.

They are competent evidence to show the duration of the earning capacity and ability to labor of the person injured. Greer v. Louisville & N. R. Co. 94 Ky. 169.

And will be admitted as an aid in determining the amount of the verdict, where the evidence is conflicting as to whether the injuries sustained are permanent. Richmond & D. R. Co. v. Garner, 91 Ga. 27; Blair v. Madison County, 81 Iowa, 313.

Or where there was some evidence tending to show that the injuries received were of a permanent character. Northeastern R. Co. v. Chandler, 84 Ga. 37; McDonald v. Chicago & N. W. R. Co. 23 Iowa, 124, 96 Am. Dec. 114.

So, tables of mortality containing by common consent the most accurate estimate of the probable duration of human life under given conditions when the subject is in reasonably good health may be read in evidence in an action for damages for personal injuries, though it is shown that the plaintiff's condition and health were below the average, and that in fact he was not an insurable risk. Arkansas Midland R. Co. v. Griffith, 63 Ark. 491.

And standard life tables in common use in this country are admissible in such an action, for the purpose of showing the probable duration of life of the person injured, though he was engaged in extra hazardous and dangerous undertakings. Coates v. Burlington, C. R. & N. R. Co. 62 Iowa, 486. 40 L. R. A.

And though when injured he was engaged in a more hazardous employment than persons with reference to whom the tables were compiled, that being merely a circumstance to be considered by the jury as tending to show that his expectancy of life was less than the tables indicate for one of his age. Birmingham Mineral R. Co. v. Wilmer, 97 Ala. 165.

And tables proved to have been used by life insurance companies, and the testimony of an insurance agent touching such tables, are admissible in evidence to show the probabilities of the duration of life in such an action, though the agent does not claim to be an expert as to the tables. Central R. Co. v. Richards, 62 Ga. 306.

But standard life tables in evidence in an action for a personal injury are to be taken subject to the peculiar conditions surrounding the person injured, such as the existence of diseases tending to shorten life, the particular member of his body of the use of which he is deprived, and the extent to which he is disabled from supporting himself. Greer v. Louisville & N. R. Co. 94 Ky. 169.

And they are not admissible in evidence to show the expectancy of life of a person suing for a permanent injury until the proper foundation has been laid by proving his age or introducing evidence from which his age may be inferred or approximated. Atlanta Consol. Street R. Co. v. Beauchamp, 83 Ga. 6; Macon, D. & S. R. Co. v. Moore, 99 Ga. 229.

And they are not proper evidence and instructions as to their use are inappropriate unless there

think that the evidence in question was clearly incompetent when judged by common-law rules of evidence. The authorities, both English and American, are practically unanimous in holding that medical books, even if they are regarded as authoritative, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third, and perhaps a more important, reason for rejecting such testimony, is that the science of medicine is not an exact science. There are different schools of medicine, the members of which entertain widely different views, and it frequently happens that medical practitioners belonging to the same school will disagree as to the cause of a particular disease, or as to the nature of an ailment with which a patient is afflicted, even if they do not differ as to the mode of treatment. Besides, medical theories, unlike the truths of exact science, are subject to frequent modification and change, even if they are not altogether abandoned. For these reasons it is very generally held that when, in a judicial proceeding, it becomes necessary to invoke the aid of medical experts, it is safer to rely on the testimony of competent witnesses, who are produced, sworn, and subjected to a cross-examination, than to permit medical books or pamphlets to be read to the jury. *Collier v. Simpson*, 5 Car. & P. 73; *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178; *Ware v. Ware*, 8 Me. 42, 56, 57; *State v. O'Brien*, 7 R. I. 336, 388; *People v. Hall*, 48 Mich. 482, 490, 42 Am. Rep. 477; *Gallagher v. Market Street R. Co.* 67 Cal. 13, 56 Am. Rep. 713; *Epps v. State*, 102 Ind. 539, 549, 550; *Com. v. Wilson*, 1 Gray, 387; *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 886, 62 Am.

Dec. 171; *Payson v. Everett*, 12 Minn. 217 (Gil. 137); *Fowler v. Lewis*, 25 Tex. Supp. 380; *St. Louis, A. & T. R. Co. v. Jones* (Tex.), 14 S. W. 809, 810; *Lawson*, Ev. pp. 169-171, and cases cited.

In the following cases, to wit, *Bowman v. Woods*, 1 G. Greene, 441; *Stoudenmeier v. Williamson*, 29 Ala. 558, 566, 567, and *Merkle v. State*, 37 Ala. 139, 141, certain medical works of standard authority were received in evidence, and were held to be admissible. But, so far as we have been able to ascertain, these cases are at variance with the well-settled rule which prevails elsewhere. In this connection it should be observed that while the prevailing rule is, as above stated, that medical books cannot be read as independent evidence of the opinions which they contain, yet, under some circumstances, such books may be referred to. For example, a physician is sometimes allowed, while testifying, to fortify an opinion which he may have expressed, by referring to medical works of standard authority on which his opinion is in part predicated; and, when a medical expert has thus indicated the source of his opinion, the books themselves may be offered subsequently, for the purpose of showing that they do not support the opinion expressed, or that they contradict it. *Ripon v. Bittel*, 30 Wis. 619; *Pinney v. Cahill*, 48 Mich. 584. In some states, also, the practice prevails of permitting counsel, while addressing the jury, to read extracts from law books and from scientific works as a part of their argument. This latter practice is approved in some jurisdictions, and strongly condemned in others, while in some jurisdictions the practice in this respect is regarded as a matter which rests entirely in the sound discretion of the trial judge. *Reg. v. Courvoisier*, 9 Car. & P. 362; *State v. Hoyt*, 46 Conn. 330; *Lawson*, Ev. pp. 178, 179. All the authorities agree,

be some evidence as to the value of such person's services or of his capacity to earn money. *Macon, D. & S. R. Co. v. Moore*, 99 Ga. 229.

Nor are mortality tables showing the expectancy of life of the person killed admissible in evidence in an action brought by such person's father for the killing, as it would be the expectation of life of the one who would soonest die in the ordinary course of nature, which should be made the basis of an award of damages. *Illinois C. R. Co. v. Crudup*, 68 Miss. 291.

And the mortality tables found in Howell's Ann. Stat. p. 1084, are not admissible in evidence in an action to recover for the death of a person caused by alleged negligence, where such person was but five years of age, and the table gives no expectancy of life for any age under ten years. *Rajnowski v. Detroit, B. C. & A. R. Co.* 74 Mich. 20.

But the Carlisle life tables are not rendered inadmissible in evidence in an action for a personal injury, for the purpose of showing the expectancy of life of the person injured, by the fact that such person was an infant at the time, and nothing could be recovered for the services of such person until such time as he would have arrived at his majority. *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71.

3. In other cases generally.

The Northampton tables are admissible as evidence tending to show the probable duration of the life of the plaintiff in an action on a contract to support her during life. *Schell v. Plumb*, 55 N. Y. 508.

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And the damages to which a policy holder is entitled as against an insurance company, for becoming insolvent and failing to keep on hand funds required by law and to keep the policy in life, is the value of the policy, and in ascertaining it resort may be had to tables used in life insurance showing the average expectancy of life. *People v. Security Life Ins. & Annuity Co.* 78 N. Y. 114, 34 Am. Rep. 522; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401.

So, the standard and recognized mortality or life tables, and the evidence of experts as to computations based thereon, are competent, in connection with other evidence, to show the expectancy of life and the present value of a life estate or annuity, in estimating damages to a remainderman, resulting from a change of grade of a street, whether before a jury or in an action in equity. *Joliet v. Blower*, 155 Ill. 418.

Courts, as matter of law, have adopted the American Life Annuity tables, and by consulting them they determine the present value of life estates when the person upon whose life the estate depends is of ordinary health and vigor for one of that age, subject, however, to be varied on account of unusual vigor or frailty which may either lengthen or shorten the probable duration of the life estate. *Alexander v. Bradley*, 3 Bush, 667.

And Wigglesworth's tables for estimating life estates may be used by the jury in computing damages under proper instructions as to such use, in an action for a breach of covenants of seisin, where the plaintiff proves an outstanding life estate as

we believe, that standard works which deal with the exact sciences, including herein interest and annuity tables, and tables compiled from well-established data showing the average duration of human life, are receivable in evidence to establish the facts to which they relate. *Schell v. Plumb*, 55 N. Y. 598; *Mills v. Catlin*, 22 Vt. 98; *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414; *Green v. Cornwall*, 1 N. Y. City Hall Rec. 11.

We can perceive no reason why the truths of exact science to which all intelligent persons assent, and well-established historical facts, should not be proved by the writings of competent authors, and all courts agree that they may be so proved. But beyond this the rule does not extend of allowing a contested issue of fact to be established by the unsworn declarations of third parties.

It is contended, however, that in the state of Iowa the practice is approved of permitting medical books to be read to the jury as independent evidence of the opinions therein contained, and that the practice in that respect which prevails in the state courts of Iowa is obligatory upon the Federal courts sitting in that state. Reference is also made to a recent statute of the state of Iowa which reads as follows: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest." McClain's Code (Iowa) § 4903.

We concede it to be the law that the Federal courts sitting within a state must enforce the provisions of a local statute prescribing rules of evidence, in the trial of civil cases at common law, unless the local statute is in conflict with some law of the United States regulating the same subject. *M'Niel v. Holbrook*, 12 Fed. 84, 88, 89, 9 L. ed. 1009, 1011;

such breach, and gives evidence as to the age and general state of health of the tenant for life, and the annual value of the premises. *Mills v. Catlin*, 22 Vt. 98.

So, judicial notice of the existence and contents of the American tables of mortality may be taken in estimating the value of a wife's inchoate right of dower. *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

And the mortality tables published in Michigan Compiled Laws are unaffected by any consideration as to the person's present condition of life, but are made up by averaging lives by the actual mortality of the strong and sick alike, and may be used in calculating the probabilities of life for the purpose of computing an estate of a doweress. *Brown v. Bronson*, 35 Mich. 415.

And in *Wager v. Schuyler*, 1 Wend. 553, an approved table of life annuities was adopted in an action for the breach of a covenant of quiet enjoyment, on a recovery by a tenant in dower, for the purpose of measuring the damages, which are the present value of an annuity equal to the interest on one third of the consideration money received by the defendant, for the time that the tenant in dower has a probable expectation of life.

So, standard tables showing mortality rates and expectancies of human lives at certain ages and under certain conditions, and probable longevity, as well as the present worth of annuities, etc., may be used as evidence under proper instructions in the trial of causes with relation to annuities and es-

Wright v. Bales, 2 Black, 535, 17 L. ed. 264; *Potter v. Third Nat. Bank*, 102 U. S. 163, 165, 26 L. ed. 111, 112; *United States v. Reid*, 13 How. 361, 13 L. ed. 1023. But the decisions of the courts of a state construing common-law rules of evidence are not obligatory on the Federal courts. Such decisions are merely persuasive authority, and, while the Federal courts will follow them when the question at issue is balanced with doubt, yet they will not be governed by such decisions when they appear to be at variance with the great weight of authority. *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 372, 37 L. ed. 772, 775; *Ryan v. Staples*, 40 U. S. App. 427, 76 Fed. Rep. 721, 727, 23 C. C. A. 541; *Northwestern P. R. Co. v. Hogan*, 27 U. S. App. 184, 63 Fed. Rep. 102, 11 C. C. A. 51. The decision above referred to in *Bowman v. Woods*, 1 G. Greene, 441, was a decision construing the common law, and, for the reasons last stated, we do not feel compelled to follow it.

With reference to the statute of Iowa, above quoted, it is only necessary to say that, by its express provisions, "books of science or art" are only made "presumptive evidence of facts of general notoriety or interest;" and we are unable to find that it has ever been held that the provision in question was intended to cover medical works of all kinds, and to make them independent evidence of whatever medical opinions or theories are therein expressed or formulated. In *Brodhead v. Witsee*, 35 Iowa, 429, the statute in question was referred to, but it was simply held that the statute was not intended to render inadmissible proof which before was admissible. In *Quackenbush v. Chicago & N. W. R. Co.* 73 Iowa, 458, 462, a passage appears to have been read from a medical work on diseases of the throat and nose, which passage was objected to on the

tates depending upon future contingencies. *Shover v. Myrick*, 4 Ind. App. 7.

But the Carlisle tables are not authoritative as to the value of a husband's life interest as tenant by the curtesy, where the disproportion of his interest to the whole, reckoned under such tables, is manifest. *Shippen's Appeal*, 80 Pa. 391.

In *Steinbrunner v. Pittsburgh & W. R. Co.* 146 Pa. 504, *supra*, I. b. 2, which was a personal injury case, *Shippen's Appeal*, 80 Pa. 391, *supra*, was distinguished upon the ground that that was a contest between a life tenant and a remainderman, in which the Carlisle tables would not serve as an authoritative guide.

So the Carlisle tables of expectancy are admissible in evidence in an action by a married woman and children against a liquor seller, under the civil damage act, to aid in estimating damages, where the husband to whom liquor was sold is shown to have been a strong robust man. *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409.

And the jury in such an action has a right to consult the annuity tables in determining the probable duration of the joint lives of the plaintiff and her husband. *Hall v. Germain*, 37 N. Y. S. R. 320.

In *Rafferty v. Buckman*, 46 Iowa, 195, however, it was said that it may well be doubted whether the Carlisle tables of mortality are admissible in evidence in an action under the civil damage act, where the habits of the person to whom liquor was sold were such that he did not have the ordinary prospect of life; but the case turned upon the

ground that it was "too indefinite;" but the court ruled that the objection, on the ground stated, was not well taken. In another Iowa case (*Peck v. Hutchinson*, 58 Iowa, 820), a medical work which was read in evidence was objected to, for the reason that it was an old edition, and therefore incompetent. The court ruled that, if an error was committed in reading passages from the book in question, it was not prejudicial to the complaining party, and therefore declined to reverse the judgment. On the other hand, § 1936 of the Code of Civil Procedure of California (3 Deering's Anno. Codes and Statutes), the statute similar to the one now under consideration, received a definite construction by the supreme court of California in the case of *Gallagher v. Market Street R. Co.*, 67 Cal. 13, 56 Am. Rep. 713, and it was there held that the statute does not authorize standard medical works to be read in evidence for the purpose of establishing the probable effects of a physical injury. It was further held that the expression "facts of general notoriety or interest" means "historical facts, facts of the exact sciences, and literature or art," all of which, when relevant to a case in hand, may be proved by the production of books of standard authority, rather than by the mouths of living witnesses. We are of the opinion, therefore, that the authorities which have been invoked by the defendant in error are insufficient to establish such a settled construction of the Iowa statute as would justify a ruling that the evidence complained of in the case at bar was properly admitted under the provisions of that statute, the evidence being, in our judgment, clearly inadmissible under the common law.

Only one medical expert who testified at the

trial pronounced the book of Dr. Erichsen, from which the foregoing excerpts were taken, to be a standard work, and so recognized by the medical profession. The same witness admitted, however, that some of the greatest physicians and surgeons in the world had disputed the theories of Dr. Erichsen, as contained in the book in question. Five other medical experts who were sworn testified, in substance, that the monograph written by Dr. Erichsen was not regarded by the profession as a modern or standard work, and some of them stated that it was not regarded as an authority on the subject of which it treats. We think that a work of that kind, concerning the merits of which there is such a wide difference of opinion among members of the medical profession, should not be accepted in a court of justice as competent evidence to establish the fact that a certain ailment from which the plaintiff below appeared to be suffering was the result of a nervous shock sustained some years previously in a railway collision. The case disclosed no apparent necessity for resorting to testimony of such a doubtful and uncertain character. The fact alleged is susceptible of proof by the opinions of competent living physicians, who may be subjected to a careful cross-examination, and compelled to state in the presence of the jury, in an intelligible way, the reasons upon which their opinions are founded; and we think that the defendants were entitled to insist that it should be so established.

The judgment of the Circuit Court is accordingly reversed, and the case is remanded for a new trial.

Rehearing denied.

point that the objection was not raised in the court below.

4. Conclusiveness and effect.

Standard life and annuity tables are admissible in evidence for personal injuries, for the purpose of assisting the jury in making an estimate of damages, but the jury is not to be absolutely controlled by them. *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257; *Joliet v. Blower*, 155 Ill. 416.

They are admissible as furnishing data on which the jury may act, and as a circumstance to be weighed by them, but they are not conclusive. *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Scheffer v. Minneapolis & St. L. R. Co.*, 32 Minn. 518; *Friend v. Ingersoll*, 39 Neb. 717.

Jurors are permitted, but not required, to make use of them. *Savannah, A. & M. R. Co. v. McLeod*, 94 Ga. 530.

The Carlisle or other tables of expectancy are not necessary evidence for the purpose of estimating the expectation of life in an action for a personal injury. The jury may make their estimation from the age, health, habits, and physical condition of the person at the time of his death. *Deisen v. Chicago, St. P. M. & O. R. Co.*, 43 Minn. 454; *Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 492.

But mortality tables are competent evidence on the question of damages sustained by a railway employee by the company's negligence, to be weighed with other evidence, such as his physical condition, general health, vocation, habits, and the like. *Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 171; *Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 492.

Mortality tables are binding, however, as to the expectancy of life, in an action involving that

question, in the absence of any other evidence from which the jury can intelligently judge. *Nelson v. Lake Shore & M. S. R. Co.*, 104 Mich. 582.

c. The almanac.

The almanac is regarded and held as a part of the law of the land, and is governed by the ordinary rule applicable to all general laws, and need not be specially pleaded. *Finney v. Callendar*, 8 Minn. 41; *Tutton v. Darke*, 5 Hurlst. & N. 647, 29 L. J. Exch. N. S. 271, 6 Jur. N. S. 983, 2 L. T. N. S. 561.

Thus, an almanac for the year in question is admissible in evidence to prove at what hour the moon rose on a designated night in such a year, where that question is material to the issue. *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414.

And an almanac may be admitted in evidence upon a trial for burglary, for the purpose of showing when the sun set on the day on which the crime was committed, not strictly as evidence, but to refresh the memory of the court and jury, the matter being one of which the court will take judicial notice. *State v. Morris*, 47 Conn. 179.

So, the court will take judicial notice on what day a certain feast occurs, and the almanac is legal evidence of it. *Brough v. Perkins*, 6 Mod. 81.

And courts will take judicial notice of the coincidence of the days of the month with those of the week as shown by the almanac. *Sprowl v. Lawrence*, 33 Ala. 674; *Allman v. Owen*, 31 Ala. 167.

But dates and other matters of which judicial notice is taken need not be put in evidence, the almanac in such case being used as the statutes, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury. *Wilson v. Van Leer*, 127 Pa. 372.

(Second Circuit.)

WESTERN ASSURANCE COMPANY OF
TORONTO, *Plff. in Err.*,v.
J. H. MOHLMAN COMPANY.

(51 U. S. App. 577; 83 Fed. Rep. 811.)

1. **A stipulation that in case of the fall of the building all insurance by this policy shall immediately cease** is a condition subsequent, and not an exception, and the burden of showing that it became operative before loss is upon the insurer,—especially where it is not in the descriptive part of the policy, but is among the proviso; and it is immaterial that the clause "except as hereinafter provided" is inserted in the descriptive part of the policy.
2. **Insurance of property "while contained in brick building"** does not cast upon the insured the burden of showing the integrity of the building at the time of the fire, if a clause is inserted in the policy to cover the case of its fall.
3. **The burden of showing that the building did not fall** before the fire is not thrown upon the insured by his allegation that the fire did not happen by reason of any of the excepted clauses, where liability for loss following the fall of the building is removed by a condition subsequent in the policy.
4. **Refusal to charge the jury that the burden of showing** that the loss was caused by fire was upon the one seeking to recover under a fire insurance policy is not error where that fact was fully proved, with no question as to the accuracy of the proof.
5. **Requested instructions** which have been fully covered by the general charge need not be given.
6. **Expert witnesses may, in support of**

And refusal to permit counsel to refer to an almanac to show in support of his argument against the truth of the testimony of a witness that a certain date fell upon Sunday is error, as dates do not require to be proved, but judicial notice will be taken of them without evidence. *Wilson v. Van Leer*, 127 Pa. 372.

So, the court in a criminal prosecution will take judicial notice of the time the sun rose on the morning of the alleged offense, if material, and that fact need not be proved, but the admission in evidence of an almanac to establish it is not error. *People v. Chee Kee*, 61 Cal. 404.

And while an almanac is not competent evidence to prove when the moon rose on any particular day, its admission is not prejudicial error, as judicial notice will be taken of the time when the moon rises and sets on the several days of the year, as well as of the succession of the seasons, the difference of time in different longitudes, and the constant and invariable course of nature. *Case v. Perrew*, 46 Hun. 57.

And while it may be that the time at which the moon rose on the night in question, if material in an action for damages, was a matter of judicial knowledge, and that the presiding judge informing himself by reference to standard almanacs should have charged the jury of that fact, the introduction of the almanac before the jury cannot be deemed injurious to the defendant, since the presumption is that the time of the rise of the moon was correctly stated therein and that the jury found accordingly. *Mobile & B. R. Co. v. Ladd*, 92 Ala. 297.

So, reading from an almanac in an argument before the jury is not subject to objection as having
40 L. R. A.

their professional opinions, read in evidence statistics of mechanical experiments and tabulations of the results thereof, where the scientific work containing them is concededly recognized as a standard authority by the profession, and when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanic arts with which such statistics and tabulations are concerned.

7. **Lapse of time after the fall of a building** before persons who testify as experts as to whether it fell before or after a fire saw it will not wholly exclude their opinions if timbers upon the condition of which the opinions were largely formed were still lying in the ruins when their inspection was made.

8. **Answers should not be permitted** to hypothetical questions from which an element "probably the most important" has been left out.

(October 11, 1897.)

ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

Before *Peckham*, Circuit Justice, and *Lacombe* and *Shipman*, Circuit Judges.

Statement by *Lacombe*, Circuit Judge:

This case comes here on a writ of error to review a judgment of the circuit court, southern district of New York, in favor of defendant in error, who was plaintiff below. The action was brought to recover loss under a policy of fire insurance issued by the plaintiff in error, who was defendant below. The relevant parts of the policy are as follows:

been brought forward at so late a stage of the case as to deprive the opposing party of the benefit of an argument, for, like any other argument or illustration, it may be made by counsel at the end of the case. *Wilson v. Van Leer*, 127 Pa. 372.

In *Tutton v. Darke*, 5 Hurlst. & N. 647, 29 L. J. Exch. N. S. 271, 6 Jur. N. S. 933, 2 L. T. N. S. 361, however, it was held that an almanac is not evidence of the time the sun rises on a particular day.

And while the court will take judicial notice of the dates in the calendar, it will not of the hours; and the fact that a designated hour in a certain month would be after sunset, if material, must be proved. *Collier v. Nokes*, 2 Car. & K. 1012.

A party objecting to the admission in evidence of an almanac to show the time the sun rose on a particular day must specify the ground of his objection. *People v. Chee Kee*, 61 Cal. 404.

II. *Inexact sciences.*a. *General rule as to admissibility.*

The weight of current authority is decidedly against the admission of scientific books in evidence before a jury, although in some of the states they are admissible. *Bloomington v. Shrook*, 110 Ill. 219, 51 Am. Rep. 679, *dictum*.

And the majority of the cases hold that scientific books are inadmissible as evidence in chief. *Forest City Ins. Co. v. Morgan*, 22 Ill. App. 198; *Epps v. State*, 102 Ind. 539; *State v. Baldwin*, 36 Kan. 1; *Whiton v. Narragansett P. & M. Ins. Co.* 109 Mass. 24; *People v. Millard*, 53 Mich. 63; *Foggett v. Fischer*; 23 App. Div. 207; *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171.

Though they are standard works on the subject to which they relate. *Epps v. State*, 102 Ind. 539.

"The Western Assurance Company, in consideration of the stipulations herein named, and of \$65 premium, does insure for the term of one year from Nov. 12, 1894, at noon, to Nov. 12, 1895, at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding \$10,000 on stock [here follows the usual percentage co-insurance clause], J. H. Mohlman & Co., as now or hereafter constituted, \$10,000 on stock of groceries and other merchandise, not hazardous, hazardous, and extrahazardous, including all materials and supplies, the property of the assured, or held in trust or on commission, or sold, but not delivered or removed, or for which the insured may be liable, in the event of loss or damage by fire, all while contained in the brick building situate Nos. 339 Greenwich and 19 Jay Sts., New York City, occupied solely by the assured. Privileged to use kerosene oil or electricity, etc. This company shall not be liable beyond the actual cash value of the property. [Here follows the usual clause as to appraisal and abandonment.] This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing, etc. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock; or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any

means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within-described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy, by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process, or judgment, or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding 25 pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights, and kept for sale according to law, but in quantities not exceeding 5 barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than 10 feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days. This company shall not be liable

Scientific books are not evidence of any facts stated in them, though they are admissible for the purpose of showing, when material, the state of invention, the course of composition, the meaning of words, and the theories or opinions which prevailed in the age in which they were written. *State v. Brown*, 4 R. I. 523, 70 Am. Dec. 163.

And a statement by the judge that a scientific book which had been read by counsel to the jury was entitled to as much authority as a witness who had been examined as an expert on the question involved is a clear violation of 1 N. C. Rev. Stat. chap. 31, § 136, forbidding the judge to express an opinion on the facts of the case. *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171.

So, the statements of a medical book are not admissible in evidence as authority on medical subjects. *People v. Millard*, 53 Mich. 63; *People v. Goldenson*, 76 Cal. 328; *State v. Baldwin*, 36 Kan. 1; *Gale v. Bector*, 5 Ill. App. 481; *Re Mason*, 60 Hun, 46; *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171; *Legg v. Drake*, 1 Ohio St. 287; *State v. O'Brien*, 7 R. I. 330; *Ware v. Ware*, 8 Me. 42; *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477; *Tucker v. Donald*, 60 Miss. 460, 45 Am. Rep. 416; *Stilling v. Thorp*, 54 Wis. 523, 41 Am. Rep. 60; *Rgr. v. Taylor*, 13 Cox. C. C. 77; *Darby v. Ouseley*, 36 Eng. L. & Eq. 518, 1 Hurlst. & N. 12, 25 L. J. Exch. N. S. 227, 2 Jur. N. S. 497.

Books of inductive science, within which are medical works, are not admissible. *Foggett v. Fischer*, 23 App. Div. 207.

Medical treatises are not admissible in evidence, 40 L. R. A.

whether proved to be standard works or not, except to discredit a witness who bases his testimony upon them. *People v. Goldenson*, 76 Cal. 328.

The only circumstance under which they can be read in evidence is where the witness has based his opinion upon them, and has referred to them as authority. *Hall v. Murdock* (Mich.) 72 N. W. 150.

Or states that a certain book lays down a certain proposition. *People v. Vanderhoof*, 71 Mich. 158.

And a witness cannot be allowed to read from his own published works to support his own testimony, any more than he can be allowed to read from any other author, even if approved and accepted as authority. *Mix v. Staples*, 44 N. Y. S. R. 399.

So, passages from a work on mental diseases cannot be read in evidence in an action involving the question of sanity or insanity, or capacity or incapacity. *Fraser v. Jennison*, 42 Mich. 206; *Com. v. Wilson*, 1 Gray, 333.

And a book on medical jurisprudence was not admissible in evidence in a case in which the question of the existence of paralysis caused by hysteria was at issue, to show that the symptoms testified to by one of the witnesses were common in hysteria, and that this was one of the existing causes of paralysis. *Huffman v. Click*, 77 N. C. 55.

Nor are extracts from Copeland's Medical Dictionary, referring to paralysis, admissible as primary evidence. *Tucker v. Donald*, 60 Miss. 460, 45 Am. Rep. 416.

for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon. If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease. This company shall not be liable for loss to accounts, bills, currency," etc.

By a rider attached to the policy on or about April 22, 1895, the insurance was transferred to cover similar described property while contained in brick building Nos. 98-40 North Moore street and 156 Franklin street. On April 30, 1895, the property insured was destroyed by fire. At or about the time of the fire the building fell, and the issue of fact in the case was whether the fall preceded the fire, or was itself the result of the fire. Upon this issue the testimony was conflicting, and the verdict of the jury was adverse to the insurance company. The questions presented by the writ of error are solely legal ones, consisting of alleged errors in the charge of the court as given to the jury, in the court's refusals to charge as requested, and in its admission of and refusal to admit evidence.

Messrs. Michael H. Cardosa and Edgar J. Nathan, for plaintiff in error:

The trial court erred in deciding and charging the jury that the burden of proof rested upon the plaintiff in error (the defendant below) to show by a preponderance of evidence

that the fire which damaged the property followed the fall of the building in which the property was contained.

Pelican Ins. Co. v. Troy Co-operative Asso. 77 Tex. 225; *Sohier v. Norwich F. Ins. Co.* 11 Allen. 836; *Hayward v. Liverpool & L. Fire & Life Ins. Co.* 7 Bosw. 385; 2 Abb. App. Dec. 349; *St. John v. American Mut. F. & M. Ins. Co.* 1 Duer, 371, 11 N. Y. 516; 2 Parsons, Marine Insurance, chap. 10, § 5, p. 518; *Baker v. Manufacturers' Ins. Co.* 12 Gray, 603; *Paddock v. Commercial Ins. Co.* 104 Mass. 521.

Precisely the same doctrine has been uniformly maintained in cases arising on life insurance contracts and in actions against warehousemen.

Gay v. Union Mut. L. Ins. Co. 9 Blatchf. 142; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308; *Union Ins. Co. v. Shaw*, 2 Dill. 14; *The Neptune*, 6 Blatchf. 193; *Whitworth v. Erie R. Co.* 87 N. Y. 418; *Kaiser v. Latimer*, 9 App. Div. 87; *Clafflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327.

The clause in question is an exception, and not a proviso.

Bouvier, Law Dict. title, *Proviso*; *Rowell v. Janvrin*, 151 N. Y. 60; *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538; *Steel v. Smith*, 1 Barn. & Ald. 99, 8 Am. Jur. 232 (Oct. 1832); *Waffle v. Goble*, 53 Barb. 517; *Marcell Land Grant Co. v. Dawson*, 151 U. S. 586, 38 L. ed. 279; *Harris v. White*, 81 N. Y. 582.

In determining whether the clause of the policy by which the fall of any part of the building is to terminate the contract should be deemed in the nature of a proviso or an exception, it is necessary to consider that clause, not in isolation, but as a part of the scheme of the insurance and in connection with the provisions of the policy which follow and precede

And a book treating from a medical and scientific standpoint of the effect upon the spine and nervous system of a certain fall or jar is not admissible in evidence in an action for a personal injury. *Johnston v. Richmond & D. R. Co.* 95 Ga. 685.

And medical books, though proved to be of standard authority, are not admissible in evidence to prove the nature and probable effect of personal injuries, in an action to recover damages therefor. *Gallagher v. Market Street R. Co.* 67 Cal. 13, 56 Am. Rep. 713.

Nor are medical works, though stated by medical witnesses to be works of medical authority, admissible in evidence in an action for slander in imputing the prescribing of medicines in improper doses, to show that such doses were sanctioned. *Collier v. Simpson*, 5 Car. & P. 74.

And the United States Medical Dispensary is not admissible in evidence to establish a fact therein stated. *Boehringer v. B. Richards Medicine Co.* 9 Tex. Civ. App. 284.

And it is not admissible in evidence in a prosecution for keeping a shop open on the Lord's day, under a statute containing an exception with relation to retail sales of drugs and medicines, for the purpose of showing the medicinal effects of tobacco, under the claim that it falls within the exception. *Com. v. Marzynski*, 149 Mass. 68.

And a book on the subject of the diseases of horses, though of established reputation, cannot be read as evidence to the jury on the trial of the question whether a horse had at a particular time a disease of which he afterwards died; the matter

stated in such a book when relevant to the issue must be proved in the same manner as other facts are proved. *Harris v. Panama R. Co.* 3 Bosw. 7.

So, medical experts cannot be permitted to testify to statements made in medical books. *Re Mason*, 60 Hun, 46.

And counsel for the accused in a criminal prosecution cannot be permitted to read to an expert witness what has been said by a physician of high authority on a question involved in a medical journal, and then ask him whether he concurs in the views there given. *State v. Coleman*, 20 S. C. 441.

And the statements of a medical book cannot be placed before the jury by reading therefrom to the witness and then asking him whether there was a case reported similar to the one read. *Marshall v. Brown*, 50 Mich. 148.

In *Marshall v. Brown*, 50 Mich. 148, *Pinney v. Cahill*, 48 Mich. 584, *infra*, II. 1., was distinguished upon the ground that there a medical book was produced to contradict a witness who professed to be testifying from it.

So, a medical expert called upon to testify in a prosecution for homicide in which strangulation was alleged cannot be permitted to testify as to what is said in standard medical works upon the subject of strangulation, and what effects would be produced upon the body of the deceased when death resulted from such cause. *Boyle v. State* 57 Wis. 472, 46 Am. Rep. 41.

And expert witnesses called by the defense in a criminal prosecution in which insanity is alleged

it. The true intention of the parties should be sought, not from any part of their agreement, but, reading it in the light of all the circumstances that led to its adoption, from the agreement as a whole.

Breuner v. Liverpool & L. & G. Ins. Co. 51 Cal. 101, 21 Am. Rep. 703; *Huck v. Globe Ins. Co.* 127 Mass. 806, 84 Am. Rep. 373; *Great Western Ins. Co. v. Egan*, 19 Wall. 640-645, 22 L. ed. 216-218; *Judah v. Randal*, 2 Cal. Cas. 324; *Wallerstein v. Columbia Ins. Co.* 44 N. Y. 204, 4 Am. Rep. 664; *Freeman v. Traveler's Ins. Co.* 144 Mass. 572.

Even without such a clause in the policy the burden was upon the plaintiff to show that the fire preceded the fall.

The subject-matter of the insurance must be shown to have been destroyed; and it is the part of the plaintiff to identify the thing destroyed with the subject-matter of the contract.

Holland, Jurisp. pp. 69, 70, 76; *The City of Norwich*, 118 U. S. 468, 494, 30 L. ed. 134; *Biddle*, Ins. § 639; *Eddy Street Iron Foundry v. Hampden Stock Mut. F. Ins. Co.* 1 Cliff. 800; *Harford F. Ins. Co. v. Farrish*, 73 Ill. 166; *Shertzer v. Mutual F. Ins. Co.* 46 Md. 506; *Maryland F. Ins. Co. v. Gundorf*, 43 Md. 506; *English v. Franklin F. Ins. Co.* 55 Mich. 278, 54 Am. Rep. 377; *Bryce v. Lorillard F. Ins. Co.* 55 N. Y. 240, 14 Am. Rep. 249; *Citizens' Ins. Co. v. Rolland*, 1 Legal News (L. Can.) 604; *First Nat. Bank v. Lancashire Ins. Co.* 62 Tex. 461; *Annapolis & E. R. Co. v. Baltimore F. Ins. Co.* 32 Md. 37, 8 Am. Rep. 112; *Nare v. Home Mut. Ins. Co.* 37 Mo. 480, 90 Am. Dec. 894.

The complaint alleges that "the said fire did not happen by the action or procurement of the plaintiff or of any of its officers, agents, or servants, or by reason of any of the causes excepted by the terms of the said policy."

And the answer denied any knowledge or information sufficient to form a belief as to this allegation of the complaint.

This condition of the pleadings left with the plaintiff the duty, not alone imposed by law, but self-imposed under the allegations of its complaint, of negating by evidence the exceptions contained in the contract of insurance.

Whillatch v. Fidelity & C. Co. 149 N. Y. 45.

The court clearly erred in refusing to charge the jury that "the burden upon the whole case is upon the plaintiff to establish by a preponderance of evidence that the damage sustained was caused by fire, for this is the only risk it was insured against under the policy."

Farmers' Loan & T. Co. v. Seifke, 144 N. Y. 854; *Powers v. Russell*, 13 Pick. 69.

The court clearly erred in refusing to charge the jury that, "even though the jury find that the fire in the building preceded the fall they cannot award the plaintiff any amount for loss following the fall, unless they find that the fall was the result of fire."

Beakes v. Phoenix Ins. Co. 143 N. Y. 402, 26 L. R. A. 267; *Pelican Ins. Co. v. Troy Co-operative Asso.* 77 Tex. 225.

The court erred in permitting the witness Bowman to read in evidence extracts from scientific books and government reports.

Scientific books cannot be read in evidence.

1. The reasons for the rule are that such

cannot be asked to name the circumstances of a case they have read where violence accompanied hysterical mania, as such an examination, if allowed, would be in effect the introduction of the medical works containing such case in evidence. *People v. Goldensohn*, 78 Cal. 328.

And refusal to permit a witness who had given his opinion as to the sanity of another to answer the question whether he had read an article in a journal on insanity in which designated statements were made, and whether the same accords and agrees with his knowledge and experience on the subject, is not an abuse of discretion, as the answer would have been but a reiteration in another form of the opinion he had expressed already. *State v. Winter*, 72 Iowa, 627.

So, the fact that an expert witness in a prosecution for homicide read passages in a work on medical jurisprudence to which on cross-examination he was referred, and with relation to which he answered questions, does not render the book itself admissible in evidence. *State v. O'Brien*, 7 R. I. 336.

Nor is it rendered admissible by the fact that counsel for the accused in a prosecution for homicide ceased to cross-examine a medical witness upon the ground that he might afterwards quote it against him. *State v. O'Brien*, 7 R. I. 336.

Iowa Rev. Stat. § 8996, providing that historical works, books of science or art, etc., when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest, does not make inadmissible any evidence which before was admissible; and whether there is a difference among medical or surgical authorities as to the mode of treatment or proper course to be pursued in a designated case may be shown by the evidence of competent physicians or surgeons, and they are 40 L. R. A.

also competent to testify as to who are standard authors and as to what treatment they prescribe. *Brodhead v. Wiltse*, 36 Iowa, 429.

But evidence of a medical expert as to whether delusions or transitory mania is a condition recognized by medical authorities, offered for the purpose of proving that the theory in question is taught by the authorities, is not admissible, as the works themselves would be the only competent evidence of what they teach; but perhaps it would be admissible on cross-examination to test the accuracy of his knowledge. *State v. Winter*, 72 Iowa, 627.

And extracts from a book which is a standard scientific authority on the subject treated therein, with relation to appliances for stopping trains and the devices required therefor, are not admissible in evidence on the question of negligence in stopping a train, where the negligence was not claimed to be in the equipment of the train, and the extract did not give the size of the train, the pressure applied to the brakes, or the character of the grade, and it did not appear what the conditions were under which the trains were stopped; and where such evidence is admitted remarks of the court in disparagement of its value cannot be deemed to have been prejudicial. *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106.

So, facts of general notoriety and interest, which, under Cal. Code Civ. Proc. § 1936, may be proved by books of science or art, made by persons indifferent between the parties, refer to facts of a public nature not existing in the memory of man, as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses. *Gallagher v. Market Street R. Co.* 67 Cal. 13, 56 Am. Rep. 713.

An objection that books offered to be read in

evidence is hearsay, secondary, wanting in the sanctity of an oath, and the writer is not present to be subjected to the truth test of cross-examination.

1 Whart. Ev. 8d ed. § 665; 1 Greenl. Ev. Lewis, 5th ed. 1896, § 440; Lawson, Expert & Opinion Ev. p. 170; 7 Am. & Eng. Enc. Law, p. 513; *Davis v. United States*, 165 U. S. 373, 41 L. ed. 750; *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487; *North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 340; *Harris v. Panama R. Co.* 3 Bosw. 7; *Ashworth v. Kittridge*, 12 Cush. 198, 59 Am. Dec. 178; *Whiton v. Albany City Ins. Co.* 109 Mass. 242; *Com. v. Sturtevant*, 117 Mass. 122, 19 Am. Rep. 401; *Johnston v. Richmond & D. R. Co.* 95 Ga. 685; *Ware v. Ware*, 8 Me. 42; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 678; *Gallagher v. Market Street R. Co.* 67 Cal. 13, 56 Am. Rep. 713, 51 Am. Rep. 690; *State v. O'Brien*, 7 R. I. 386; *Collier v. Simpson*, 5 Car. & P. 73; *Washburn v. Cuddihy*, 8 Gray, 430; *Com. v. Wilson*, 1 Gray, 337; Mechem "Books of Science as Evidence," 17 Irish L. T. 74, 3 Ohio L. J. 9.

2. There are no authorities adverse to the position for which we here contend.

Messrs. John S. Sheppard, Jr., and Treadwell Cleveland, and Evarts, Choate, & Braman, for defendant in error: The court below correctly held, at the trial of this case, that the burden of proof upon the question whether the building fell as a result of fire, or the fire preceded the fall, was upon the defendant.

evidence are immaterial only, however, and not that they are incompetent or wholly inadmissible, is not sufficient to raise the question of their admissibility on appeal. *Ripon v. Bittel*, 30 Wis. 614.

And an objection that a standard medical work produced by an expert witness, which is offered in evidence after he has given evidence to the same effect as the statements in such book thus offered, and that the question whether he knew what records of the medical profession and medical authorities taught upon the subject were immaterial, is insufficient to present any question on appeal. *State v. Sexton*, 10 S. D. 127.

But though statements of medical books are inadmissible in evidence, their admission is not a ground for reversal on appeal, where both parties introduced and had the benefit of such evidence, and the question was not raised in the trial court by proper and specific objections. *Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 158.

And a verdict in a prosecution for rape will not be vitiated by the fact that certain books on the subject of rape which had been inadvertently left on the table were consulted by the jury during their deliberations, though it was an irregularity, in the absence of evidence as to their contents or that they influenced the jury to the prejudice of the defendant. *People v. Draper*, 1 N. Y. Crim. Rep. 139.

But the jury in an action in which passages from a scientific work have been read as evidence cannot be permitted to take the book with them into the jury room when they retire for deliberation, where the portions read have not been marked. *State v. Gillick*, 10 Iowa, 98.

b. Reasons for the rule.

The reasons for the non-admissibility of scientific books in evidence are, first, that experiment and discovery are so constantly changing the theories

Jones v. Azen, 1 Ld. Raym. 119; *Elliott v. Blake*, 1 Lev. 88; *Hotham v. East India Co.* 1 T. R. 638; *Cage v. Acton*, 1 Ld. Raym. 515; *Gray v. Gardner*, 17 Mass. 188; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572; *Transatlantic F. Ins. Co. v. Bamberger*, 11 Ky. L. Rep. 101; *Blasingame v. Home Ins. Co.* 75 Cal. 633; *London & L. Fire Ins. Co. v. Crunk*, 91 Tenn. 376; *Slocovich v. Orient Mut. Ins. Co.* 108 N. Y. 56.

Under similar clauses in the standard fire insurance policy, the courts of various jurisdictions have held that the burden of proof was on the defendant who sets up one of these defenses under the clauses exempting the company from liability.

Clark v. Hamilton Mut. Ins. Co. 9 Gray, 148; *Portsmouth Ins. Co. v. Reynolds*, 82 Gratt. 613; *Young v. Newark F. Ins. Co.* 59 Conn. 41; *Bittinger v. Providence Washington Ins. Co.* 24 Fed. Rep. 549; *Russell v. Fidelity F. Ins. Co.* 84 Iowa, 93; *Oshkosh Pkg. & Provision Co. v. Mercantile Ins. Co.* 31 Fed. Rep. 200.

This same question has arisen many times where a defense under one of the clauses limiting liability is set up to an action on a life insurance policy, and the decisions have been uniform in placing the burden of proof on the defendant insurance companies.

Van Valkenburgh v. American Popular Life Ins. Co. 70 N. Y. 605; *Murray v. New York L. Ins. Co.* 85 N. Y. 236; *Goldschmidt v. Mutual L. Ins. Co.* 102 N. Y. 486; *Spencer v. Citizens' Mut. L. Ins. Assn.* 142 N. Y. 505; *Dial v. Valley Mut. L. Assn.* 29 S. C. 560; *Den.*

on scientific subjects that the books of last year may contain something which this year everybody rejects as absurd. Secondly, the book may be a compilation of a compilation, and be thus hearsay evidence of the most extreme kind; and thirdly, that the authors do not write under oath, and cannot be cross-examined as to the reasons and grounds for their opinions. *Johnston v. Richmond & D. R. Co.* 95 Ga. 685.

Medicine is not to be considered as an exact science, but rather as an inductive science, based on data subject to change from year to year, and medical books are therefore inadmissible as evidence of the opinions contained in them. *Gallagher v. Market Street R. Co.* 67 Cal. 13, 56 Am. Rep. 713.

And extracts from a medical work, however high its character, are no more than written statements of the opinion of the author. *Tucker v. Donald*, 60 Miss. 460, 45 Am. Rep. 416.

They are no more than hearsay. *People v. Millard*, 53 Mich. 63; *Reg. v. Taylor*, 13 Cox, C. C. 77.

And they lack the sanction of an oath, and are not admissible in evidence for that reason. *State v. O'Brien*, 7 R. I. 386; *State v. Baldwin*, 36 Kan. 1; *Boehringer v. A. B. Richards Medicine Co.* 9 Tex. Civ. App. 234.

They are not the statement of any witness under oath, or of any documentary evidence permitted or required by law to be received as such, but simply the theory of a writer concerning medical science. *Boehringer v. A. B. Richards Medicine Co.* 9 Tex. Civ. App. 234.

So, the benefit of cross-examination would be lost by allowing the admission of such evidence. *Ware v. Ware*, 8 Me. 42; *State v. Baldwin*, 36 Kan. 1.

Scientific or expert testimony must be given by living witnesses who can be cross-examined concerning their means of knowledge, and can explain in language open to general comprehension what is necessary for the jury to know, and resort cannot

nis v. Union Mut. L. Ins. Co. 84 Cal. 570; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589.

So, in cases of accident insurance the courts hold that the burden of proof as to conditions and provisos of this sort is on the insurance company.

Freeman v. Travelers' Ins. Co. 144 Mass. 572; *Coburn v. Travelers' Ins. Co.* 145 Mass. 226; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652.

The contention on the part of the defendant that the policy has been avoided by the fall of the building prior to the fire, so far as the question of the burden of proof is concerned, raises exactly the same issue as the defense that the contract of insurance had been terminated by the parties before the loss in accordance with some clause in the policy. In such a case there can be little or no doubt that the burden would be on the insurance company to prove such termination.

American F. Ins. Co. v. Brooks. 83 Md. 225; *Mohr & M. Distilling Co. v. Ohio Ins. Co.* 13 Fed. Rep. 74; *Ziegler v. Mutual Aid & Benev. Life Ins. Asso.* 1 McGloin (La.) pt. 3, 12 Ins. L. J. 79.

Another analogy which affords a means of determining where the burden of proof in this case lies is the rule in the carrier cases.

2 Greenl. Ev. 14th ed. p. 209; *Clark v. Barnwell*, 12 How. 272, 18 L. ed. 985; *Rich v. Lambert*, 12 How. 347, 18 L. ed. 1017.

There can be no question that a clause which provides that the whole contract shall be void

on a certain contingency "avoids its liability by way of defeasance."

Yoch v. Home Mut. Ins. Co. 111 Cal. 503, 34 L. R. A. 857.

The insertion of an unnecessary allegation in the complaint cannot change the rights of the parties or the burden of proof.

Murray v. New York L. Ins. Co. 85 N. Y. 239; *Whilatch v. Fidelity & C. Co.* 149 N. Y. 45.

No error was committed by the court below in relation to the extracts from scientific books and government reports.

Rogers, Expert Testimony, § 163.

Books on various branches of scientific subjects have been allowed to be read in many jurisdictions.

Stoudenmeier v. Williamson, 29 Ala. 558; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 291, 87 Am. Dec. 391; *State v. Winter*, 72 Iowa, 627; *Bales v. State*, 63 Ala. 30; *State v. Hoyt*, 46 Conn. 330; *Harvey v. State*, 40 Ind. 516; *State v. West* (Del.) Houst. Crim. Rep. 371; *Legg v. Drake*, 1 Ohio St. 286; *Wade v. De Witt*, 20 Tex. 398.

Annuity tables have been admitted in evidence.

See *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257; *McKeigue v. Janesville*, 68 Wis. 50.

So, the Northampton Life Tables.

Schell v. Plumb, 55 N. Y. 592; *People v. Security Life Ins. & Annuity Co.* 78 N. Y. 116, 34 Am. Rep. 522; *Central R. Co. v. Richards*, 62 Ga. 806.

be had to reading medical books to the jury. *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477.

And extracts from a work on surgery, setting forth the views of the writer upon a subject in question in the action, cannot be read in evidence, as such procedure would deprive the party of the privilege of cross-examining a witness whose opinion was sought to be introduced to influence the minds of the jury upon an issue in the case. *Gale v. Rector*, 5 Ill. App. 481.

c. The contrary rule.

Some of the cases hold that the opinions of an author as contained in his works are better evidence than the mere statement of those opinions by a witness who testifies as to his recollection of them from former reading. *Bowman v. Woods*, 1 G. Greene, 441.

And that standard medical works are admissible as evidence of the author's opinion upon questions of medical skill or practice involved in a trial. *Bowman v. Woods*, 1 G. Greene, 441; *Merkle v. State*, 37 Ala. 139; *Bales v. State*, 63 Ala. 30; *Stoudenmeier v. Williamson*, 29 Ala. 558.

And may be read to the jury. *Merkle v. State*, 37 Ala. 139.

In connection with proper explanation of the terms used. *Bales v. State*, 63 Ala. 30; *Stoudenmeier v. Williamson*, 29 Ala. 558.

In *Stoudenmeier v. Williamson*, 29 Ala. 558, *supra*; *Collier v. Simpson*, 5 Car. & P. *supra*, II. a, and *Green v. Cornwell*, 1 N. Y. City Hall Rec. 11, *supra*, IV., were distinguished upon the ground that they were cases at *nisi prius*, and passed by with little examination. And *Atty. Gen. v. Cast Plate Glass Co.* 1 Anstr. 39, *infra*, IV., was distinguished upon the ground that the question there was on the proper construction of a word in a statute, and the court held that it was a question of law with which the jury had nothing to do, and hence it was im-

proper to read books to the jury to explain the term used.

In *UNION P. R. Co. v. YATES*, however, in construing McLean's (Iowa) Code, § 4903, making books of science or art, etc., made by indifferent persons, presumptive evidence of facts of general notoriety or interest, the court refused to follow *Bowman v. Woods*, 1 G. Greene, 441, upon the ground that that was a decision construing the common law.

And in *State v. West* (Del.) Houst. Crim. Rep. 371, it was held that scientific works on medical jurisprudence, although admissible and allowed to be read in a criminal prosecution before the court and jury, have not the weight of legal authorities except so far as the views expressed in them on the subject in question have been recognized and sustained by judicial ruling and decision.

d. Opinions founded on books.

Though scientific and medical books are not deemed admissible in evidence, expert witnesses may give their opinions and the grounds therefor, though they may in some degree be founded on books as a part of their general knowledge. *Melvin v. Easley*, 48 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171; *Carter v. State*, 2 Ind. 617; *Collier v. Simpson*, 5 Car. & P. 74; *State v. Baldwin*, 36 Kan. 1.

Medical witnesses in giving their opinions as experts are not confined to opinions derived from their own observation and experience, but may give opinions based on information derived from books. *State v. Terrell*, 12 Rich. L. 321.

And medical experts are entitled to speak from the accepted facts of medical science, though they seem to have little knowledge of the subject beyond that derived from books. *Marshall v. Brown*, 50 Mich. 148.

And though their knowledge thereof is derived from study alone. *Taylor v. Grand Trunk R. Co.*

So, almanacs have been admitted to show at what time the sun or moon rose.

State v. Morris, 47 Conn. 179; *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414.

So, a weather report kept at an insane asylum.

De Armond v. Neasmith, 32 Mich. 231.

So, market reports upon which the commercial world relies.

Sisson v. Cleveland & T. R. Co. 14 Mich. 489, 90 Am. Dec. 252.

So, also, tide tables have been received in evidence.

Green v. Cornwell, 1 N. Y. City Hall Rec. 14.

Also the grinding capacity of a certain quantity of water at a mill was ascertained from Leffel's tables.

Garwood v. New York C. & H. R. R. Co. 45 Hun, 128.

The latest authority on the subject of the admission of medical books in evidence is the case of *Union P. R. Co. v. Yates*, 49 U. S. App. 241, 79 Fed. Rep. 584, 25 C. C. A. 103, *ante*, 553.

The hypothetical questions put to the witnesses Chasman and Freel, as to the length of time a fire would burn without weakening the posts, and what time would elapse before fire and smoke would appear, were properly excluded.

Multry v. Mohawk Valley Ins. Co. 5 Gray, 541, 66 Am. Dec. 880; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *First Cong. Church v. Quincy Mut. Ins. Co.* 158 Mass. 475; *Roberts v. New York Elev. R. Co.* 128 N. Y. 455, 13 L.

48 N. H. 304, 2 Am. Rep. 229; *State v. Wood*, 53 N. H. 484.

Thus, an expert witness in an action on a contract of warranty on a horse which subsequently died, who has stated that he has read various standard authors on the subject of diseases, and had given his own opinion in respect to the character of the disease of which the animal died, may be asked for his best medical opinion according to the best authority. *Pierson v. Hoag*, 47 Barb. 243.

But the judgment or opinion which they give must be their own, and not merely that of the author, though it is not improper for them to give the source of their opinions and state that all writers and authority on the subject, so far as they know, support them in their position. *State v. Baldwin*, 36 Kan. 1.

It has been held, however, that the opinions of physicians upon a medical subject are not admissible in evidence where they have not had any experience whatever on the subject, and all that they knew of it is derived from medical or scientific books and medical instruction. *Soquet v. State*, 72 Wis. 659.

e. Use of, on examination.

Counsel may use the statements of a physician of high standing in a medical journal for the purpose of framing questions to be asked an expert witness as to his own opinions. *State v. Coleman*, 20 S. C. 441.

Whether questions put to a medical expert who claims to have read certain medical works, for the purpose of testing his knowledge on the subject in question, are asked him or read out of such medical works, is immaterial. *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516. And see *Hess v. Lowrey*, 122 Ind. 233, 7 L. R. A. 90, *supra*, II. g.

And a technical medical question asked an expert witness, in which the language of a standard medical

R. A. 499; Van Wycklen v. Brooklyn, 118 N. Y. 424; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

Lacombe, Circuit Judge, delivered the opinion of the court:

The trial judge charged the jury that the burden of proof rested upon the defendant (the insurance company) to show by a preponderance of evidence that "the fall preceded the fire," and that "this building did not fall as the result of fire." Exceptions to the charge and to refusals to charge the converse of this proposition sufficiently present the question of the correctness of this ruling. It will not be necessary to repeat the text either of the charge or of the requests. The trial judge construed the clause referring to a fall of the building as a proviso or condition subsequent defeating any claim of the insured. If it be such, no one here disputes the proposition that the burden of proving the happening of the subsequent condition would rest upon the insurer. The defendant here, however, contends that the clause is an exception to the general liability assumed by the insurance company, and that, therefore, it was for the insured to show that the loss did not come within the terms of the exception. The general rule is well expressed by Earl, J., in *Slocovich v. Orient Mut. Ins. Co.* 108 N. Y. 56: "Which there is an insurance against a loss by fire, and it is proved or admitted that the property insured has been destroyed by fire, the loss is brought literally

cal authority is substantially repeated, is not thereby rendered objectionable. *Tompkins v. West*, 56 Conn. 478.

And a scientific witness may refresh his recollection by reference to standard authorities prepared by persons of acknowledged ability. *State v. Baldwin*, 36 Kan. 1; *Huffman v. Click*, 77 N. C. 55.

But the opinion which he gives must be his own, independent of those of the author of the work used. *State v. Baldwin*, 36 Kan. 1; *Huffman v. Click*, 77 N. C. 55.

So, the court will take judicial notice of the meaning of a compound word found in a statute, and a standard authority like Webster's Unabridged Dictionary may be used before the court or jury to refresh the memory of the court, and the definition in such dictionary may be given in evidence to the jury. *Adler v. State*, 55 Ala. 16.

And a witness may use an engraving, however made, to illustrate his meaning, in an action for malpractice in unskillful surgery; but when offered as a part of a medical book or as the work of some distinguished medical man, it should be excluded, as this would give it undue importance to the jury. *Ordway v. Haynes*, 50 N. H. 159.

And while no part of the book called "Modern Pocket-Boyle" can be used as evidence in itself of what constitutes the game of faro, a page of it containing a pictorial representation of faro may be used in a prosecution for dealing and playing the game of faro, as a diagram by which a witness illustrates his testimony. *People v. Gosset*, 93 Cal. 641.

f. Use to sustain or discredit expert.

Books referred to by a medical expert as furnishing a basis for his opinion cannot be referred to in order to support his testimony. *Gallagher v. Market street R. Co.* 67 Cal. 13, 56 Am. Rep. 718.

And the contents of medical books cannot be in-

a convenient way of expressing the fact that the insured under such a policy would not be liable for all losses by fire. This seems clearly indicated by the sentence from 11 N. Y. 518: "Hence, a loss occasioned by invasion, insurrection, riot, and the like, has usually been found excepted in such policies; and although in this, and perhaps in policies generally, the exception in this respect is in terms of losses by fire, the clause would be equally definite and intelligible if those words were omitted in the clause stating the exception."

The academic distinction between an exception and a proviso is thus stated in Bouvier's Law Dictionary, *sub titulo*, *Proviso*: "An exception exempts absolutely from the operation of an engagement or an enactment; a proviso defeats their operation conditionally. An exception takes out of an engagement or enactment something which would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse." It may not be always easy to apply this distinction in practice (witness the conflicting decisions *supra*), but no especial help to the solution of the problem is to be derived from cases holding, as do some of those cited on the brief, that, when the insurance is against "perils of the sea," the burden is upon the insured to show that such perils caused the loss; or that, where insurers engage to be responsible for partial loss only if it amounts to 5 per cent, or the ship be stranded, the insurer must

show loss to the specified percentage, or that the ship was stranded; nor that, under bills of lading providing that the carrier should not be liable for loss by fire while in transit, plaintiff, if he seeks to recover for a fire resulting from the carrier's negligence, must show that negligence affirmatively; nor that under a policy insuring against injuries effected through external, violent, and accidental means the burden is upon the plaintiff to show from all the evidence that the death was caused by external, violent, and accidental means. *Baker v. Manufacturers' Ins. Co.* 12 Gray, 603; *Paddock v. Commercial Ins. Co.* 104 Mass. 521; *Union Ins. Co. v. Shaw*, 2 Dill. 14; *The Neptune*, 6 Blatchf. 193; *Whitworth v. Erie R. Co.* 87 N. Y. 413; *Kaiser v. Latimer*, 9 App. Div. 37; *Claffin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308.

A pertinent case cited on the brief of plaintiff in error is *Sohier v. Norwich F. Ins. Co.* 11 Allen, 336. The policy in that case insured Sohier, in the language of the opinion, "against loss or damage by fire, to the amount of \$2,500 on his brick and slated building known as the National Theatre, situate on Portland street, Boston, Mass. This policy not to cover any loss or damage by fire which may originate in the theatre proper."

Some provisos against liability for loss by fire which happens by invasion, riot, and the

bases his opinion upon medical treatises read by him, to test his knowledge, great care should be taken by the court to confine it within reasonable limits, and see that the quotations read to the witnesses are so fairly selected as to present the author's views on the subject of the examination. *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516.

It is not competent to ask an expert witness upon cross-examination whether he is acquainted with a certain scientific work, and upon his answering in the affirmative and that it is a standard authority, to read at length from the book and inquire of the witness whether he agreed with the author as to the parts read, where the object is not the contradiction of the witness as to something asserted by him, but simply to prove a contrary theory. *Bloomington v. Shrook*, 110 Ill. 219, 51 Am. Rep. 679.

And a witness who on his direct examination gives certain medical opinions and supports them by the assertion that they conform to the authority of medical works cannot be asked on cross-examination to read statements from medical works, and then asked if he agrees with the authors where the extracts do not contradict his evidence and are evidently intended to sustain the theory of the cross-examining party. *Fisher v. Southern P. R. Co.* 39 Cal. 399.

So, a medical witness in a prosecution for murder, who states that a certain medical work draws a distinction between an autopsy and an external examination, distinguishing the latter as an examination of the body, cannot be handed the book of such author on cross-examination, and asked to refer to that part of it in which such an examination was so distinguished. *Davis v. State*, 38 Md. 15.

And refusal to permit medical witnesses to answer questions as to whether certain medical works, naming them, were standard authorities, is not error where no previous mention of them has been made. *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676.

40 L. R. A.

b. Use of, in argument.

The prevailing rule would seem to be that scientific and medical works cannot be read to the jury by counsel in argument, though they are standard works of established authority.

This is the rule laid down in *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178; *Washburn v. Cuddihy*, 8 Gray, 430; *Com. v. Brown*, 121 Mass. 69; *Com. v. Sturdivant*, 117 Mass. 130, 19 Am. Rep. 401; *Huffman v. Click*, 77 N. C. 55; *Burt v. State* (Tex. Crim. App.) 39 L. R. A. 305; *Re Mason*, 60 Hun, 46.

Thus counsel for a person accused of crime, who sets up insanity as a defense, has no right in his address to the jury to quote the opinions of medical men as given in their works. *Queen v. Crouch*, 1 Cox, C. C. 94; *Burt v. State* (Tex. Crim. App.) 39 L. R. A. 305.

And a book considered as authority on railroad injuries, and extracts from such book, cannot be read by counsel in summing up to the jury as part of his argument. *Robinson v. New York C. & H. R. R. Co.* (U. S. C. C. N. Y.) 24 Alb. L. J. 357.

And failure to restrain counsel, who in his address to the jury reads and comments on a book of science as evidence in the cause, is not a waiver of the error, as it is the duty of the judge in his instructions to present the case to them properly, and correct any errors into which counsel may have fallen. *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171.

Extracts from books containing the opinions or acquisitions of learned or scientific witnesses upon a point in issue, which are inadmissible in evidence, and which are offered during the introduction of testimony by the parties, should not be permitted to be read to the jury at any time. *Jones v. Doe*, Little Blue River Regular Baptist Church, 1 Smith (Ind.) 47.

But it will be presumed on appeal that medical works read in evidence against objection were read for some legitimate purpose, where the bill of ex-

like are in a later part of the policy. The clause in italics is written in the policy, the rest of the parts quoted being printed.

The opinion proceeds (the italics *infra* being our own): "The first question raised by the bill of exceptions is whether the burden of proof was on the plaintiff to show a loss by fire which did not originate in the theatre proper. This depends upon the construction given to the clause, 'this policy not to cover any loss or damage by fire which may originate in the theatre proper.' If that clause can be regarded as a *proviso*, that is, a stipulation added to the principal contract, to avoid the defendants' promise by way of defence or excuse, then it is for the defendants to plead it in defense, and support it by evidence. But if, on the other hand, it is an exception, so that the promise is only to perform what remains after the part excepted is taken away, then the plaintiff must negative the exception to establish a cause of action. It is not always easy to determine to which class, whether of provisos or exceptions, a particular stipulation belongs; and *this one is certainly very near the line*. But after a careful consideration the court are of opinion that this was an exception to the subject of the contract, that it put the burden of proof on the plaintiff. . . . The qualification of the contract to which the parties agreed is not inserted with any technical formality or precision. But *it is found between the statement of what is insured, and the prom-*

ise to pay in case of loss, in close connection with, and qualification of, the description of the subject-matter of the insurance. The provisos are set forth in a different part of the instrument. It thus seems to be a direct limitation of the risk against which insurance is effected. The difference would only be a formal one, if, instead of the phraseology actually used, the language of the policy had been, 'do insure against loss or damage by fire not originating in the theatre proper.' It would illustrate the operation of the phrase in question, and show its effect as an exception, if we suppose it applied to the building insured. If the clause in the policy had been, 'this policy not to cover any loss or damage by fire to the part of the building used as a theatre proper,' . . . this would manifestly have been an exception from the subject-matter of the insurance. And it is in like manner an exception to the risks taken by the defendants, *when, in the same part of the policy in which they insure the risk of fire, and in the same connection, they state, in substance, that it is only fire which does not originate in the theatre proper against which they insure.*"

A similar question has been before the courts in actions upon policies of life insurance, where the contract sued upon contained a clause that it was to be void if insured died of a disease induced or aggravated by intemperance, or was to be null and void if he should die in, or in consequence of, a duel, or in viola-

ceptions does not purport to contain all the evidence. *Ripon v. Bittel*, 30 Wis. 614.

The reason for the rule is that when books are thus offered they are in effect used as evidence, and are statements wanting the sanction of an oath. *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178.

Quotations from medical books are not admissible as evidence when offered independently or when read by witnesses, and it follows that counsel ought not to be allowed to read them to the jury, especially when they are not proved to come from works of standard authority in the profession, as the opinions of medical experts are in the nature of facts to be established by living witnesses, and not to be proved by hearsay alleged to have come from those not present, and not even shown to be competent to give them. *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70.

In *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70, *supra*, *Ripon v. Bittel*, 30 Wis. 619, *supra*, II. f, was distinguished upon the ground that in that case a medical expert had stated that the treatise sustained his conclusion, and the book was admitted as evidence in the nature of impeaching testimony to show that the witness was mistaken; and *Harvey v. State*, 40 Ind. 516, *infra*, was distinguished upon the ground that the court in that case supposed that any evil that might arise would be overcome by the direction of the jury to discredit the extract as evidence, but that in the case at bar the court did not so instruct the jury, but it was said that it was not thought that that case was well decided; and *Merkle v. State*, 37 Ala. 139, and *Stoudenmeier v. Williamson*, 29 Ala. 596, *supra*, II. e, were distinguished upon the ground that the question there considered was not whether an expert could read from medical works, but whether such books themselves could be introduced in evidence.

In some states, however, the practice prevails of permitting counsel while addressing the jury to read extracts from law books and from scientific

works as a part of their argument. *UNION P. R. CO. v. YATES*.

And in *Wade v. De Witt*, 20 Tex. 398, it was said that the privilege of counsel in their address to the jury to read from legal authors or from works of general science extracts pertinent to the case in support of their argument is a valuable one, though susceptible of abuse, and ought not to be abridged.

Thus, extracts from medical works which have been accepted by the profession as authority may when pertinent be read to the jury by counsel as a part of their argument. *State v. Hoyt*, 46 Conn. 230; *State v. Coleman*, 20 S. C. 441.

Counsel has the right in the argument of a cause before the court or jury, by way of argument or illustration, to read from a book a pertinent quotation or extract from a work on science or art or other publication, adopting it and making it a part of his own address to the jury. *Legg v. Drake*, 1 Ohio St. 286.

Extracts from scientific books, which are merely argumentative and contain no opinions or acquisitions of learned or scientific witnesses which could be regarded as proper matters of evidence, may be read or adopted as argument subject to the instructions of the court as to the law of the case. *Jones v. Doe*, Little Blue River Regular Baptist Church, 1 Smith (Ind.) 47.

The rule that matters gathered from books or newspapers cannot be used as testimony does not prohibit counsel from using quotations as mere illustration. *Baldwin v. Bricker*, 86 Ind. 221.

But they cannot be used as evidence. *Legg v. Drake*, 1 Ohio St. 286.

It would be an abuse of privilege to make the right thus to do the pretense of getting improper matter before the jury. *Legg v. Drake*, 1 Ohio St. 287.

And scientific works on insanity read from by counsel for the accused in a criminal prosecution in argument cannot be considered or regarded as

tion of the laws of any nation, state, or province; or, where the clause read, "The self-destruction of the person [insured], whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in the contract." In each of these cases it was held that the clause contained a condition, and that it was for defendant to show its breach by a fair preponderance of proof. *Van Valkenburgh v. American Popular Life Ins. Co.* 70 N. Y. 605; *Murray v. New York L. Ins. Co.* 85 N. Y. 286; *Goldschmidt v. Mutual L. Ins. Co.* 110 N. Y. 628. And a similar rule of construction has been applied in cases of accident insurance, where the contract provided that the insurance should not extend to cover accidental injuries or death caused by fighting or voluntary exposure to unnecessary danger, nor while the insured was under the influence of intoxicating drinks. See *Jones v. United States Mut. Acci. Assn.* 92 Iowa, 652, where the court says: "Not one of these conditions was to happen prior to the time the contract between the assured and the company should become binding. . . . The situation, then, is this: That there was a valid contract of insurance when the policy issued, but it might thereafter, upon the happening of some of these conditions, cease to be enforceable. . . . They were each and all matters of defense available to the defendant; but, not constituting a part of the plaintiff's case, the burden did not rest upon him to

either plead or prove the absence of them in the first instance."

And in *Coburn v. Travelers' Ins. Co.* 145 Mass. 226, where there was a similar ruling, the court uses this language: "Stipulations added to a principal contract, which are intended to avoid the defendant's promise by way of defeasance or excuse, must be pleaded in defense, and must be sustained by evidence. They are in the nature of provisos. Exceptions which leave the defendant liable to perform that which remains after the part excepted is taken away are to be negatived."

Some remarks of the court in *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, are most pertinent to the case at bar. The policy insured against bodily injuries "effected through external, violent, and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed." After the principal clause followed five provisos and eight conditions. The second proviso was: "Provided, always, that this policy is issued and accepted subject to all the provisions herein contained or referred to." The third proviso was: "That this insurance shall not extend to any bodily injury . . . when . . . injury may have happened in consequence of . . . voluntary exposure to unnecessary danger." The first condition was: "The party insured is required to use all due diligence for personal safety," etc. The last condition provided: "The provisions and con-

legal authorities in the case except so far as the views expressed in them are sanctioned and supported by judicial rulings and decisions in the trial of cases. *State v. West* (Del.) Houst. Crim. Rep. 371.

So, where counsel reads from medical books to the jury in his argument the court should instruct them that such books are not evidence, but simply theories of medical men. *Yoe v. People*, 49 Ill. 410.

And the reading by the attorney for the people in a criminal prosecution of extracts from medical works which have not been introduced in evidence or proved to be of authority is error unless the court instructs that such books are not evidence but simply theories of medical men. *Yoe v. People*, 49 Ill. 410.

But permitting counsel to read extracts from a work on medical jurisprudence during his argument before the jury in a criminal prosecution was not error where the court informed the jury that they could not be regarded as evidence, but were read simply as part of the argument. *Harvey v. State*, 40 Ind. 516; *Cory v. Silcox*, 6 Ind. 39.

And the reading in evidence by a counsel, as a part of his argument, of an essay of his own on dueling, and an extract from a book on duels and dueling, in a prosecution for homicide, is not such an abuse of the privilege of counsel as will require a reversal and setting aside of a verdict of guilty, where the evidence is such as to demand such a verdict. *Cavanah v. State*, 56 Miss. 300.

So, counsel should not be permitted to read medical authorities to the jury in his argument, where they are not read by way of illustration, but to give the jury a clear view of what such medical writers lay down as evidence on the question in hand. *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41.

And refusal to permit counsel to read extracts from a work on science or arts as part of his address to the jury is not reversible error where the bill of exceptions does not show that such extracts had any relevancy to the cause on trial, or came within 40 L. R. A.

the purport and legitimate scope of argument. *Legg v. Drake*, 1 Ohio St. 236.

In some jurisdictions the practice of permitting counsel while addressing the jury to read extracts from scientific works as a part of their argument is regarded as a matter which rests entirely in the sound discretion of the trial judge. *Union P. R. Co. v. Yates*; *Wade v. De Witt*, 30 Tex. 396; *Cross v. State*, 11 Tex. App. 84; *Hudson v. State*, 6 Tex. App. 565, 32 Am. Rep. 568.

And one which the appellate court will not revise unless it is made to appear that such discretion has been abused. *Cross v. State*, 11 Tex. App. 84; *Hudson v. State*, 6 Tex. App. 565, 32 Am. Rep. 568.

And refusal to permit counsel to read from medical books to the jury is a matter within the discretion of the court, and not the subject of a writ of error. *Luning v. State*, 1 Chand. (Wis.) 17, 2 Pinney, 215, 52 Am. Dec. 153.

III. Law.

Judicial opinions and opinions of counsel are to be excluded as evidence of the law in the trial of a cause, but may be read and are entitled to consideration as argument. *Steiner v. Coxe*, 4 Pa. 12.

Counsel may read and comment on the law to the jury in argument in a criminal case, and invoke the opinion of the judge upon any principle of law therein. *Powell v. State*, 65 Ga. 709.

While it is the duty of the jury in criminal cases to receive and accept the law as given them by the court, counsel in their argument may read law to the court in the hearing of the jury, or the jury in the hearing of the court, subject to the correction of the court in its charge. *McMath v. State*, 55 Ga. 303.

And the reading by the court, as a part of its charge to the jury, of the law as announced by the appellate court on a former appeal in the same case, is not error where the passages read seem to be the law. *Richmond & D. R. Co. v. Hiscox*, 7 Ala. 187.

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ditions aforesaid, and a strict compliance therewith during the continuance of this policy, are conditions precedent to the making of this contract." The question presented on appeal was whether the burden of proof was on the plaintiff to show that the insured used "all due diligence for personal safety and protection." The court says: "The rule of pleading in declaring upon a contract which contains an exception, or a proviso, or a condition, is stated in *Com. v. Hart*, 11 Cush. 130, 134, as follows: 'If such an instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it, together with the exception.' It is a general rule of the law of evidence, that it is necessary for a party to prove the substantive facts which he is required affirmatively to aver in his pleading. It is true that the policy in the case at bar only insures against bodily injuries effected by the means described 'within the intent and meaning of this contract, and the conditions hereunto annexed,' but this does not change the nature of the conditions. They shall take effect as conditions, and the insertion of these

words in the principal clause of the contract does not vary the legal effect of the contract. The condition we are considering is essentially an executory stipulation, in the form of a condition, that Murray shall use all due diligence for his personal safety and protection, and it is the breach of this condition by Murray which the defendant sets up as a defense. We are not aware that it has ever been held that the introduction of the words we have quoted, or of other similar words, into the principal clause of a policy of insurance, incorporates into this clause the conditions of the policy, within the meaning of the rule of pleading we have stated; and in some of the decisions, where it has been held that the defendant must plead, or that the burden of proof was on him to show, that a representation was false, or that a stipulation contained in a condition had not been complied with, the policy contained these or similar words in the principal clause. . . . In an action upon a policy which contains many provisos and conditions, there is a practical wisdom which courts have recognized, in compelling the insurance company to allege and prove the want of compliance with any particular proviso or condition on which it relies."

Examined in the light of these authorities, the clause providing what shall happen in the event of a fall is not difficult of construction. It is not in that part of the policy which insures the risk, nor "in close connection with and qualification of the description of the sub-

case has the right, in opening, to read to the jury the general observations of a learned judge, made in a case previously tried, on the nature and effect of circumstantial evidence, where he adopts them as his own opinions and makes them a part of his own address to the jury. *Reg. v. Courvoisier*, 9 Car. & P. 382.

And in reading to the jury a case from the regular law reports of the state he is not confined to the opinion of the court upon the question of law therein, but may read, in connection therewith, the statement of the facts of the case, and comment thereon. *State v. Hoyt*, 46 Conn. 330.

So, the use by counsel for the accused in a criminal prosecution of *Phillip's Remarkable Cases of Circumstantial Evidence* in argument before the jury is not objectionable. *Jones v. State*, 65 Ga. 506.

The general rule is that permission to counsel to read legal authorities in argument of a cause before the court and jury rests in the sound discretion of the court, and is not subject to revision on appeal except in a clear case of abuse of the discretion. *Hines v. State*, 3 Tex. App. 483; *Hudson v. State*, 6 Tex. App. 565, 32 Am. Rep. 593; *Cross v. State*, 11 Tex. App. 84; *Wade v. De Witt*, 30 Tex. 398; *Curtis v. State*, 36 Ark. 284; *People v. Anderson*, 44 Cal. 65.

And the manner of reading them as part of the argument also rests in the discretion of the court. *Curtis v. State*, 36 Ark. 284.

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And refusal of the court to stop the attorney for the people in a criminal prosecution from reading, in the course of his argument to the jury, extracts from books of law and reports of judicial decisions on matters of law, is not error where the court instructs the jury that it is their duty to decide the case according to the law as it is given by the court, regardless of any law which has been read from the books by any of the counsel. *People v. Treadwell*, 60 Cal. 226.

So, refusal to permit counsel for the defense in a criminal prosecution to read in his argument cases previously decided in the supreme court is not an abuse of discretion, where the court declines to hear them on the ground that it is sufficiently advised on the law of the case. *Hudson v. State*, 6 Tex. App. 565, 32 Am. Rep. 593.

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And the manner of reading them as part of the argument also rests in the discretion of the court. *Curtis v. State*, 36 Ark. 284.

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And a remark by the state's attorney that Phillips's Remarkable Cases of Circumstantial Evidence, which had been used by the counsel for the accused in a criminal prosecution in his argument, was a mere romance or fiction, is not objectionable; but if the judge should have reason to believe that the jury were likely to be misled thereby, it would be his duty to state to them what principles applicable to the case were to influence and guide them. *Jones v. State*, 65 Ga. 506.

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ject-matter of the insurance," but is placed with the other provisos, in a different part of the instrument. The mere location of the clause is, of course, not controlling, but it has been considered as of some weight in several of the cases cited *supra*. Nor is it to be construed as if it were removed from its position among the provisos, and incorporated with the clause descriptive of the subject-matter, by the mere use of the words, "except as hereinafter provided." To give these words such an effect would be to incorporate with the descriptive clause all the provisos as to loss caused directly or indirectly by riot or invasion, or by neglect of the insured, or by explosion or lightning, or where there has been other insurance (not notified to company), or where manufacturing is carried on after 10 p. m., or the building stands vacant, etc. The overwhelming weight of authority, as will be seen from the citations *supra*, is opposed to any such construction. The most important element, however, in determining whether a particular clause expresses a condition or an exception, is the nature of the clause itself. What does this particular clause mean, "If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease?" Manifestly, it does not merely provide that the insurer will not be liable for the particular variety of loss by fire which results from a fall. It stipulates for very much more, *viz.* that the contract, which it is expressly provided shall normally con-

tinue for a year, shall, in the event of a fall, absolutely cease and determine, so that, if a fall shall take place which in no way injures the property insured, and it be thereafter destroyed by fire happening otherwise than by fall or from prohibited causes, the insurer is nevertheless not liable, because an event has happened which, by agreement of the parties, puts an end to the contract altogether. It is difficult to see how such a clause can be construed otherwise than as a condition subsequent.

To the further argument that the words in the descriptive clause, "while contained in brick building," etc., made it necessary for the plaintiff to show that no fall had destroyed the integrity of the building, a sufficient answer is found in the brief of the defendant in error. A clause drawn expressly to cover the case of a building falling before a fire has been inserted in the contract, and it is to be assumed that the whole intention of the parties on that subject is expressed in such clause.

The circumstance that the complainant alleged that the "fire did not happen by . . . reason of any of the causes excepted by the terms of the policy" did not change the situation in any way. Unnecessary allegations in a complaint need not be proved. *Murray v. New York L. Ins. Co.* 85 N. Y. 239.

It is next contended by defendant that the court erred in refusing to charge, as requested, that "the burden upon the whole case is upon the plaintiff to establish by a preponderance of evidence that the damage sustained was

evidence then adduced, is not an abuse of discretion. *Dempsey v. State*, 3 Tex. App. 429, 30 Am. Rep. 148.

And the exclusion of portions of a work on mental diseases, offered in evidence in a criminal prosecution in which insanity was interposed as a defense, all of which related to the question of the responsibility of an insane person for his acts, containing an elaborate discussion on that question, is not error, as the jury is bound to accept the law as given by the court, and is not charged with the duty of determining whether the rules laid down by the court were correct. *State v. Winter*, 72 Iowa, 627.

And in *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70, it was held to be error to permit the district attorney on an argument in a criminal case to read to the jury certain extracts from Brown on Insanity, where no evidence had been adduced that the book was by a standard author.

A jury has no right to receive the law from books, however, nor from counsel, in a will contest, and counsel cannot be permitted, against objection, to read to them from books, cases decided in other states and in England, for the purpose of showing that the facts set forth therein were not inconsistent with the legal significance of soundness of mind as applied to the making of wills. *Baldwin's Appeal*, 44 Conn. 37.

And it has been held that counsel cannot be allowed to read to the jury and comment upon decided cases upon the question at issue found in the books of reports, for the reason that, so far as the question is one of law, such cases and the arguments upon them are for the consideration of the court only, and so far as it is a question of fact, it is to be decided by the jury upon the facts given in evidence in the regular course of the trial. *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756.

The accused in a criminal prosecution, however, has the right to read to the jury the determination of the court of last resort upon points affecting
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him, in such a manner as to give them a complete knowledge of their spirit, scope, and meaning, where the jury has statutory power to determine the law of the case. *State v. Hoyt*, 46 Conn. 330.

In *People v. Anderson*, 44 Cal. 65, it was said that as a general rule the practice of allowing counsel in either civil or criminal cases to read law to the jury is objectionable, and ought not to be tolerated, as its usual effect is to confuse rather than to enlighten the jury.

As to foreign laws and the methods by which they may be established, see *note* to *State v. Behrman* (N. C.) 25 L. R. A. 449.

IV. Miscellaneous matters.

Ephemeral publications, such as bank directories or reporters, cannot be referred to or produced in court in proof of the facts stated in them. *State v. Brown*, 4 H. I. 528, 70 Am. Dec. 168.

And statements of facts and extracts from books or newspapers cannot be read in evidence to the jury. *Baldwin v. Bricker*, 86 Ind. 221.

Nor is a gazetteer competent evidence of the distance between places. *Spalding v. Hedges*, 2 Pa. St. 240.

And pamphlets commonly known as "bank-note detectors" are inadmissible in evidence to prove the worthlessness of a bank bill. *Payson v. Everett*, 12 Minn. 217.

So, books explaining a process and terms of art in a manufacture and evidence as to the technical meaning of words in a trade are not admissible in evidence to explain a statute in which such terms are used, though the judge may inform himself by consulting such books. *Atty. Gen. v. Cast Plate Glass Co.* 1 Anstr. 89.

And a volume entitled "The Principle and Practice of Life Insurance," though a standard work of recognized authority in the business of life insurance companies, containing rules and modes of

caused by fire, for this is the only risk it was insured against under the policy; and, if all the evidence, when considered together, leaves the jury in doubt as to whether the damage was caused by fire or not, their verdict must be for the defendant."

Manifestly, this is an accurate statement of the law, and presumably the only reason why the trial judge did not include it in his charge was because the question it refers to was completely overshadowed by the other and more important one which has just been discussed. There seems to have been no conflict of evidence at all on this branch of the case. There is no suggestion anywhere in the record that the "damage was not caused by fire." The opening page of the brief filed by plaintiff in error contains this statement: "On April 30, 1895, the property insured was damaged and destroyed by fire." The only question in the case was whether the fall preceded the fire, thus terminating the contract, or whether it did not. There was no contention upon the trial that the agency which destroyed the property was not the fire. If the jury had been required to answer specific questions, and if they had found, first, that the fall did not precede the fire nor result from it, and had found, secondly, that the damage was not caused by fire, it would have been the duty of the trial judge, upon motion, to set aside such finding, since it would be not only against the weight of evidence, but wholly unsupported by any testimony in the case. Under these circumstances it was clearly unnecessary to instruct the jury as to the academic question, Upon whom was imposed the burden of proving that

the damage to the property insured was caused by fire? The fact was conclusively proved, and no one questions the accuracy of such proof.

It is next contended that the court erred in refusing to charge the jury that "even though the jury find that the fire in the building preceded the fall, they cannot award the plaintiff any amount for loss following the fall, unless they find that the fall was the result of fire."

The amount of the loss was not disputed upon the proof, nor, except for the suggestion that the fall preceded the fire, and thus caused the catastrophe, was there any claim that any part of the damage was caused otherwise than by fire. The court had charged the jury that the decision of the case "turns upon your conclusion as to a single issue of fact;" that "the suit was brought to recover a loss which the plaintiff alleges it sustained by the burning of its stock of goods," etc.; that "the plaintiff alleges that on the night of April 29, 1895, while this policy was in force, a fire occurred, in consequence of which its stock of merchandise was nearly wholly destroyed;" that, "according to the theory of the plaintiff,—and there seems to be no dispute about this upon the evidence,—the loss which the plaintiff is entitled to recover, if it is entitled to recover at all, is the sum of \$7,744.77, with interest," etc.; that the "simple issue, therefore, for your consideration is that which is presented by this defense: Did the building fall as a result of fire, or did the fall precede the fire?" These parts of the charge were not excepted to, and, having thus substantially covered the point now presented as the proof left it, the trial

calculating and adjusting life insurance, is not admissible in evidence in an action upon a life insurance policy. *Mutual L. Ins. Co. v. Bratt*, 55 Md. 200.

And permitting counsel for an insurance company against objection to read to the jury a pamphlet prepared by the secretary of the company for the use of its agents, setting forth the qualities of a good agent, and what was expected of them, and comment thereon to illustrate his argument, in an action upon a life insurance policy, is an abuse of discretion preventing a fair trial. *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573.

In *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573, *supra*, *Leag v. Drake*, 1 Ohio St. 287, *supra*, II. b. was distinguished upon the ground that in that case the matter read was pertinent to the subject of inquiry, while in the present case the matter sought to be read had no possible bearing upon the subject.

So, United States Patent Office act of 1836, § 15, providing that the defendant in an action concerning a patent may plead the general issue and give notice in writing that the improvement has been described in some public work anterior to the supposed discovery thereof by the patentee, does not make such a public work admissible as evidence of the facts relied on, for the purpose of laying a foundation for an inference of some fact sought to be established. *Seymour v. McCormick*, 19 How. 96, 15 L. ed. 567.

And a description of an improvement in London's Encyclopedia of Agriculture before the issue of the patent is not evidence that the improvement was operated successfully before the patent issued. *Seymour v. McCormick*, 19 How. 96, 15 L. ed. 567.

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But a foreign publication is competent as evidence in regard to the state of the art and as a foundation for the inquiry whether a patented structure required invention. *French v. Carter*, 137 U. S. 259, 34 L. ed. 664.

And tide tables calculated by celebrated scientific authors and contained in their books may be read in evidence, and are of equal validity with the almanac. *Green v. Cornwell*, 1 N. Y. City Hall Rec. 11.

And a record of the weather, kept at an insane asylum for a number of years, is admissible in evidence to show the condition of the weather on a given day included in such record. *De Armond v. Neasmith*, 32 Mich. 231.

So, the general acquiescence of millwrights in the accuracy of Leffel's Tables, and in the results of computation founded upon them, may be treated as common knowledge of men of that profession, and their computations so made are competent evidence; and such tables may be admitted in an action for damages for the diversion of water from a creek. *Garwood v. New York C. & H. R. R. Co.* 45 Hun, 123.

And permitting counsel for plaintiff in a suit for backing water by a dam upon his machinery, to read extracts from Evans's Millwright Guide in the closing argument to the jury, is not error where the court charged that extracts read from scientific works are not of authority, conclusive or *prima facie*, but, like argument of counsel or any other thing adduced to illustrate, they may be satisfactory to the jury or they may not. *Cory v. Silcox*, 6 Ind. 39.

As to tabulated results of computations by civil engineers, see *WESTERN ASSUR. CO. v. J. H. MOHLMAN CO.* F. H. B.

judge was under no obligation to instruct again upon the same point in the precise language of the request.

The next group of assignments of error raises the question as to the propriety of allowing one of the witnesses, a civil engineer, and expert in heavy construction work, to read excerpts from scientific books when giving his testimony. The general proposition that scientific books are not to be read in evidence is a familiar one, and many citations from text-writers and reported cases are found in the brief of the plaintiff in error. Nearly all the reported cases deal with medical works, and most excellent reasons for the application of the general rule in such cases may be found therein. But the rule is not of universal application. It would be a reproach to the administration of the law if it were so. Records of observations are undoubtedly secondary evidence, but, if all such records were excluded from the sources of knowledge available to a court of justice, it would frequently find itself unable to obtain information which was open to every individual in the community. It has been held repeatedly that standard life and annuity tables, showing at any age the probable duration of life, are competent evidence (*Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 554, 30 L. ed. 2518); and yet these tables show merely the deductions from records of past transactions, when neither the record of the transactions nor the individual who has worked out the deductions is called to testify to the accuracy of his work, or to the conditions under which it was performed. So, too, almanacs, astronomical calculations, tables of logarithms, interest tables, weather reports, tables of the rise and fall of the tide, have been admitted in evidence. In an opinion approving of the admission of market reports, upon which the commercial world relies, is found the following pertinent suggestion of Judge Cooley: "As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries; and courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." *Sisson v. Cleveland & T. R. Co.* 14 Mich. 497, 90 Am. Dec. 252.

The particular excerpts complained of in the case at bar are these: Certain reports of the United States Department of Agriculture, prepared under the direction of the chief of the division of forestry, contain tables which comprise the results of over 2,000 tests by the United States government of the crushing strength of different kinds of timber, prepared expressly to increase the knowledge of timbers grown in this country for the benefit of merchants and dealers and builders and engineers. The report is a recognized authority in the engineer's profession. From the tables the witness read the "results of investigation on 'long leaf pine,'" which was the kind of timber in the posts the cause of whose giving way was the

subject of dispute. The next book produced was Kent's *Mechanical Engineer's Pocketbook*, — the last edition of 1896, — which, it is not disputed, is a recognized authority. "Every mechanical engineer," says the witness, "has one on his shelf." From a table in this book, giving the crushing strength of timber, the witness read a statement of such strength, per square inch, of the kind of pine of which the posts were made. The third book is Johnson's *Strains in Frame Structures*, entitled "Theory and Practice of Modern Frame Construction," also concededly a recognized authority. It contained similar tables, and a similar excerpt was read. That information of great value is obtained by multiplying such tests and tabulating the results is surely self-evident. Under the rule contended for, that valuable information would be available for the use of a court of justice so long as the men who made the tests and prepared the tabulations were living and producible, but after their death or disappearance the information they had gathered would be lost to the court, although available for everyone else in the community, and relied upon by engineers and builders whenever a new structure is in process of erection. Upon the precise point here presented the diligence of counsel has not succeeded in discovering a single authority. We feel, therefore, no hesitancy in so modifying the general rule as to hold that, where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanic arts with which such statistics and tabulations are concerned.

It is further assigned as error that two witnesses (Bowman and Stanton), called by the plaintiff, were allowed to state their opinions as to whether the fall preceded the fire or the fire preceded the fall. It is not objected that the witnesses were not experts, and precisely similar questions had been put by defendant to its own witnesses. It appeared, however, that neither Bowman nor Stanton saw the ruins until long after the fire, and defendant insists that their opinions were, therefore, incompetent. This does not necessarily follow. Although the ruins had been pretty well cleaned up, there was plenty of timber and columns lying down in the bottom, and it is safe to say that the indications afforded by the condition of the columns had much to do with the formation of an opinion. The lapse of time may have rendered the opinions of but little value, but on so much of the testimony as the record contains we are not prepared to say that the trial judge should have excluded them altogether.

The only remaining exceptions are to the refusal of the trial judge to allow defendant's witnesses Cashman and Freel to express an opinion as to "how long a fire would burn in the building before the posts would be weakened," and as to "what time would elapse before fire and smoke would appear." The hypothetical question intended to elicit this infor-

mation contained, so far as the record shows, no indication as to whereabouts in the building the fire broke out. It is manifest that this is an important—probably the most important—element in the hypothesis, and, without it, any opinion, expert or other, would be mere wild

guesswork. The trial judge correctly excluded it.

The judgment of the Circuit Court is affirmed.

Motion to Supreme Court of United States for writ of certiorari denied.

WISCONSIN SUPREME COURT.

Joseph F. RASCH, *Recept.*,

v.

Albert NOTH, *Appl.*

(.....Wis.....)

An action of ejectment cannot be maintained against one the eaves of whose barn overhang his neighbor's land 10 or 11 inches, where the eaves of the latter's barn are lower than those of the former, and the barn is built so close to the line that the water from the eaves falls on the former's land.

(April 12, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Calumet County in favor of plaintiff in an action of ejectment to compel the removal of the eaves from defendant's barn. *Reversed.*

The facts are stated in the opinion.

Messrs. James Kirwan and L. J. Nash, for appellant:

Ejectment can be maintained only to recover something visible and tangible, something which lies in livery, and not in grant, something that is not incorporeal, but is capable of physical possession and can be delivered by the sheriff upon execution from the possession of the defendant to the possession of the plaintiff.

The eaves, being attached to the defendant's lot, belong to him, and if the projecting part were cut off by the sheriff in execution of the judgment, the severed material would still belong to the defendant, and could not be delivered into the possession of the plaintiff.

Co. Litt. 4a; 2 Bl. Com. 18; 8 Kent, Com. 401; 2 Bouvier; Inst. ¶ 1570; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 826; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 587; *Reed v. Drake*, 29 Mich. 222; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Skinner v. Wilder*, 88 Vt. 115, 88 Am. Dec. 645.

Neither can there be a recovery by ejectment of the light and air that ought to be where the eaves are, nor of the space occupied; for these are invisible, intangible, and incapable of possession or ownership.

Sedgwick & Wait, Trial of Title to Land, §§ 97, 101; *Racine v. Crotzenberg*, 61 Wis. 485, 50 Am. Rep. 149; *Fritsche v. Fritsche*, 77 Wis. 270; *Taylor v. Gladwin*, 40 Mich. 232; *Jackson, Sarton v. May*, 16 Johns. 184; *Child v. Chappell*, 9 N. Y. 252; *Woodhull v. Rosenthal*, 61 N. Y. 389.

NOTE.—On the question what disseisin will support ejectment, including cases of projection of eaves, see note to *Harrington v. Port Huron* (Mich.) 13 L. R. A. 664.

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The overhanging eaves did not constitute an ouster or disseisin.

McCourt v. Eckstein, 22 Wis. 158; *Zander v. Valentine Blatz Brew. Co.* 89 Wis. 164, 95 Wis. 163; *Sedgwick & Wait*, Trial of Title to Land, §§ 80, 93, 276; *Tyler*, Ejectment, pp. 83, 875.

If the piece of ground which the judgment awarded to the plaintiff was in some sense occupied by the defendant by his overhanging eaves, it was also as distinctly occupied by the plaintiff by resting his own barn upon it.

Sedgwick & Wait, Trial of Title to Land, § 741; *Tyler*, Ejectment, p. 904; *Jones v. Collins*, 16 Wis. 595.

The facts are more consistent with the theory that the barns of both plaintiff and defendant were placed as they were shown to be, not by mutual wrong, but by mutual license or sufferance.

Sedgwick & Wait, Trial of Title to Land, §§ 872, 873.

If there were mutual licenses, neither acquired any estate in or seisin of the other's soil.

13 Am. & Eng. Enc. Law, p. 539.

And if such possession was permitted by the owner to continue, a tenancy at will or by sufferance was created.

Wood, Land. & T. § 7, p. 15; *Brown v. Kayser*, 60 Wis. 7.

In Wisconsin a tenant at will or by sufferance cannot be ejected until his tenancy has been regularly terminated by notice to quit.

Rev. Stat. §§ 2183, 2184; *Brown v. Kayser*, 60 Wis. 7.

Trespass, or an action of nuisance, and not ejectment, is the proper remedy for overhanging eaves.

Sedgwick & Wait, Trial of Title to Land, § 156; *Tyler*, Ejectment, p. 88; 3 *Wait, Act. & Def.* p. 5; *Newell*, Ejectment, pp. 50, 52, 58; *Brady v. Hennion*, 8 Bosw. 528; *Aiken v. Benedict*, 39 Barb. 400; *Vrooman v. Jackson*, 6 Hun. 826; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 587; *Leprell v. Kleinschmidt*, 112 N. Y. 364; *Harrington v. Port Huron*, 86 Mich. 46, 13 L. R. A. 664.

Messrs. J. E. McMullen and C. E. McMullen, for respondent:

The owner of lands is entitled to enjoy, and has the exclusive use and enjoyment of, all the space both below and above the soil of his premises, and to erect thereon any superstructure that he may see fit for such enjoyment, and no one can lawfully obstruct it to his prejudice.

Appellant in this case transgressed that provision of law.

If the appellant can extend his roof over and upon the property of the respondent, and

interfere thereby with his use and enjoyment of his premises, without any liability created thereby, then he can extend it 11 feet or any other distance that he may choose, either for the purpose of annoying the owner, or for personal benefit to himself. This clearly cannot be the intention of the law, nor the construction to be put thereon.

Den. Gilliam, v. Bird, 30 N. C. (8 Ired. L.) 280, 49 Am. Dec. 379; *Den. Huggins, v. Ketchum*, 20 N. C. (4 Dev. & B. L.) 415.

Where the defendant interferes with the use of the plaintiff's land the plaintiff might treat this as a disseisin rather than a trespass, and might maintain ejectment.

McCourt v. Eckstein, 22 Wis. 154, 94 Am. Dec. 594; *Childs v. Nelson*, 69 Wis. 125; *Zander v. Valentine Blatz Breving Co.* 95 Wis. 162; *Murphy v. Bolger Bros.* 60 Vt. 723; 3 Watt, Act. & Def. p. 6; *Sherry v. Frecking*, 4 Duer, 452; *Stedman v. Smith*, 8 El. & Bl. 1.

Ejection or trespass at the option of the plaintiff may be brought against the owner of a building which, through inadvertence of the owner, overhangs the plaintiff's land; but if the defendant offers to remove the projecting part, and is prevented by the plaintiff, ejectment will probably not lie.

6 Am. & Eng. Enc. Law, p. 281, title *Ejectment*; 1 Greenleaf's Cruise, Real Prop. p. 52, note 2.

Cassoday, Ch. J., delivered the opinion of the court:

This is an action of ejectment. The defendant answered by way of general denial and adverse possession. A trial by jury being waived, the cause was tried by the court, and the findings of the court are to the effect that block 4 of the village, now city, of Chilton, was platted in 1852, and consisted of lots 1, 2, and 3 lying in the extreme northern portion of the block, which was of irregular shape, and another large and irregular lot, called the "Mill Lot," adjoining them upon the south; that the plaintiff owns the west one half of the mill lot, which is immediately south of lot 3, and the defendant owns lots 1, 2, and 3; that both parties claim through and under a common grantor as far back as 1865; that at that time stakes designating the corners of the lots and the division line between lot 3 and the mill lot were still standing, and were pointed out to the purchaser; that in 1869 the original plat stakes were still standing and visible; that the then proprietors of lot 3 and the mill lot, respectively, participated in the location of the line between the two lots, and built a line fence thereon; that the same was then treated by the respective proprietors as the division fence located upon the true line between lot 3 and the mill lot until 1888, when the then proprietors conveyed lots 1, 2, and 3 to the defendant, who has since occupied up to such line fence as the true line; that in 1875 the respective proprietors dug a well on the line of said fence, each paying one half of the expense of its construction; that in 1891 the west one half of the mill lot was conveyed to the plaintiff; that since that time the plaintiff and defendant have used the well in common; that the premises in dispute are northerly from such division fence, and are a part of lot 3, 40 L. R. A.

and not a part of the mill lot; that since 1869 the defendant and his grantors have held and occupied adversely all of the land lying northerly from the division fence; that the defendant has built upon lot 3 a barn, which stands and rests wholly upon his own soil, northerly from the division fence; that the eaves of such barn did project and overhang the line to the extent of 10 or 11 inches, but that the drip from the eaves fell upon the plaintiff's barn, which was also built so close to the line that its eaves, being lower down than the eaves of the defendant's barn, received and receive upon the northerly slant of its roof the water dripping from the eaves of the defendant's barn, and casts the same, together with all that falls upon its northerly slope, back northward on the defendant's land; that no complaint by the plaintiff or his predecessors or grantors was ever made to the defendant on account of the projection and overhanging of the eaves of the defendant's barn, and no evidence was given as to damage, if any, occasioned by such projection. And as conclusions of law the court found, in effect, that such projection of the eaves of the defendant's barn constituted an invasion of the plaintiff's rights, which was redressible in an action of ejectment; that the plaintiff was entitled to judgment accordingly, and for costs, and ordered the same to be entered. From the judgment so entered the defendant brings this appeal.

We are clearly of the opinion that this action of ejectment cannot be maintained upon the facts found by the trial court. Certainly, the cases in this court do not authorize a recovery in such a case. *McCourt v. Eckstein*, 22 Wis. 153; *Zander v. Valentine Blatz Breving Co.* 95 Wis. 164, *Id.*, 95 Wis. 162. This last case, in line with the first, held, in effect, that "an intrusion by one lot owner of his foundation wall upon the land of the adjoining owner, without permission, is a trespass, and may be treated as a disseisin; but, if the owner of the land so intruded upon extends his own building to his line, and rests it upon such wall, and occupies the same continuously, he thereby elects to treat the intrusion as a mere trespass, and cannot maintain ejectment therefor." While it is found in the case at bar that the eaves of the defendant's barn projected 10 or 11 inches over the line, yet it was also found that the eaves of the plaintiff's barn projected under the eaves of the defendant's barn sufficiently to carry the water from both roofs northward onto the defendant's land. There is no dispute but what each party owns and occupies to the line mentioned. The only dispute is as to whether the plaintiff can maintain ejectment for such projection of the eaves of the defendant's barn, upon the facts found; in other words, whether the plaintiff can thus occupy his premises clear to his line, and at the same time maintain ejectment for such mere intrusion. And we must hold that he cannot. There are cases holding that one is liable in ejectment for the projection of his roof over another's land. *Murphy v. Bolger Bros.* 60 Vt. 723; *Sherry v. Frecking*, 4 Duer, 452. In others it is held that such action cannot be maintained. *Aiken v. Benedict*, 39 Barb. 400; *Frooman v. Jackson*, 6 Hun. 326. See also *Leprell v. Kleinachmidt*, 119 N. Y. 364,

where the question was left undetermined. *Harrington v. Port Huron*, 86 Mich. 46, 13 L. R. A. 664. It is unnecessary to determine the question in the case at bar.

The judgment of the Circuit Court is reversed, and the cause is remanded, with direction to dismiss the complaint.

Re Estate of August ZILLEY, Deceased.

Mary A. ZILLEY, *Respnt.*,

v.

B. F. DUNWIDDIE, Guardian, *et al.*, *Appts.*

(.....Wis.....)

1. The father's duty to maintain a child after divorce, where there is no decree of the court relating thereto, remains as before, especially if the custody of the child is not taken from him.

2. A promise of the father to pay the mother for maintaining their boy after he has reached the age when the father is entitled to have him under a decree of divorce granted for the father's fault will be implied, although he has tried to get the custody of the boy, and has told the mother that unless he can get it he will not pay for the boy's keeping, but she will not consent to surrender him.

(*Marshall, J., dissents.*)

(February 8, 1898.)

A PPEAL by the guardian of the infant children of August Zilley, deceased, from a judgment of the Circuit Court for Rock County reversing a judgment of the County Court disallowing the claim of Mary A. Zilley for support furnished to one of the children. *Affirmed*

Statement by Pinney, J.:

This is an appeal from the judgment of the circuit court for Rock county allowing the claim of Mary A. Zilley, the respondent, against the estate of her former husband, August Zilley, deceased. The parties were married September 26, 1867, and divorced, by a decree of the circuit court for Rock county, December 29, 1894, in an action brought by the claimant against said August Zilley on the ground of his cruel and inhuman treatment. The court by its decree made a final division of the estate of said August Zilley between him and the said Mary A. Zilley. The parties had an understanding with each other previous to the divorce in regard to the custody and education of the two children of the marriage, namely, William A. Zilley, at that time about sixteen years of age, and Clayton A. Zilley, about five years of age, to the effect that the mother, the present claimant, should have the custody and education of the boy William A. Zilley, and also of the youngest child, Clayton A. Zilley, until he should become of the age of

ten years, after which his father was to have him. The court accordingly decreed the custody of said children to the mother "until the youngest of said children should become of the age of ten years, or until the further order of the court," the defendant in the meantime having the right to visit such children at reasonable times, in the daytime. No provision whatever was made in the decree as to the maintenance and support of either of the children. About two or three years subsequent to the divorce the deceased was married to Martha Zilley, who survives him. The deceased, August Zilley, then resided in the city of Beloit, where he continued to reside after the divorce and for some two or three years after his second marriage. He then moved onto his farm, near said city, and continued to reside there until the time of his death, March 7, 1895. The youngest child became ten years of age July 9, 1889, when the deceased, August Zilley, applied to the claimant for the boy to go and live with him, and she refused to allow him to go; whereupon he told her that if the child could not come and stay with him he would not pay for his keeping; that he was willing to pay his schooling, and give him a home with him, which was where he belonged, as he understood it. A room was fixed up for him in the home where Mr. Zilley then resided, and subsequently Zilley tried frequently to get the boy to live with him, but claimant would not consent. He continued to make his home with the claimant down to the 18th of January, 1895, when his father sent him to Faribault, Minnesota, to school, where he remained until after the death of the latter. It was found by the circuit court, among other things, that no allowance for or provision respecting the expense of the education and support of said children was made by the judgment, and no application to the court in respect thereto or in respect to the custody of said children was made by either party after judgment. The youngest child, Clayton A. Zilley, became ten years old July 9, 1889, and had at all times since the divorce resided with his mother, the claimant, excepting short periods of time, since he attained the age of ten years, not exceeding in the aggregate six months. He was attending school at Faribault, Minnesota, the greater portion of the time when not so residing with his mother, and during the residue of such time he was with his father, August Zilley, and his second wife, upon said farm. He visited and resided with his father for a few days at a time on several occasions after he became ten years of age, but preferred to reside with his mother, and returned to her on each such occasion, and made his permanent residence with her of choice, because his father was unwilling to compel, or did not compel, him to reside with him. Between July 9, 1889, and March 7, 1895, the date of the death of August Zilley, the claimant furnished said Clayton A. Zilley his board and lodging, and cared for him for and during five years and two months at her sole cost and ex-

NOTE.—For unsuccessful actions against father for support of child after divorce, see *Fulton v. Fulton* (Ohio) 29 L. R. A. 678; *Brown v. Smith* (R. I.) 30 L. R. A. 680; *Foss v. Hartwell* (Mass.) 37 L. R. A. 689.

40 L. R. A.

For enforcement of liability of father after divorce, see also *McKay v. San Francisco City and County Super. Ct.* (Cal.) *post*, 585; and *Gibson v. Gibson* (Cal.) *post*, 587.

pense, which board, lodging, and care were reasonably worth \$1,072, and after said 9th day of July, 1889, and prior to March 7, 1895, said claimant furnished to said Clayton A. Zilley necessary clothing, at the cost to her of \$146.50; and nothing had been paid to or received by her from anyone for or on account of such board, lodging, and care, or for such clothing. The claimant filed a claim against the estate of said August Zilley, deceased, in the county court for Rock county, for such board, lodging, care, and clothing for the sum of \$1,444, and the county court by its judgment wholly disallowed said claim, and the claimant appealed therefrom to the circuit court. The foregoing facts were found by the circuit court and that the executor of the last will and testament, George Crosby, had in his hands assets, properly applicable thereto, more than sufficient to pay the said claim. There was evidence that the deceased, August Zilley, desired the boy Clayton to live with him, and on one occasion sent for the boy, and the claimant said that he did not have to go if he did not want to. In answer to the question why she kept the boy, she testified that the boy stayed there, and "I felt under obligations to have him stay." It appeared that the father was able and willing to properly provide for the boy, and desired that he should live with him. The circuit court reversed the judgment of the county court, and allowed said claim in the sum of \$1,218.50, and adjudged that it be paid to the said claimant by said executor, with the costs of the action. The guardian *ad litem* of the two minor children of the said deceased, to wit, said Clayton A. Zilley and Edna Zilley, a daughter by his second wife, appealed.

Mr. B. F. Dunwiddie, guardian *ad litem*, for appellant:

A divorced wife and mother cannot recover from the estate of her husband, on the settlement thereof in the county court, for support and maintenance furnished voluntarily by her to her own child, where, under the decree of divorce, the father is entitled to the custody of the child, and where he was at all times desirous, ready, and able to give the child a home and provide for its support, but where he is prevented therefrom by the influence and refusal of the mother.

Ramsey v. Ramsey, 121 Ind. 215, 6 L. R. A. 682; *Rich v. Rich*, 88 Hun, 566; *Burritt v. Burritt*, 29 Barb. 124; *Cushman v. Hassler*, 82 Iowa, 295; *Hampton v. Allee*, 56 Kan. 461; *Harris v. Harris*, 5 Kan. 46; *Hall v. Green*, 87 Me. 122; *Brown v. Smith*, 19 R. I. 819, 30 L. R. A. 690; *Chester v. Chester*, 17 Mo. App. 657; *Gotts v. Clark*, 78 Ill. 229; *Finch v. Finch*, 22 Conn. 412; *Chandler v. Dye*, 37 Kan. 765; *Fulton v. Fulton*, 52 Ohio St. 229, 29 L. R. A. 678.

The decree of divorce between the respondent and Mr. Zilley was and is conclusive, as to the mutual rights and obligations of the parties, from its rendition in December, 1884, subject only to be modified by the court which rendered it, in an application under and pursuant to § 2363, Rev. Stat.

Under the evidence in this case, she could not have obtained any modification of the decree had she made an application, as the court 40 L. R. A.

would not have been warranted in awarding her anything for maintenance and support of the boy Clayton, which she had voluntarily furnished during a period when the father was ready and anxious to care for and maintain him.

Ramsey v. Ramsey, 121 Ind. 215, 6 L. R. A. 682; *Huffman v. Huffman*, 15 Ohio St. 427; *Williams v. Williams*, 13 Ind. 523; *McNees v. McNees*, 97 Ky. 152; *Brow v. Brightman*, 136 Mass. 187; *Stetson v. Stetson*, 80 Me. 483; *Sullivan v. Learned*, 49 Ind. 252; *Shaw v. McHenry*, 52 Iowa, 182; *Leming v. Sale*, 128 Ind. 317; *Jennings v. Jennings*, 56 Iowa, 288; *Bennett v. Southard*, 35 Cal. 688.

By the express terms of § 2369, last clause, where a final division of property is made in a divorce action, no other provisions can thereafter be made for the wife. The judgment is finally conclusive, and cannot be modified by the trial court after the term at which it was rendered.

Webster v. Webster, 64 Wis. 438; *Campbell v. Campbell*, 37 Wis. 206; *Hopkins v. Hopkins*, 40 Wis. 462; *Bacon v. Bacon*, 43 Wis. 197.

Messrs. Ruger, Norcross, & Ruger, for respondent:

While the marital relation continues the father is primarily liable for necessities for the support of his minor children.

McGoon v. Irvin, 1 Pinney, 526, 44 Am. Dec. 409, 1 Bl. Com. p. 447; 2 Kent, Com. 190 *et seq.*; *Edwards v. Davis*, 16 Johns. 281; *Schouler*, Dom. Rel. p. 343; *Bishop*, Mar. Div. & Sep. §§ 1154-1156; 1 Parsons, Contr. pp. 251, 253, 255.

A mother, also, is under an obligation to support her minor children, but as to the father her obligation and duty are but secondary.

Wis. Rev. Stat. §§ 1508, 1505; *Thomas v. Thomas*, 41 Wis. 229.

These relative duties and obligations of husband and wife are not changed by severance of the marital relation through a divorce, and *a fortiori* when the divorce is granted for the misconduct of the husband; and after divorce the husband continues to be primarily obligated to support his minor children, except so far as the judgment of divorce otherwise provides.

Stanton v. Willson, 8 Day, 37, 3 Am. Dec. 255; *Pretzinger v. Pretzinger*, 45 Ohio St. 453; *Fulton v. Fulton*, 52 Ohio St. 229, 29 L. R. A. 678; *Dolloff v. Dolloff* (N. H.) 38 Atl. 19; *McCarthy v. Hinman*, 35 Conn. 538; *McGoon v. Irvin*, 1 Pinney, 526, 44 Am. Dec. 409; *Thomas v. Thomas*, 41 Wis. 229; *Bishop*, Mar. Div. & Sep. § 1223; *Buckminster v. Buckminster*, 38 Vt. 248, 38 Am. Dec. 652.

On like grounds the primary obligation of the father to support his minor children continues during a separation of husband and wife caused by his misconduct.

Pierce v. Pierce, 64 Wis. 78, 54 Am. Rep. 581.

This judgment of divorce did not change these relative obligations and liabilities of the father and mother.

Pretzinger v. Pretzinger, 45 Ohio St. 453; *Plaster v. Plaster*, 47 Ill. 290; *Welch's Appeal*, 43 Conn. 342; *Stanton v. Willson*, 3 Day, 37, 3 Am. Dec. 255; *Covels v. Covels*, 8 Ill. 435, 44 Am. Dec. 708.

The fact that the father did not have actual custody of Clayton after he became ten years of age did not relieve him from his primary obligation to support him.

No subsequent order respecting their custody having been made, the mother's right of custody continued.

Wis. Rev. Stat. §§ 2362-2369; *Williams v. Williams*, 36 Wis. 362; *Thomas v. Thomas*, 41 Wis. 229; *Campbell v. Campbell*, 37 Wis. 206; 5 Am. & Eng. Enc. Law, p. 887.

Having acquiesced in and made it the mother's duty to continue her custody, the father could not claim exemption from liability for the support of Clayton because he did not have actual custody, nor can those claiming through him make such claim.

Pierce v. Pierce, 64 Wis. 73, 54 Am. Rep. 581; *McGoon v. Irvin*, 1 Pinney, 526, 44 Am. Dec. 409; *Stanton v. Willson*, 3 Day, 87, 3 Am. Dec. 255.

The position of the respondent is clearly distinguishable from that of a stranger who voluntarily takes and supports the child of another who is willing to keep and support it.

Wis. Rev. Stat. 1503. See also Rev. Stat. 1535, § 4587c; Bishop, Mar. Div. & Sep. §§ 1162, 1164, 1223, 1224; *Courtright v. Courtright*, 40 Mich. 633.

During the continuance of the jurisdiction of the court adjudging the divorce, the mother's remedy for obtaining compensation for the support of Clayton, after he became ten years of age, would have been by application to that court, and it would have been competent for that court to award compensation for both past and future support. After the termination of such jurisdiction by the death of August Zilley, the jurisdiction of the county court, administering his estate, was properly invoked to exercise the power to make an allowance to compensate for the support of this boy, which should have been made by the court granting the divorce had application been made to it.

Thomas v. Thomas, 41 Wis. 229; *Pierce v. Pierce*, 64 Wis. 73, 54 Am. Rep. 581; *Welch's Appeal*, 43 Conn. 342.

Pinney, J., delivered the opinion of the court:

At the common law the husband was primarily liable for the support of his minor children. 2 Kent, Com. 190. In *McGoon v. Irvin*, 1 Pinney, 532, 44 Am. Dec. 409, it was said that "by every principle of law upon the subject, recognized and strengthened by our statute, parents are under legal obligation to maintain and support their children, who are of tender years and helpless." The statute (Rev. Stat. § 1503) makes the father primarily liable to support his minor children. When the marriage is dissolved by divorce, the duty of parents to maintain their children remains as before, for children are not parties to the divorce suit, and do not lose any rights thereby. Hence the father's duty to maintain them after the divorce, where there is no decree of the court relating thereto, especially if their custody is not taken from him, remains as before. After the parents were divorced, all duties and obligations to each other ceased, and they were as strangers to each other. *Nelson, Divorce*, 40 L. R. A.

§ 981. The claimant owed the husband no duty as wife, and her duty to support the child continued, as before, secondary, and his primary. 2 Bishop, Mar. & Div. § 1210; *Plaster v. Plaster*, 47 Ill. 292. It is generally laid down that the liability of the husband to a divorced wife, in respect to the support of the children, is the same as to any third person, except as provided in the decree. If the court makes no order either for custody or support of children of the marriage, the divorce leaves the father's liability as at common law, and the mere divorce does not terminate his liability. 2 Bishop, Mar. & Div. § 1220; *Thomas v. Thomas*, 41 Wis. 233. In a proper case, it seems, after the marriage is dissolved, he may be answerable to the mother for maintenance rendered the children while living with her. *Stanton v. Willson*, 3 Day, 87, 3 Am. Dec. 255; *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652. The father is under legal obligation to provide for the support of his children, even if they remain with their mother after her divorce, and, as against the public and the children, he cannot escape the duty. *Courtright v. Courtright*, 40 Mich. 633. Where the decree has granted the custody of the children to the wife, and contains no provision for their support, it has been held that the father is not liable for the support of the children. But this is upon the ground that, the statute having made it the duty of the court to provide for their custody and maintenance upon divorce, it will be presumed that the decree has made all the provisions on that subject that were necessary; that the decree is conclusive as to the respective rights and obligations of the parties, subject to the right to have it modified as subsequent exigencies may require. As the decree makes the parties strangers as to each other, it is generally considered that a divorced husband is not liable to his divorced wife for necessities furnished a child of the marriage in her custody, unless by agreement, express or implied; that there must be either an express promise, or facts from which one can reasonably be inferred. *Ramsey v. Ramsey*, 121 Ind. 215, 6 L. R. A. 682; *Cushman v. Hassler*, 82 Iowa, 295. And it has been considered that the support of the child, under such circumstances, by the mother, was but the voluntary performance of a natural duty, and that her remedy was to apply to the court for maintenance of the child when the divorce was granted. These, and other cases of a similar purport, are confidently relied on as decisive against the claimant. In *McGoon v. Irvin*, 1 Pinney, 532, 44 Am. Dec. 409, where the husband had procured a legislative divorce from his wife, and had left the minor children of the marriage in the family of a third person to be supported, the mother afterwards obtained the custody of the children without his knowledge and consent, and refused, on demand made in behalf of the father, to give them up. She afterwards intermarried with I., and the children were supported and educated by him. In an action by I. against the father to recover for their support, it was held that McG. had a legal right to the custody of the children, but, as he had not attempted to assert it against I., the law would presume that McG. had assented to their being in the control and custody

of I.'s wife, their mother, and that I. could recover, though the act of the mother in obtaining the custody of the children before her second marriage might have been wrongful. And it was said by the court that "when a parent permits a stranger to maintain, support, and instruct such children, in no way objecting to the act, but rather assenting and advising therein, the law will presume that he knows his obligations, accepts the services, and assumes to pay." It was also said that "there was no duty or obligation on the plaintiff to notify the defendant to take the children away, or leave them to suffer until he could see the defendant and make an express contract about their support and maintenance. Such a course would have merited the reprobation of every humane and upright man. The defendant had the legal right to the possession, and could have enforced it at any time. He should have first moved in the matter, and on failure to do so, the law would presume that possession elsewhere was with his approbation and consent." In the leading case which holds the father liable, under circumstances like the present, the court approves the doctrine that, if a minor is forced out into the world by the cruelty or improper conduct of the father, necessities may be supplied, and the value thereof may be recovered from the parent. "There is evidently no satisfactory reason," said the court, "for changing the rule of liability when, through ill treatment, or other breach of marital obligation, the husband renders it necessary for a court of justice to divorce the wife, and commit to her the custody of her minor children. If, under such circumstances, upon the allowance of alimony with custody of children, the court omits to make an order for the children's maintenance, the father's natural obligation to support them is of none the less force." The duty of support "is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties, or to enable the father to convert his own misconduct into a shield against parental liability." But, obviously, this reasoning can only apply where the husband is at fault and the decree is silent as to his liability. *Pretzinger v. Pretzinger*, 45 Ohio St. 458, and approved in Bishop, Mar. & Div. § 1223, and in *Fulton v. Fulton*, 52 Ohio St. 229, 29 L. R. A. 678. It is to be borne in mind that the divorce in the instant case was granted to the claimant against her husband, August Zilley, on the ground of his cruel and inhuman treatment. It was his marital wrongdoing which led to the separation of the parties, and the award of the custody of the boy Clayton to the mother until he became of the age of ten years. The case as to the subsequent support of the boy Clayton A. may well be placed upon the ground that the improper conduct of the father had deprived the boy of his rightful and legitimate home, and so gave the right to the mother to supply the necessary support and maintenance, and that the father should be held liable as upon an im-

plied contract, his primary liability still remaining in full force. It is said that the father is released from obligation to maintain his infant children when deprived of their society and services against his will. In *Pretzinger v. Pretzinger*, 45 Ohio St. 458, it is answered that, "if voluntary misconduct on his own part leads to the deprivation, he is himself responsible, and not the court, which intervenes for the protection of his children. And if the father, as against a stranger, cannot escape liability for necessities furnished to his minor children, though remaining with their mother after the divorce, the mother will not be barred of an action against her former husband for the expense of maintaining the children. After a dissolution of the marriage relation by divorce, the parties are henceforth single persons, to all intents and purposes. All marital duties and obligations to each other are at an end, and they become as strangers to each other. Upon the establishment of such new relations, a promise may be implied on the part of the father to pay the mother, as well as a third person, who has supplied the necessary wants of his infant child." The case of *Holt v. Holt*, 42 Ark. 465, was one where there had been a decree of divorce giving the custody of infant children to the mother, and it was held that this would not relieve the father from his obligation to support them; that he was bound to maintain them as long as they were too young to earn their own livelihood; and a court of chancery would, at a subsequent term, entertain the petition of the mother to recover from him her reasonable and proper advances for their support since the divorce, and for an order for their future support. The case of *Stanton v. Wilton*, 3 Day, 37, 3 Am. Dec. 255, already cited, was relied on,—"a decision," says Ellsworth, J., in *Finch v. Finch*, 23 Conn. 421, "well considered, by a court of distinguished and unsurpassed ability, and which, as far as my knowledge extends, has ever been satisfactory to the judges and the profession, . . . and sustained by principles entirely satisfactory and as old as the common law itself." It was the right, and the duty as well, of the husband to obtain the custody and control of his infant son, and to support him, after he had arrived at the age of ten years. We consider it against the policy of the law to encourage a father thus obligated to attempt to ignore or evade his parental duty, or to cast it upon any other party, so as to enable him to convert such parental neglect and misconduct into a shield against parental liability. Domestic and social duty alike required him, when his son arrived at the age of ten years, to enforce his parental rights, and discharge his parental duties. He knew they were being exercised and performed by another, who as to him was then an utter stranger, and he knew, also, that the disrupted condition of his family relations had been adjudged in consequence of his marital misconduct. We think the case of *Pretzinger v. Pretzinger*, and other similar cases, indicate the true rule, and that they are in accordance with sound principles of public policy. We think there is ample ground from which the acquiescence and assent of the husband may be

justly inferred to the provision made by the claimant for the necessary support and maintenance of his son, and which he had failed to furnish for him, so that a promise on his part to compensate the claimant for what she had so expended may be justly implied, as in the case of *McGoon v. Irwin*, 1 Pinney, 582, 44 Am. Dec. 409. The cases bearing upon the subject are not, it must be admitted, in entire accord, but they have turned largely upon questions of public policy in the states where they have been decided. We hold, therefore, for the reasons stated, that the recovery in favor of the claimant is correct, and should be affirmed.

The judgment of the Circuit Court is affirmed.

Marshall, J., dissenting:

The question presented and decided in this case, stated plainly, is as follows: Where husband and wife are divorced and the custody of their minor child is left with the mother till it arrives at the age of ten years, the legal custody then passes to the father by operation of law. If, when the latter period arrives, he does all thereafter that parental affection can suggest to induce the child to live with him, stopping short only of using force or legal authority to accomplish that result, yet the child, through stronger natural attachment for the mother, or induced by her, or from both causes combined, shall remain with the mother by her consent, and she makes no claim to compensation in advance for supporting the child or during the time of such support, and knows that the father desires to control, educate, and maintain the child in his own way, can the mother maintain an action against the father for her services in maintaining such child during the time the legal custody was in the latter? My brethren have answered this question in the affirmative. The grounds upon which the decision is placed, I am not able to discern with certainty. Allusions are made to the moral and legal duty of a father to maintain his child, with which all concur, but, obviously, that mere duty is one enforceable only by the public. In an action by a private individual such duty is only a circumstance to be considered in determining whether contractual relations, express or implied, exist between the parties. Many cases are cited by my brethren where there was an application for support of a child, made in a divorce action, granted, and sustained on appeal, on the ground of parental duty, but such is not this action. The citations do not touch the questions here. Nevertheless in substantially all of the well considered cases cited, it is held that compensation in such instances can go only for future, not for past support. *Thomas v. Thomas*, 41 Wis. 229; *Courtright v. Courtright*, 40 Mich. 633; *Ramsey v. Ramsey*, 121 Ind. 215, 6 L. R. A. 682. Cases are cited to the effect that a cause of action accrues to the person who furnishes support to a child where the father omits to do so, merely because of the moral and legal duty of the parent and a failure on his part to compel the child's obedience to his authority. That appears to be the theory my brethren have adopted. The precedents for that are instances where courts have seemingly lost sight of the distinction be-

tween duty to the child which the public may enforce, and duty as evidence of a contract, that a private party, privity thereto, may enforce by personal action at law. Man's humanity for children and melting tenderness for their welfare, one of the most admired and admirable sides of human character, has apparently operated, at times, to swing even courts away from that safe anchorage in the law, that personal obligations, enforceable by personal actions *inter partes*, rest solely on contract. That principle, rigidly adhered to, is the best protection of us all. Any departure from it, for any cause, is fraught with danger.

I am warranted in believing that the decision here, as stated, is based on the natural and legal obligation to support the child, not on contract, because the most prominent authorities cited and quoted from by my brethren in support of the decision are instances, in my judgment, that come within the observation made at the close of the last paragraph, as evidenced by the subsequent history of the question under discussion in the courts where such decisions were rendered. The first is *Pretzinger v. Pretzinger*, 45 Ohio St. 458. There the divorce was granted on application of the wife for fault of the husband. The custody of the child was awarded to the mother without provision for its support. Subsequently the divorced wife brought suit against the father to recover for the support of the child, and her action was sustained solely upon the ground that the obligation of the father was primary, continuous and absolute, and not affected by divorce. The same reasoning was indulged in as that leading up to the decision here. It was decided in 1887. In 1895, in *Fulton v. Fulton*, 52 Ohio St. 229, 29 L. R. A. 678, the same question was again presented, except the divorce was granted for fault of the wife. It was held that there could be no recovery in the absence of an obligation growing out of a contract, express or implied. The court said, in effect, that while the relations of the parties to the child were not changed, their relations and obligations to each other were the same as that of strangers, and that no recovery could be had without showing a request from the father to support the child, or a promise to pay for such support; that the circumstance of the child's staying with its mother was so explained by the natural relations existing between them as not to leave any room for implication that there was a contract relation between the father and the mother in respect to the support of the child. True, the court instead of directly overruling *Pretzinger v. Pretzinger*, 45 Ohio St. 458, distinguished the two cases by saying that the divorce in the former was for fault of the husband, in the latter for fault of the wife; but that was manifestly an explanation that entirely failed to explain. The right to recover, so far as it could be sustained on moral and legal duty, did not change in any respect by the circumstance that the divorce was granted for the fault of the wife. In both cases the divorced husband and wife were strangers to each other. The learned and very able court would have made a more orderly retreat from its early position by saying that it was based upon a wrong principle, for the two cases are manifestly in-

consistent, and the result of trying to harmonize them presents the appearance ordinarily observed when the effort is made to preserve consistency by trying to harmonize things that are diametrically opposed to each other.

Again, in *Stanton v. Willson*, 8 Day, 87, 8 Am. Dec. 255, decided in 1808, that court held that the divorced wife could recover for the support of the child because of the fact that prior to the divorce he abandoned it and his conduct compelled the court to place its custody with the mother as its guardian; that by reason of the facts she could contract debts for the support of the child after the divorce, while she had the legal custody of it without any provision for its support, without consent of the father, upon the principle that when a person forces his wife from his home he is liable to the stranger to whom she is thus compelled to resort for necessities. The case has very little bearing on this one. Here the custody of the child was in the father; his residence with the mother was not by order of the court, or because abandoned or compelled to leave the paternal roof, but because he preferred the society of his mother, and the mother invited and induced it, by her conduct, against the wishes of the father. Manifestly the case should not be considered as authority under the circumstances. But treat this, for the sake of argument, as a case where there was an abandonment of mother and child before the divorce, so that the court, in its discretion, placed the custody of the child with the mother as a matter of necessity, but without provision for compensation for its support, and we then have, substantially, *Finch v. Finch*, 22 Conn. 411, decided in 1855, cited in the opinion of the court, but unfortunately, the part of the opinion relied upon, which refers approvingly to *Stanton v. Willson*, 8 Day, 87, 8 Am. Dec. 255, is from the dissenting opinion of Justice Ellsworth, while the rule of the early case, in the opinion of the court by Chief Justice Church, one of the most eminent jurists that has graced the bench of that court, was expressly disapproved. The contention was that because of the duty the father owed to the child, the mother who supported it could herself enforce that duty by recovering compensation for her services in a direct action for that purpose. In deciding the case, the court said, in effect, that the question is not what are the reciprocal rights of the children and parents as respects each other, but what are the duties as between themselves; that a divorced wife who has taken the children from the father stands in no more favorable position to recover for their support than a stranger; that the mere moral duty to support is not sufficient to support a promise, and that nothing short of a contract, express or implied, will warrant a recovery. Speaking of the claim made, that the difficulties which broke up the home and led to the divorce and award of the custody of the child to the wife should be held sufficient to support a contract obligation to pay for the necessary support of the child (the theory mentioned by my brethren in support of the decision here), the court said, "*Stanton v. Willson* is the only case that we know of in which such a claim has ever been sustained."

From the foregoing we might proceed at

great length to review the authorities, substantially all in accord, as I read them, that no recovery can be had in a case like this, except upon a contract obligation, and that the doctrine is elementary that mere moral or legal duty as between parent and child, or the parent and the public, constitutes no foundation for the liability, nor is it material at all except as a circumstance from which a promise may be inferred; and that such inference cannot arise when in fact repelled by the proof that the father was anxious and willing to support his child and was prevented from doing so by the conduct of the child, or the mother, or both, as in this case. Says Lord Abinger, C. B., in *Mortimore v. Wright*, 6 Mees. & W. 482: A father who gives no authority and enters into no contract is not liable for goods sold to his infant son. The mere moral obligation affords no inference of a promise. The idea discussed by Lord Abinger was that, so long as the father stands willing to support his child, so that support is not of necessity furnished by a stranger, he incurs no obligation to another in the absence of a contract of some kind. So in *Seaborne v. Maddy*, 9 Car. & P. 497, it was held that no one is bound to pay another for maintaining his children unless he has entered into some contract so to do; that every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another to perform that duty and charge him in an action. To the same effect is the entire body of English law on the subject, from the time of Blackstone to the present, and to the same effect are substantially all American authorities as I read and understand them. *Cushman v. Hassler*, 82 Iowa. 295; *Jackson v. Muhl* (Wyo.) 42 Pac. 603; *Lapworth v. Leach*, 79 Mich. 16.

The only question left is, Is there any circumstance here from which a contract can be inferred? It may be conceded that slight circumstances will be sufficient, but I am unable to find evidence of any such circumstances preserved in the record. On the other hand, the circumstances repel all such inferences. In *Cushman v. Hassler*, 82 Iowa. 295, it was held that, while from unexplained residence of a child with its mother, the legal custody being in the father, a contract may be implied to pay the latter for her services, when such residence is explained as contrary to the wish of the father, the inference is effectually repelled. That appears to fit the circumstances of this case most perfectly, and is in accordance with reason and common sense. So in *Lapworth v. Leach*, 79 Mich. 16, it was held that the moral obligation is not sufficient to support by inference the existence of an implied contract; that where the mother voluntarily supports her child, she cannot recover therefor as upon contract. The idea expressed by the court was that proof that the support was voluntary and that the father was willing to support the child himself, in the absence of any express promise or circumstances from which a promise to pay for the support could be implied, left no room for inference that a contract relation existed between the parties. Again, in *Ramsey v. Ramsey*, 121 Ind. 215, 6 L.R.A. 682, an exceedingly well-considered and instructive case, where the facts were much like those in

the instant case, except the strong evidence of parental affection and desire of the father for the society of and privilege to educate and support his child in his own way, that exists here, did not exist there, the court said, in effect, that while the rule that by moral and legal obligation the duty was on the father, primarily, to maintain his infant child during the years of infancy and tenderness, the rule must also be recognized, which lies at the very foundation of all cases where a third person has discharged the obligation of the father, that it must in every instance be predicated upon contract, express or implied, and that mere voluntary residence of the child with the mother, without some evidence of abandonment on the part of the father, is not sufficient to show a promise by implication to compensate the mother for keeping the child.

We hesitate to go further in this discussion. The excuse for proceeding so far is the importance of the question involved, and the wide departure which, in my judgment, the decision rendered is from the settled rule on the subject. I cannot subscribe to the doctrine that, where a child resides with its mother by choice and through her maternal influence over it, after the father has exhausted all the resources that strong affection for his child can suggest, to secure his pres-

ence under the paternal roof, he can be held liable to the mother because of the moral or legal obligation to support, which, under the circumstances, cannot be said to have been violated at all, unless it be a violation not to proceed to the extreme of compelling obedience of the child by force of legal proceedings. I cannot subscribe to the doctrine that a father can be held liable as upon an implied promise, when all the circumstances obviously repel such an implication; that after he has done all above indicated in order to be saved harmless from the liability of being called upon and compelled to respond to a third party for the expense of supporting his child, he must resort to the extremity of compelling the child's obedience. If such is the law, any disobedient child may desert his father's home, accept support from another, and a right of action will thereby accrue to such other against the father for the child's support. The law has been held contrary to such view, as I understand it, for time out of mind. The fact that the person furnishing the support away from the parental roof is the mother does not change the rule, but rather the moral obligation of the mother and the maternal relation to the child, and the natural desire for his society, rather repel than support an implication of implied contract relations.

* CALIFORNIA SUPREME COURT.

Angus McKAY

v.

SUPERIOR COURT FOR THE CITY
AND COUNTY OF SAN FRANCISCO.

(.....Cal.....)

An order that the father pay for the support of minor children awarded to the custody of the mother without any provision for their maintenance, by a decree of divorce, may be obtained by petition in that case long after the decree has become final and the mother has remarried.

(February 19, 1898.)

APPLICATION for a writ of review to reverse an order directing the payment of counsel fees in a proceeding for maintenance of a minor child after divorce proceedings. *Writ discharged.*

The facts are stated in the opinion.

Mr. S. W. Goodfellow, for petitioner.

Henshaw, J., delivered the opinion of the court:

This is a hearing upon an original application for a writ of review. The unquestioned facts shown by the return are the following: Upon the 16th day of June, 1884, Emma J.

McKay, then the wife of the petitioner herein, Angus McKay, obtained a decree of divorce from her husband. The decree awarded to her the care, custody, and control of the children of the marriage,—Horton L. McKay, aged five years, and Ethel M. McKay, aged three years. It contained, however, no provisions for alimony for the maintenance and support of the minor children. No appeal was taken from this decree, and it has long since become a final adjudication. No further proceedings of any kind were had in that action until May of the current year, when Emma J. McKay, who had since remarried, and is now Emma J. Polastri, filed in the superior court, and in the action in which the decree of divorce was granted, a petition setting forth the decree, the award to her of the care, custody, and control of the children, who are still minors, and averring that no provision had been made by the court for the maintenance and support of said children, prayed an order to compel the defendant in that action, the petitioner herein, to pay \$50 per month for the past support of each of said children, and \$50 per month for the future support of each of said children, until the further order of court. Upon hearing, and over the objection of defendant, the order was made. From this order defendant perfected his appeal, therewith giving a bond to stay execution. No objection is made to the form, substance, or sufficiency of this undertaking. After perfecting his appeal, the defendant was cited to show cause why he should not be punished for contempt

NOTE.—See preceding case, *Re Zilley (Wis.) ante*, 579; and following case, *Gibson v. Gibson (Wash.) post*, 587.

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in refusing to comply with the terms of the order, and to make the payments contemplated therein; and, notwithstanding the showing made by him, in answer to the citation, that he had perfected an appeal from said order, and upon advice of counsel believed that his said appeal, with its accompanying bond, operated as a stay of all proceedings under said order, the trial court was about to pronounce him in contempt, and to punish him therefor, when, under a separate petition setting up these facts, he here obtained a temporary order staying proceedings, and an alternative order to show cause why all proceedings should not be stayed until the determination of his appeal. Thereupon Emma J. Polastri on behalf of and as guardian of the minor children, presented her petition to the superior court in the action of McKay against McKay, setting up the fact that the defendant McKay had appealed from the order fixing a sum for the maintenance of the children, and that the sum of \$250 attorney's fees and \$40 costs for printing briefs upon appeal were necessary disbursements to be made by and in behalf of the minors, to the end that they might properly present their response in the appellate court. The court then made its order directing this petitioner to pay the sum of \$250 for the indicated purposes. The payment of money contemplated by this order being less than \$300, and thus no appeal lying therefrom, he sought and obtained this writ of review.

The only question in this inquiry is whether or not the court exceeded its jurisdiction in making the order under review. Petitioner recognizes this, and contends that the former order requiring him to pay moneys for the support of the children was in excess of jurisdiction, and void; and that, therefore, the order here under consideration, being incidental to and for the purpose of enforcing the former order, is likewise void. While a determination of this matter in this proceeding will necessarily anticipate one of the propositions presented upon appeal from the order for maintenance, which appeal is now here pending, yet, as its determination is essential to this adjudication, it may not be avoided or postponed. The order of the court allowing the children \$250 is to be considered as an order for the payment of money deemed necessary by the trial court to be furnished the children for the proper defense of their rights, under the order of maintenance. Therefore, if they are entitled to the money at all, they should receive it promptly, to accomplish the end in view, and the question of their right to receive it should not be postponed until the determination of the very appeal to defend which the money was declared needful. The order of the court making provision for the maintenance and support of the children was not void as in excess of jurisdiction. In this regard the

circumstances of the case are identical with, and the order the same as, that made in *Wilson v. Wilson*, 45 Cal. 401, and upheld as a proper exercise of the power of the court. The power of the court to make such orders for the maintenance of minor children, under petition in the action long after final decree has been entered, finds such general support from the authorities that it may be said that the rule is uniform where any similarity exists in the codes or statutes upon the subject. Thus, in New York, under provisions similar to our own, the plaintiff obtained a decree in 1869 which gave her the custody of the children of the marriage, but which made no provision for the care of the children. In 1879 she presented her petition in the matter, and an award for the maintenance of the children was held to be proper. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. The New York statute declared: "In any suit brought by a married woman for a divorce, the court . . . may, during the pendency of the cause, or at its final hearing, or afterwards, make such order . . . for the custody, care, and education of the children of the marriage, as may seem necessary and proper," etc. 2 Rev. Stat. p. 148, § 59. Section 138 of our Civil Code reads: "In an action for divorce the court may, before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same." The court of appeals held that under this statute an order could be made after final judgment providing for the payment of moneys for the maintenance of the children, and that the payment could be enforced against the father. To like effect is the case of *Washburn v. Catlin*, 97 N. Y. 623. In line with these authorities may be cited *Holt v. Holt*, 42 Ark. 495; *Buckminster v. Buckminster*, 38 Vt. 248. 88 Am. Dec. 652; *Pretzinger v. Pretzinger*, 45 Ohio St. 452; *Plaster v. Plaster*, 47 Ill. 290; 2 Nelson, Div. & Sep. § 981; 2 Bish. Mar. Div. & Sep. §§ 1218, 1223. It is to be noted that the order here under consideration being exclusively for the maintenance and support of the children, is radically a different order from that considered by this court in *Howell v. Howell*, 104 Cal. 45, in which case it was distinctly said that section 138 of the Civil Code, and the rights of minor children to maintenance and support under it, were not before the court. It having been determined that the order for the maintenance of the minor children is not in excess of jurisdiction and void, and as petitioner's argument in this case is based wholly on that contention, it follows that the order here under review is likewise not in excess of jurisdiction.

The writ is therefore discharged.

We concur: Temple, J.; McFarland, J.; Van Fleet, J.

WASHINGTON SUPREME COURT.

Loueza GIBSON, *Resp't.*,

v.

B. O. GIBSON, Impleaded, etc., Appt.

(18 Wash. 489.)

1. **One who relied upon a former adjudication** of a matter cannot complain of a decision which is to the same effect.
2. **Other allegations in a petition for divorce** may be treated as surplusage and the action sustained as one for the maintenance of a child, when the parties had been previously divorced.
3. **A divorced wife can maintain an action against her former husband** for the maintenance of a minor child, when the father is found unfit to have the custody of the child and this has been awarded to her.

(January 31, 1898.)

A PPEAL by defendant from a judgment of the Superior Court for Lincoln County in favor of plaintiff in a suit for divorce and an allowance for support of a minor child. *Affirmed.*

The facts are stated in the opinion.

Messrs. Myers & Warren, for appellant: The court having found "that at the time of the commencement of this action the plaintiff and defendant were not husband and wife," it was error in the court to make any finding as to the fitness of either party to have the care, custody, or control of the child.

The court has no more authority to award the custody of the child than it has to order a division of the defendant's property, when there is no marriage.

Keppel v. Keppel, 92 Ga. 506; *Davis v. Davis*, 75 N. Y. 221; *Brown v. Brown* (Va.) 24 S. E. 238.

The question of the care, custody, and guardianship of the child was settled and adjudicated in a former divorce proceeding between the same parties, and it was therefore *res judicata*.

Leming v. Sale, 128 Ind. 817; *Joab v. Sheets*, 99 Ind. 328; 5 Am. & Eng. Enc. Law, p. 836; *Stewart, Mar. & Div.*; *Hoffman v. Hoffman*, 15 Ohio St. 427; *Wakefield v. Ices*, 85 Iowa, 238.

When a court has once decided the question of care, custody, and guardianship of the children in a divorce proceeding, the same is *res judicata*, and binding upon the parties until its provisions have been modified by application in the original cause, or by appeal.

McNess v. McNess, 97 Ky. 152; *Harvey v. Lane*, 66 Me. 536; *Leming v. Sale*, 128 Ind. 317.

Unless liability is imposed in a decree for divorce, the husband is not liable for the support of his child thereafter, when custody is awarded to the mother.

Hampton v. Allee, 56 Kan. 461; *Cushman v. Haasler*, 82 Iowa, 295.

NOTE.—See preceding cases, *Re Zillee* (Wis.) *ante*, 579, and *McKay v. San Francisco City & County Super. Ct.* (Cal.) *ante*, 585.

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Messrs. Davies & Holcomb and Caton, Martin & McComb, for respondent:

The wife may recover her support without even commencing a divorce suit.

Kimble v. Kimble, 17 Wash. 75.

As the right to the custody of the child was put in issue the court determined that question and found in favor of plaintiff; then must the court not take into consideration the ability of the parties, father and mother, to feed, clothe, and support the child?

Kimble v. Kimble, 17 Wash. 75.

Dunbar, J., delivered the opinion of the court:

The respondent, Loueza Gibson, and the appellant, B. O. Gibson, were lawfully married in the year 1886, and they have one child, the fruit of said marriage, Bessie O. Gibson, now eleven years of age. On the 16th day of March, 1891, the respondent began an action in the superior court of Garfield county against the appellant for divorce and the care, custody, and control of their child, Bessie O. Gibson. On the 15th day of the June following the superior court of Garfield county rendered a decree in said cause, in which the plaintiff, Loueza Gibson, was awarded a divorce and the care, custody, and guardianship of the child, Bessie Gibson. In 1893 a correspondence began between the parties, and in February, 1896, the respondent came to Lincoln county to take up her residence with the defendant, and continued to live with him until shortly before the commencement of this action. This was an action brought by the respondent to obtain a decree of divorce from the appellant, for the care and custody of the child, and for general relief. The action was brought by the respondent on the supposition that she had been married a second time to the appellant. The petition also asked for the setting aside of some alleged fraudulent transfers by the appellant. The court found that the plaintiff and defendant were not husband and wife; that the transfers were not fraudulently made; that the defendant had treated plaintiff in a cruel, inhuman manner; that he had attempted to strike and kill her; that he had choked her until she was nearly unconscious, and that he had scratched her face; that since March 24, 1897, defendant had failed to provide plaintiff or her daughter, Bessie, with any provisions, fuel, or clothing. The court also found that the defendant was not a proper person to have the care, custody, and control of the said child, and that plaintiff was a proper person to have the care, custody, and control of said child, Bessie, and that the defendant Gibson was the owner of a certain amount of property; and, as conclusions of law, found that the defendant was entitled to a decree that the marriage relation did not exist between plaintiff and defendant, but that \$150 was a reasonable allowance for the support of the child, Bessie O. Gibson, and the defendant B. O. Gibson was amply able to pay such money each year; and the judgment followed in accordance with the conclusions of

law. From such judgment, an appeal is brought to this court.

It is contended by the appellant that the court was without jurisdiction in this case to enter any judgment for alimony; that it was error in the court to make any findings as to the fitness of either party to have the care, custody, and control of the child; and that, having found there was no marriage, the court had no authority to award the custody of the child. So far as the last contention is concerned, while the court may not have had jurisdiction to make this award, it appears from the record that it was the same award that had been made by the court which tried the divorce case; and as the appellant relies upon this case as being *res judicata* of the whole matter in controversy, he is in no wise injured by the order of the court in this case, for it leaves the custody of the child where it was found.

It also appears from the record of the former trial that it was found by the court in that case that neither of the parties, Loueza Gibson or B. O. Gibson, had any property. The pertinent question, and the one question that really affects appellant, is the right of the court to enter a judgment against him for the support of the minor child, and the question resolves itself into this: Can a divorced wife bring an action against her former husband for maintenance for a minor child whose custody has been awarded to her? The ordinary rules in relation to alimony which are discussed largely by the attorneys in this case do not apply in an action for the maintenance of a minor child. There do not seem to have been a great many adjudications on this particular question, and the courts have differed somewhat in their views; but we think that the weight of authority, as well as the better reasoning, sustains the view that this action for maintenance can be maintained, and any other demands in the petition can be treated simply as surplage. The court in this case had jurisdiction of the subject-matter. It also had jurisdiction of the parties. The maintenance of minor children is a subject that is especially relegated to courts of chancery, and while it is held in a case cited by the appellant, and which we think is the most pertinent case cited by him (*viz. Husband v. Husband*, 67 Ind. 583, 83 Am. Rep. 107), that "the awarding to the mother of the custody of her minor child, on decreeing to her a divorce from the father, deprives him of all right to the services of the child, and, consequently, frees him from all liability to the mother, for the care, support, and maintenance of the child," still that was an action for debt. The mother having supported the child for a given length of time, afterwards brought action against the father for the amount expended. There did not exist, as in the case at bar, the actual necessity for the support of the child. However, we think that the case was not rightfully decided. It was decided on the principle that the right to the services of the children and the obligation to maintain them go together; and that, if the assignment of the custody to the wife extends to depriving the father of his claim to their services, then he cannot be compelled to maintain them. But

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this court has frequently sustained judgments where the custody of minor children has been awarded to the mother, and maintenance adjudged against the father, and so have the courts of nearly every state in the Union; and, while there is no wrong in asserting the legal principle that the right to the services of the children and the obligation to maintain them go together ordinarily, yet the decision above cited loses sight of the fact that the right to their services has been forfeited by the father by reason of his proving himself recreant to the trust which the law and natural duty impose upon him. It violates our sense of justice to allow a father to plead his own wrong as an excuse for relieving himself from an obligation. Presumably the custody of the child is taken from him, because he is not worthy of its care and custody; and this doctrine in effect releases from an obligation the unworthy parent, and imposes an additional burden upon the worthy one. It seems, however, in this Indiana case, that an allowance had been made to the wife; and the court concluded that the reason that the court which had granted the decree did not render any judgment for the support of the child was on account of the allowance to the plaintiff of the sum of \$1,500 by way of alimony. The court says: "The action for divorce was one in which the plaintiff might, if her case warranted it, and should, have obtained a provision for the support of the child, but, having taken her decree for divorce, and the custody of the child without any provision for its support, she took upon herself the burden of its support, without such provision, and cannot now maintain an action for such support." It will thus be seen from the quotation that this reason would not apply in this case, for the findings of the court show that, at the time the decree of divorce was granted, neither of the parties had any property; consequently, it would have been impossible for the respondent to have obtained this right in that action. But, under the findings of the court, the conditions and circumstances of the parties have changed; and it is a well-established rule of law, and, we think uncontradicted, that the maintenance of children is a matter which the court can adjudicate at different times during the minority of the child. Mr. Bishop, in his work on *Marriage, Divorce, and Separation* (vol. 2, § 1223), in noticing this question, says: "But it was his own wrong that deprived him of the custody. And it is fundamental, equally in our law and in natural reason, that no one can cast off an obligation by refusing to keep it, or any duty by any evil doing. Therefore a better-reasoned case holds that the duty of support 'is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony, and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties, or to enable the father to convert his own misconduct into a shield against parental liability.'" And in *Pretzinger v. Pretzinger*, 45 Ohio St. 452, it was held that "the obligation of the father to provide reasonably for the support of his minor child, until the

latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife *a vinculo*, on account of the husband's misconduct, gives to her the custody, care, and nurture of the child, and allows her a sum of money as alimony, but with no provision for the child's support. The mother may recover a reasonable compensation from the father, for necessities furnished by her to the child after such decree, and may maintain an original action for such compensation against the father, in a court other than that in which the divorce was granted." It will be seen that this case squarely sustains the judgment for maintenance in the case at bar. In fact, the case at bar is stronger than the case cited; for in the latter the wife had

been allowed a sum of money as alimony, but in this case no alimony had been awarded. In *Courtright v. Courtright*, 40 Mich. 633, which was an action brought for divorce, it was held that "the parental duty of giving personal care and protection to children is distinct from the duty to support them," and that "a father is under legal obligation to provide for the support of his children, even if they remain with their mother after her divorce; and as against the public and the children he cannot escape the duty."

The judgment will be affirmed.

Scott, Ch. J., and Anders, Gordon, and Reavis, JJ., concur.

Rehearing denied.

ILLINOIS SUPREME COURT.

Morris SELLERS, *Appt.*,

v.

HOWARD GREER.

(172 Ill. 549.)

1. **Acceptance of a contract** by assenting to its terms, holding it and acting upon it, may be equivalent to a formal execution by one who did not sign it.
2. **A contract between persons who are equal owners of all the stock** of a corporation except two shares, of which one is controlled by each of them, by which they assume to divide and dispose of the property of the corporation, is not obligatory upon the corporation.
3. **Specific performance will not be granted** in favor of a person who knew when the contract was made that the other party had no authority to dispose of the property which it assumed to dispose of.

(April 21, 1898.)

APPEAL by defendant from a judgment of the Appellate Court, First District, reversing a decree of the Superior Court for Cook County in favor of defendant in a suit to enforce specific performance of a contract to transfer certain property. *Reversed.*

Statement by **Craig, J.**:

This was a bill for specific performance, brought by Howard Greer against Morris Sellers, in the superior court of Cook county. The cause proceeded to a hearing on the pleadings and evidence, and the court entered a decree dismissing the bill. To reverse the decree Greer appealed to the appellate court, where the decree was reversed, and the cause remanded for the purpose of allowing Greer to recover such damages as he may have sustained on account of the failure of Sellers to perform the contract. To reverse the judgment of the appellate court, Sellers appealed to this court.

Upon looking into the record it appears that Morris Sellers and Howard Greer had been associated together in the business of manufacturing railroad supplies for several years prior

to 1891. In June, 1891, they formed a corporation under the laws of this state, and adopted the name of Morris Sellers & Co., Incorporated. The capital stock of the corporation was fixed at \$100,000, each share being of the par value of \$100, and 499 shares were subscribed for and owned by Morris Sellers and Howard Greer, respectively, each owning that number of shares from the formation of the corporation to the time of filing the bill. The remaining two shares were owned by John M. Sellers and Paul E. Greer, who were sons of said principal stockholders, each owning one share. No money was paid by any of the stockholders for their stock. The 500 shares belonging to Sellers and his son were paid for by turning over the plant and their interest in certain patents to the corporation, and the 500 shares issued to the Greers were paid for by turning over their interest in certain patents controlled by them. All four of the above named parties were stockholders and directors. Morris Sellers acted as president and treasurer, and had charge of the office and financial department of the concern. Howard Greer was secretary and manager, or superintendent, and had charge of the factory and manufacturing department of the business.

After the organization of the corporation it did a fair business, and its management and success seemed to have been satisfactory to the parties interested until the latter part of 1894, when trouble arose between the two principal stockholders in regard to the management of the business. Greer made an offer to purchase the Sellers interest, but the offer was not accepted. Negotiations continued, however, between the parties until September 4, 1894, when Morris Sellers made a written proposition to buy out Greer. The proposition was written and executed by Morris Sellers and by him delivered to Greer. It was as follows:

Outline of proposition between Howard Greer and Morris Sellers: Greer to take all of the Greer patents and all of the special machinery attached to punching machines, all other appliances belonging to the making of spikes; he surrendering all of his stock in M. S. & Co. and to furnish M. S. & Co. complete set of templets for splices; M. S. & Co. to loan machine No. 4 for six mo. and pay Howard

NOTE.—For sole ownership of stock of corporation, see note to Louisville Bkg. Co. v. Eisenman Bros. & Co. (Ky.) 19 L. R. A. 684; Parker v. Bethel Hotel Co. (Tenn.) 31 L. R. A. 706.

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Greer \$1,800 towards a new machine for cutting spikes; Howard Greer to fill all of the present orders so far as the material now on hand will complete. This agreement to be put in proper form at as early a date as possible, pending the return of the company's att'y to draw up the necessary releases, etc.

Morris Sellers. Tuesday, Sept. 4, 1894.

The bill alleged and the evidence tended to prove that the Greer mentioned in the proposition was appellee, and the letters "M. S. & Co." meant and referred to the corporation known as Morris Sellers & Co.

Messrs. Loesch Brothers and Howell, for appellant:

The superior court did not obtain jurisdiction in this suit to decree specific performance of the outline of proposition, or to award damages because of appellant's inability to perform, for the following reasons:

a. Said proposition is not a contract because it does not purport to bind appellant and contains no binding promise by him. The contract must be complete, definite, and certain in its terms and limitations.

Hamilton v. Harvey, 121 Ill. 469; *Lawson, Contr.* § 10; 3 Pom. Eq. Jur. § 1405; *Clipson v. Villars*, 151 Ill. 165; *Shovers v. Warrick*, 152 Ill. 355; *Dentleman v. Gilbert*, 140 Ill. 597; 22 Am. & Eng. Enc. Law. pp. 1002-1012, and notes.

b. The proposition lacks mutuality and could not have been enforced against appellee at law or in equity. The contract must be mutual in its obligation and its remedy.

3 Pom. Eq. Jur. § 1405; *Hamilton v. Harvey*, 121 Ill. 473; *Lawson, Contr.* § 472; *Wollensak v. Briggs*, 20 Ill. App. 50; *Winter v. Trainor*, 151 Ill. 191; *Tink v. Walker*, 148 Ill. 234; 22 Am. & Eng. Enc. Law, p. 1019; *Lear v. Chouteau*, 23 Ill. 39.

c. The proposition shows upon its face that the subject-matter was the property of a corporation, and not of appellant, and that the consent of the corporation thereto and a new contract by the company was a prerequisite; all which appellee knew when he filed his original bill.

Hurlbut v. Kantzler, 112 Ill. 482; *Doan v. Mauzey*, 33 Ill. 227; *Stickney v. Goudy*, 132 Ill. 213; 3 Pom. Eq. Jur. § 1405, and note p. 450; *Hatch v. Cobb*, 4 Johns. Ch. 559; *Kempshall v. Stone*, 5 Johns. Ch. 193; *Harrison v. Polar Star Lodge, No. 652*, 116 Ill. 279.

d. It appears from the proposition and the testimony relating to the time of its being given, that the subject-matter was not appellant's property. The proposition is incomplete, uncertain, and indefinite, and incapable of specific enforcement, and its enforcement by a decree for damages would be harsh and inequitable.

Barrett v. Geisinger, 148 Ill. 98; *Hamilton v. Harvey*, 121 Ill. 469; *Winter v. Trainor*, 151 Ill. 191; *Tink v. Walker*, 148 Ill. 234; *Stone v. Pratt*, 25 Ill. 25; 3 Pom. Eq. Jur. § 1405.

Equity may enforce but not make agreements.

22 Am. & Eng. Enc. Law, p. 932; *Lombard v. Chicago Sinai Congregation*, 75 Ill. 271.

Where the formal contract is to be executed before the preliminary contract is to be effect-

ive, then no action will lie until the execution of such formal contract.

Hussey v. Horne-Payne, L. R. 4 App. Cas. 311; *Commercial Telegram Co. v. Smith*, 47 Hun, 494; *Bourne v. Shapleigh*, 9 Mo. App. 64; *Methudy v. Ross*, 10 Mo. App. 101, 81 Mo. 481.

The action of appellee (after filing bill in this cause), in filing, as a stockholder, bill of complaint against Morris Sellers & Co., incorporated, to have said corporation dissolved, and in having a receiver appointed who took charge of and sold the chattels and letters patent generally described in the outline of proposition, bars him from any relief in this suit.

Stone v. Pratt, 25 Ill. 25; Pom. Spec. Perf. §§ 178, 301; 3 Pom. Eq. Jur. § 1405, and note 1, p. 449; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 357, 19 L. ed. 955, 961; *Knatchbull v. Grueber*, 1 Madd. 158; 3 Meriv. 124; 6 English Ruling Cases, 668, and note.

Messrs. Jones & Strong, for appellee:

If the allegations of the bill are proved the prayer thereof must be granted.

The specific performance of an agreement, relating to personal property, such as the one in this cause, has been held to be good, in numerous instances.

22 Am. & Eng. Enc. Law, ¶ e, p. 994; *Whitney v. Burr*, 115 Ill. 289; 1 Pom. Eq. Jur. § 237, p. 246.

It is not necessary for the party to whom the contract is addressed to accept it in writing, if it is signed by one of the parties and acted on by the other. Under these circumstances it is as binding as if signed by both parties.

Vogel v. Pekoc, 157 Ill. 339, 30 L. R. A. 491; *Johnson v. Dodge*, 17 Ill. 442.

Craig, J., delivered the opinion of the court:

The two following grounds are relied upon by counsel for appellant, in the argument, to reverse the judgment of the appellate court: "We claim, firstly, that the proposition is not a contract binding upon appellee or upon appellant; that it lacks mutuality; that the subject-matter was the property of a corporation, and not of either of the parties named in the proposition; that appellee is in no wise bound, and so acted as not to legally bind himself, in terms, to said proposition; that it was made under such circumstances that it was not, and was not intended to be, a complete or binding contract or agreement upon either appellant or appellee; hence its specific enforcement was not only impossible, but if attempted by way of assessment of damages upon appellant, as the appellate court seeks to do, would contravene equitable principles. Secondly, that, if all these points are negatived, appellee has yet barred himself of all relief in equity by his own inequitable conduct."

It will be observed that appellee did not sign the contract, and hence it is contended that the contract is not mutual. It appears, however, that the contract was delivered by Morris Sellers, appellant, to appellee, on the day it was executed, and appellee accepted the contract and agreed to its terms and conditions. The acceptance of the contract by appellee assenting to its terms, holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on his part,

as held by this court in *Johnson v. Dodge*, 17 Ill. 442, and *Fogel v. Pekoc*, 157 Ill. 339, 30 L. R. A. 491.

But it is said the subject-matter of the contract was the property of a corporation, and not of either of the parties named therein, and, as the corporation never executed or ratified the contract, it cannot be enforced in a court of equity. Of the 1,000 shares of capital stock of the corporation Greer and Sellers owned equally the entire amount except two shares, which were held in the names of the respective sons of the two parties. These sons never paid anything for the stock placed in their names, and were mere nominal shareholders, and the only inference to be drawn from all the evidence is that the two shares were placed in their names in order that the concern might have a sufficient number of stockholders to make up a board of directors. In the management of the affairs of the concern, whatever was done by Greer was assented to by his son, and whatever action was taken by Sellers was approved by his son. As between the appellant and appellee, they may be regarded as owners of the property named in the contract, and any contract which they may have made in regard to the property may, as between them, be enforced in a court of equity.

But it is said that the proposition was not intended to be a complete and binding contract. There is nothing appearing on the face of the contract, nor is there anything in the evidence introduced on the hearing, which will sustain that position. The contract is definite and specific in regard to what was to be done by each of the parties. By the contract Greer was to do three things: First, he was to surrender all of his stock in the Morris Sellers & Co. establishment; second, he was to furnish a completeset of templets for splices; third, he was to fill all of the present orders, so far as the material then on hand would permit. From the terms of the contract there could be no uncertainty or doubt in regard to what Greer was required to do in order to comply with the contract. As to Sellers, he was required by the contract to deliver over to Greer all of the Greer patents, and what was meant by Greer patents was well understood by both parties.

It is true that Morris Sellers and Howard Greer owned all of the stock of the corporation except two shares, which belonged to their sons. But did this fact confer upon them, or either of them, the power to sell the corporate property? It is conceded that the patents and all the other property named in the contract in question belonged to the corporation Morris Sellers & Co., and the question presented is whether Morris Sellers and Howard Greer, two of the stockholders, without the consent or authority of the corporation Morris Sellers & Co., had the right to divide the corporate property between themselves, or to sell it, as was attempted to be done by the contract in question. A corporation is an artificial being created by law, clothed with certain powers. It acts through its board of directors and officers. Its property is not subject to the control or disposition of its members or stockholders. They have no power to sell or encumber the corporate property. A reference to a few authorities will fully sustain what has been said.

In 2 Cook, Stock & Stockholders, 8d ed. 40 L. R. A.

§ 709, it is said: "The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors, and not by the stockholders. The corporation, in such matters, is represented by the former, and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf. Although one person owns a majority of the stock, or all of it, or all but two shares, he does not in consequence thereof acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations, and business methods of the corporation continue. A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption in the regular manner."

In *Allemong v. Simmons*, 124 Ind. 199, it was attempted to hold a corporation liable on a contract made by one Crawford, who was a director and owner of five sixths of the stock of the corporation. In disposing of the question the court said: "It is true, Crawford was one of the directors of the company, and held a majority of the stock, but the existence of these facts conferred upon him no power to make contracts for the corporation. It could only be bound by the action of its board of directors; the board could have conferred on Crawford this power, but there was no evidence that it had done so. Crawford, as one of the directors, had no more authority or power than any other director. The board consisted of five members; and three constituted a quorum, less than three could make no binding contract for the corporation."

The contract which Simmons and Ayleshire executed with Crawford was the mere personal engagement of Crawford with the said parties."

In *Humphreys v. McKissack*, 140 U. S. 304, 35 L. ed. 473, the validity of the action of all the stockholders of a corporation in transferring its property without corporate action arose, and in disposing of the case the court said: "Both the commissioner and the court, in confirming his report and entering the decree mentioned, seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights; the ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law. In *Smith v. Hurd*, 12 Met. 385. 46 Am. Dec. 690, the relations of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief Justice Shaw, speaking for the supreme court of Massachusetts, and the same doctrine applies to the relations of stockholders in all business.

corporations. Said the chief justice: "The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent, or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default, simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined."

In this court, in *Hopkins v. Roseclare Lead Co.* 72 Ill. 373, the right of a stockholder of a corporation to transfer certain leases belonging to the corporation arose, and in disposing of the question the court said (p. 379): "It is insisted that La Grave had no power to make the sale of the leases, to transfer the control of the suit, or to sell the 20 acres of land, as they were all owned by the company. He was but a stockholder, and as such had no power to make the sale. He, although owning the majority of the stock, could not act for the company unless specially authorized. He could, no doubt, control the action of the company by the election of its officers, but still the company could only act through its officers or by expressly delegating power to others, whether a stockholder or other persons." See also *England v. Dearborn*, 141 Mass. 590; *Newton Mfg. Co. v. White*, 42 Ga. 148; *Russell v. M'Lellan*, 14 Pick. 68.

From what has been said it is apparent that Morris Sellers, although he owned one half of the capital stock of the corporation, had no right to sell the corporate property, and any contract he may have made would not be obligatory on the corporation. The corporation, Morris Sellers & Co., the owner of the letters patent and other property described in the contract, was not made a party to the bill, and no decree could have been obtained against it if it had been made a party, for the reason it never executed the contract. Nor did it ratify the contract after it was made, but, on the other hand, expressly refused to do so on application of Greer to its board of directors. The bill prayed that Sellers might be compelled to convey the letters patent named in the contract to Greer. He had no title, and hence could not make a conveyance, and any decree that might have been rendered would have been nugatory. In a bill for specific performance, the contract must be of such a character that the court is able to make an efficient decree and enforce it when made. 8 Pom. Eq. Jur. § 1405.

This case is similar in principle to *Hurlbut v. Kantzler*, 112 Ill. 482, where a bill was filed for specific performance against Kantzler, Cretty, & Blair and the board of education, to compel the assignment of a lease. There Kantzler held a lease from the board of education which was not assignable without the written consent of the board. Kantzler, however, gave to Hurlbut a written agreement to assign the lease, but it was held the agreement could not be enforced against the board, as it

had not assented to the agreement. In disposing of the case it is said (p. 488): "There is no allegation in the bills, or proof, that the consent of the board of education will be given, or ever was given. . . . Hurlbut, at the time he took the contract from Kantzler, knew that the latter could not transfer his leasehold interest without the express consent of a third party, against whom he could claim no rights, legal or equitable, and consequently took his contract under such circumstances as to make its validity and effectiveness depend upon the exercise of the will of another under no obligation to do any act for him or for his benefit."

Appellee not being entitled to a decree for a specific performance, the next question presented is, Did the court err in refusing to retain the bill for the purpose of allowing appellee to recover damages for the failure of Sellers to perform the contract? It appears from the record that a short time before the bill was filed two actions were brought against the corporation, Morris Sellers & Co., to recover money due on certain obligations of the corporation. Judgments were subsequently rendered against the corporation. After the existence of these judgments came to the knowledge of appellee, four days after he filed the bill in this case he filed another bill against the corporation, in which he prayed for the appointment of a receiver and that the affairs of the corporation might be closed up. A receiver was appointed, and all the property, including that described in the contract, was sold by the receiver; and it is insisted by appellant that appellee has no standing in a court of equity to recover damages, because the property described in the contract was sold under a decree procured by him. In the view we take of the case it will not be necessary to determine this question, as there are other grounds upon which the decision of the case may be predicated. In *Doan v. Mauzey*, 33 Ill. 227, it was held that a bill for specific performance will not be retained to assess damages for a failure to perform the contract, where the complainant knew when he filed the bill that the vendor had parted with the title to the property. The same rule was declared in *Stickney v. Goudy*, 132 Ill. 213. In *Kennedy v. Hazelton*, 128 U. S. 667, 33 L. ed. 576, it was held that specific performance cannot be decreed of an agreement to convey property which has no existence or to which the defendant has no title, and if the want of title was known to the plaintiff at the time of beginning suit the bill would not be retained for the assessment of damages. The same doctrine is declared in *Hurlbut v. Kantzler*, 112 Ill. 482. Here Greer, the appellee, knew when he accepted the contract from Sellers that the property named in the contract was owned by Morris Sellers & Co., a corporation. He also knew that Sellers had no authority to sell the property, and, knowing these facts, he could not maintain a bill for specific performance, nor would the bill be retained for an assessment of damages for a breach of the contract.

The judgment of the appellate court will be reversed, and the decree of the superior court of Cook county will be affirmed. *Judgment reversed.*

WASHINGTON SUPREME COURT.

STATE of Washington, *ex rel.* A. A. DENNY,Robert BRIDGES *et al.*
and

City of Seattle, Intervener.

(..... Wash.)

1. A lease of harbor area in front of tide lands for curing and canning fish, maintaining a retail and wholesale fish market, and storing ice for packing and handling fish, is

not authorized by Const. art. 15, § 1, reserving such area "for maintaining wharves, streets, and other conveniences of navigation and commerce," since the word "commerce" is qualified by the word "navigation."

2. The structures authorized by Const. art. 15, § 2, respecting leases of harbor areas for "wharves, docks, and other structures," when this section is construed with § 1, must be limited to "conveniences of navigation and commerce."

(February 25, 1898.)

NOTE.—Right of owner of upland to access to navigable water.

Few questions present so much difficulty, when viewed in the light of the expressions of judicial opinion, as does this one. In England when by virtue of the Conquest the King had all the rights and the subject only those which were granted to him, there is no express decision as to the riparian right of access to navigable water. The general understanding of the situation at that time has been, however, that the King could cut off access if he chose to do so. On the other hand, when the rights of the King became limited, and those of the subject correspondingly amplified, the right of access became a substantial one recognized by the courts, until now such rights cannot be destroyed, even by the government, without making compensation to their owner. This is also the rule wherever the English law controls. In this country some of the courts have adopted one extreme, some the other, while yet others have taken a middle ground not very clearly defined. The earlier cases were more favorable to the individual, while, contrary to the course in England, the later ones seem to be ignoring his claims, until one of the lower courts in Illinois has held that the state can convert the water into dry land for park purposes, and that the former riparian proprietor has no legal cause for objection.

The English rule.

Hall (Seashore, 2d ed. p. 6), says that the title of the King to the land under water is similar to his ancient title to all the *terra firma* in his dominions. It is a fundamental principle that all the lands in the realm belonged originally to the King, and that which had not been granted to the subject remained in him in absolute ownership. This is what is known as the *jus privatum*.

Freeman says (Eng. Const. 2d ed. pp. 130 *et seq.*) the tracts of unoccupied land were originally the property of the public. But by the time of or after the Conquest this land was known as *terra regia*, and disposed of by the King as he chose. After Magna Charta the character of the land began to change again, until now the land is not the King's with power in him to dispose of it, but in the people, and under the control of Parliament. He further states that by custom each new sovereign is now compelled to grant his individual rights in the unoccupied land to the people.

The practical effect of this is to merge the *jus privatum* into the *jus publicum*. The first case involving the right of access was decided in 1843, after this change had been accomplished.

In *Rose v. Groves*, 5 Mann & G. 613, 6 Scott, N. R. 645, 1 Dowl. & L. 61, 12 L. J. C. P. N. S. 251, 7 Jur. 951, access from the river to plaintiff's public house was obstructed by timber moored by defendants in the stream in front of plaintiff's bank. During the argument, Maule, J., said this was not an action for obstructing the river but for obstructing access to plaintiff's house. And it was held that the declaration was good after verdict. 40 L. R. A.

And a recovery was permitted on a remarkably similar state of facts in *French v. Connecticut River Lumber Co.* 145 Mass. 261.

Kearns v. Cordwainers' Co., 6 C. B. N. S. 888, 28 L. J. C. P. N. S. 286, 5 Jur. N. S. 1216, was a proceeding between licensor and licensee based upon a contract that the licensor should apply for leave to erect a landing place beside a wharf, and the question was as to whom application must be made. Cockburn, Ch. J., during the argument, stated that the conservators of the river had a right to authorize the erection so far as the public was concerned, but the difficulty he felt was as to whether or not they could override private rights. In his opinion he said it appeared to him that no private rights were interfered with; that the erection was not one which was immediately brought into contact with, or would directly interfere with, access to the premises of adjoining owners, and that being so, the only rights interfered with were public rights which the conservators could control. But he says that if the obstruction operated a private particular injury to abutting owners, according to *Rose v. Groves*, they would have a right of action.

If a railroad is built between a wharf and the water, the wharf is injured within the meaning of a statute requiring compensation to be made in such cases. *Bell v. Hull & S. R. Co.* 6 Mees & W. 690, 2 Railway Cas. 279.

In *Atty. Gen. v. Conservators of the Thames*, 1 Hem. & M. 1, 8 Jur. N. S. 1203, 11 Week. Rep. 163, the judge says the right of the owner of a private wharf to have access thereto is a totally different right from the public right of passing or repassing along the river. The existence of such a private right of access was recognized in *Rose v. Groves*. The wharf owner claimed that it had a right to the wharf coupled with a right of access to the river, and the judge agreed that if this access was taken away it would be entitled to an injunction. But, he says, the access was not blocked up, the wharf was only made less accessible. That is a mere interruption to the navigation of the river which they enjoyed in common with the public, and not as part of their special right of access.

In *Duke Buccleuch v. Metropolitan Bd. of Works*, L. R. 8 Exch. 306, where an embankment for a road was built along the shore so as to cut the riparian owner off from access to the water, the court of exchequer held that he was entitled to damages, Kelly, C. B., saying: "I am clearly of opinion that the plaintiff would have been entitled to bring an action against a person who should have deprived him of the mass of water flowing along the back of his premises, just as much as he would against anybody who took away the public road in front" of them. This judgment was reversed in the exchequer chamber on the ground that the plaintiff was not entitled to the compensation given him for the general damages and depreciation in value of his premises caused by the execution of the undertaking. But there is no discussion of the riparian right of access which aids

APPPLICATION for a writ of mandamus to compel defendants to grant to relator a lease of state lands in a harbor for purposes connected with his business. *Denied.*

The facts are stated in the opinion.

Messrs. Blaine & De Vries, for plaintiff:
Chapter 28, Laws of 1897, relating to Seattle

in the settlement of the question. During the argument in the House of Lords (L. R. 5 H. L. 418) Lord Chelmsford asked, What is the distinction between cutting off access to a house by obstructing a road and cutting off access to it by embanking a river? and it was replied that that is not here made the subject of a specific claim. But Lord Chelmsford stated that the loss of access to the river at high water was claimed. The judgment in favor of plaintiff was reinstated, and upon the question of the right to compensation for loss of the water right, Cleasby, B., said plaintiff was entitled as riparian owner to the regular flow of the water all along the extremity of the ground, and that the deprivation of the water right was clearly an injurious affecting of the premises entitling him to compensation. That the plaintiff had caused the chief difficulty in his case by making the alleged ownership of the causeway to the water the pivot of the whole case, so that the taking of the strip of land was the only injurious act, whereas the main grievance was the destruction of the valuable water right. Hannen, J., said plaintiff as owner of land abutting on a navigable river was entitled to a right of access to the stream along his whole frontage, and not merely to the place where his causeway was located. Martin, B., said plaintiff had the easement, or right, or privilege, by whatever name it may be called, of the flow of the water of the river in its natural channel up to his garden wall. He had one entire thing. He had not the land alone, or the causeway alone, or the right of the flow of the river alone. He had all three combined. If anyone constructed an embankment so as to shut out his premises from the river he could have maintained an action against him for depriving him of his riparian right. Lord Chelmsford said there can be no doubt, and none has been entertained, that the plaintiff is entitled to compensation in respect to the taking away of the causeway and landing place, and the injury arising to his house and premises by depriving them of access to the river. The only question upon which there has been a difference of opinion among the judges is as to whether or not compensation could be given in respect of the depreciation of the property by the conversion of the land between it and the river into a highway. Lord Cairns said: It has appeared to me that the property of the plaintiff in this case was what is commonly called riparian property. The meaning of that is, it had a water frontage. The meaning of its having a water frontage was this, that it had a right to the undisturbed flow of the river which passed along the whole frontage of the property, in the form in which it had been formerly accustomed to pass. Beyond all doubt the water right was a property belonging to the plaintiff for which compensation was to be made when it was taken away.

That decision settled the rule that deprivation of access to water is an element of damages to be awarded for the building of a roadway along the bank of the stream.

In Metropolitan Bd. of Works v. McCarthy, L. R. 7 H. L. 248, 43 L. J. C. P. N. S. 385, 31 L. T. N. S. 182, 23 Week. Rep. 115, property between which and the river a highway ran was held to be injuriously affected by the stopping up of a dock on the river opposite it, which the owner was in the habit of using, within the meaning of a statute requiring compensation in such cases.

40 L. R. A.

tide lands, is repugnant to the Constitution: (1) On the ground that it is a private or special law having for one of its objects the laying out, opening, and altering of highways contrary to § 28, article 2, of the Constitution.

(2) That the act seeks to take the private property of one individual and give it to

The owner of a wharf the length of which is less than that of his boat cannot be deprived of his right of access to his wharf by his neighbor's preventing the boat overlapping his wharf if the latter wharf is not in use. But a use of the wharf which would deprive his neighbor of the use of his wharf during the greater part of the time would be unreasonable. *Original Hartlepool Collieries Co. v. Gibb*, L. R. 5 Ch. Div. 712, 46 L. J. Ch. N. S. 311, 36 L. T. N. S. 483.

If a pier is built so as to obstruct the access of a riparian owner to and from his property, he may use the pier to facilitate such access. *Marshall v. Ulleswater Steam Nav. Co.* L. R. 7 Q. B. 166, 41 L. J. Q. B. N. S. 41, 26 L. T. N. S. 793, 20 Week. Rep. 144.

In *Lyon v. Fishmonger's Co.* L. R. 10 Ch. 673, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1, where licensees of the conservators of the river Thames were about to fill up a little inlet in the river bank in such a way as to cut off access to a portion of plaintiff's wharf, the vice chancellor says that at the argument he asked counsel, Do you contend that the conservators of the river could make an embankment in front of the main front of plaintiff's wharf, and thereby prevent his having barges coming up to be loaded and unloaded immediately in front of his wharf?—and he states that this was a proposition so monstrous that counsel seemed to recoil from it and they have not ventured to assert such a right as that. It is in fact conceded that such a right could not be exercised, and that if it was attempted to be exercised plaintiff would be entitled to apply to the court for protection. And he states that a man who has a house opening on a highway has a right to step from his house into the highway, and whether the highway was of solid earth or a highway of water is immaterial. He has just the same right from a wharf on the bank of the Thames to step into a boat as he would have to step upon solid land from a house adjoining a public street into that highway. The court of chancery appeals said that it had been unable to find any authority for holding that a riparian proprietor where the tide ebbs and flows had any rights or natural easements vested in him similar to those of a riparian proprietor above the tide or beyond those of the public at large. And it reversed the decision of the vice chancellor. And *Rose v. Groves and Atty. Gen. v. Conservators of the Thames* were distinguished. The court says the wharfinger is amply protected in his right of access to his wharf by his interest as one of the public, and that there is no necessity to invent any private right in him as a riparian proprietor.

But upon appeal to the House of Lords L. R. 1 App. Cas. 682, the lord chancellor said unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which *per se* he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf it assumes a very different character. It ceases to be a right held in common with the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land and of the river in

another, contrary to § 16, article 1, of the Constitution.

(3) That the act contemplates the appropriation of the tide land's fund of the state of Washington, and the amount appropriated is not designated, violative of § 4, article 8, of the Constitution.

connection with the land, the disturbance of which may be vindicated by an action or restrained by injunction. It appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river, which is thus valuable, and as to which the landowner can thus protect himself against disturbance, is otherwise than a right or claim to which the owner of land on the bank of the river is by law entitled within the meaning of the act requiring compensation for the destruction of such rights. Limiting *Kearns v. Cordwainers' Co.* 6 C. B. N. S. 383, 28 L. J. C. P. N. S. 285, 5 Jur. N. S. 1218. Lord Chelmsford said that he saw no sound principle upon which the distinction between the two descriptions of natural streams (navigable and non-navigable) could be supported. That he could not comprehend why a riparian owner of a tidal river should not possess all the peculiar advantages which the possession of his property with relation to the river afforded him, provided they occasioned no obstruction to the navigation. Lord Selborne said: Upon principle as well as upon the authorities I am of opinion that private riparian rights may and do exist in a tidal navigable river. The rights of a riparian proprietor as far as they relate to natural streams exist *jure nature*, because his land has by nature the advantage of being washed by the stream; if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the stream.

In *Bell v. Quebec*, L. R. 5 App. Cas. 93, 49 L. J. P. C. N. S. 1, 41 L. J. 451, which was a case of a bridge erected on the river lower down than plaintiff's land so as to interfere with navigation, the court said that in *Lyon v. Fishmongers' Co.* the House of Lords undoubtedly decided that the right of access to the water from riparian land is a private right which the owner of such land enjoys *qua* owner.

The rule of *Lyon v. Fishmongers' Co.* is applicable to every country where the same general law of riparian rights prevails as in England, unless it is excluded by some positive rule or binding authority of the *lex loci*. *North Shore R. Co. v. Pion*, L. R. 14 App. Cas. 612.

In *Atty. Gen. v. Wemyss*, L. R. 13 App. Cas. 192, the rule of *Lyon v. Fishmongers' Co.* was applied in case of an attempted reclamation of land on the shore, carried on under direction of the Crown, the effect of which would be to shut plaintiff off from the water. In that case the reclamation was for the purpose of securing a quay at the point of navigability beyond some mud banks along the shore. This would seem to have been in aid of navigation. It was claimed that the plaintiff's right to use the foreshore as an access to the sea was no greater than the right of any other of the public. But this contention was disallowed and his right established. It was then claimed that the Crown could not be sued. But a statute had provided for suit under certain circumstances which was held to include this case, so the right was established.

From this it appears that the English law now is that the right of access is property which cannot be taken away without compensation while the present system of laws exists.

The rule in Ireland.

The rule in Ireland is the same as in England, 40 L. R. A.

(4) That the extension of the streets by the replat are not upon straight lines, as provided by §§ 1, 3, article 15, of the Constitution.

(5) That said replat disestablishes in part the harbor lines of the city of Seattle, contrary to § 1, article 15, of the Constitution.

All streets are highways.

excepting that there has been a tendency to hold that the right could not be taken away, even with compensation.

In *Queen v. Rynd*, 16 Ir. C. L. Rep. 29, where a railroad was built between plaintiff's land and the sea, it was held that the case was a proper one for the assessment of damages, *Hayes, J.*, saying: "As to the effect which is likely to result . . . from the construction of the embankment, which will prevent the access from his land to the sea which he has heretofore enjoyed, whether for the exercise of right of navigation, or for bathing, or any other lawful purpose for which the subject may require to have such access, I think he has been injuriously affected, and ought to be compensated."

In a later case it was held that the right of access is not a proper subject for pecuniary compensation, and must be provided for by accommodation works. *Jackson, J.*, says: "I think the prosecutor entitled to a communication with the sea for the purposes not connected with the mere use of the land *qua* land, *viz.*, bathing, boating, and fishing." *Ball, J.*, says it would be unreasonable and unjust to hold that plaintiff is bound to take a pecuniary compensation for his loss. *Richards, B.*, says that plaintiff is entitled to access, not in virtue of any personal privilege, but in right of his land and as an easement incident to his land and his property, and parcel of the convenient and necessary use and enjoyment of his premises. It is the common-law right of all Her Majesty's subjects to fish, boat, and bathe in the open sea, and those who have land stretching down to the shore have facilities for enjoying all these rights which others differently circumstanced have not, and they necessarily use their land for the purpose of enabling them to avail themselves of these advantages. The sea is a public highway, and I confess I see no distinction in principle between the right of adjoining owners of land to the use and enjoyment of the sea and to the use of a public road. *Blackburne, Ch. J.*, *Pennefather, B.*, *Perrin, J.*, and *Lefroy, B.*, dissented, but not all from the fact that the right of access exists; some holding that compensation could be given and that the preservation of a mode of access was not necessary. *Falls v. Belfast & B. R. Co.* 12 Ir. L. Rep. 233.

The rule in Canada.

The English rule has been accepted in Canada, although some of the judges have been inclined to hold the other way.

In *Re Miller and Great Western R. Co.* 13 U. C. Q. B. 582, compensation for land on a water front had been allowed for the land under the water which belonged to the Crown, on the theory that the riparian owner would have the prior right to acquire title to it from the Crown. This was overruled by the court, *Burns, J.*, saying the proprietor of land extending to the shore has no more right or authority over the waters beyond the shore or the lands beneath the waters than all other of Her Majesty's subjects have. He has no right to expect the Crown will grant or dispose of any peculiar advantage to him in preference to any other person.

But in *Re Widder and Buffalo & L. H. R. Co.* 20 U. C. Q. B. 688, where a railroad was laid along the bed of a river below high-water mark, thereby cutting the riparian owner off from access to the

as much pledged in carrying out this policy as though it rested in contract.

Lewis v. Portland, 25 Or. 138, 23 L. R. A. 736.

When the state has once established harbor areas or harbor lines, the only way to change

those lines is through a constitutional amendment.

Wilson v. State Land Comrs. 13 Wash. 65; *State, Haller, v. Young* (Wash.) 50 Pac. 786.

Messrs. P. H. Winston, Attorney General, and *Thomas M. Vance* for defendants.

street so as to cut the owner off from access to the water, the loss of access would form an element of the damages to be awarded.

A riparian owner has the right of access to the stream which cannot be cut off without paying him compensation. *Chapman v. Oshkosh & M. River R. Co.* 33 Wis. 629.

Damages for taking land by placing a pier on the bed of the river where it belongs to plaintiff cannot be recovered under a declaration alleging obstruction to plaintiff's right of access to his wharf. *Maxwell v. Bay City Bridge Co.* 41 Mich. 458.

While some of the above expressions were mere dicta, the rule was regarded as so well settled that it was stated as in the nature of a fundamental principle to illustrate some other rule.

The state cannot make a grant of the land under the water of the great lakes, which will impair the riparian rights of the owners of the shore. *McLellan v. Prentiss*, 35 Wis. 437.

The state cannot arbitrarily take away or destroy the rights of a riparian owner on a navigable lake without his consent, or without compensation or due process of law, for the sole purpose of benefiting some other riparian owner. *Priewe v. Wisconsin State Land & I. Co.* 93 Wis. 547, 33 L. R. A. 645.

But a riparian owner cannot recover damages for the diversion of the waters of the stream by a corporation under authority of the legislature for the purpose of improving the public navigation. *Black River Improv. Co. v. La Crosse Boom & Transp. Co.* 54 Wis. 669, 41 Am. Rep. 66.

In that case it is said the doctrine of the *Delaplaine Case* cannot be extended to a case where the state places obstructions in the navigable waters of the state for the purpose of improving the navigability of the stream.

In *Cohn v. Wausau Boom Co.* 47 Wis. 325, where a booming company had run a boom along the river in front of plaintiff's land, he claimed the right to have it removed as a nuisance. But the court, without directly considering the question of the right of access, held that plaintiff held his right as a riparian owner only by implied public license—as tenant by sufferance of the state—a right of which the exercise might always be prohibited by public law in aid of public use. The private right is a *quasi* intrusion upon the public right, tolerated only in private aid of navigation, and gives way *ex necessitate rei* to public measures in aid of navigation.

And that case was recognized in *J. S. Keator Lumber Co. v. St. Croix Boom. Corp.* 72 Wis. 82.

The rule in Massachusetts.

While there is some obscurity in the Massachusetts decisions, the rule is well settled there that the right of access cannot be cut off without compensation made.

In *Ashby v. Eastern R. Co.* 5 Met. 366, 38 Am. Dec. 426, it is stated in the headnote that where the value of the wharf is impaired by construction of a railroad across the flats beyond it the owner is entitled to recover of the proprietors of the railroad the damages thus sustained by him.

In *Brayton v. Fall River*, 113 Mass. 229, 18 Am. Rep. 470, where a city had obstructed the use of plaintiff's wharf by refuse coming down a sewer, the court said if the effect of defendant's acts had been merely to create a bar across the mouth of the creek so as to destroy or injure its navigability, the plaintiff could not have maintained an action be-
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cause it was thereby rendered more difficult to reach his wharf. Those would have been injuries of the same kind sustained by other persons who have occasion to use the creek. But where the land has been filled up directly in front of plaintiff's wharf so that vessels could not gain access to it, the injury was special to plaintiff so as to give him a right of action.

In *Davidson v. Boston & M. R. Co.* 8 Cush. 91, a bridge without a draw had been erected over the flats in front of plaintiff's wharf, and he claimed damages for the interference with access to the wharf, which was on a small inlet or arm of the sea. The court said the plaintiff had no right, as riparian proprietor, to have his flats kept open for the purpose stated. So far as the railroad erected by authority of the legislature affected the right of plaintiff to pass or repass to and from his lands and wharves with vessels, it was a mere regulation of a public right, and not a taking of private property for public use, and gave the petitioner no claim for damages. In that case the instruction which the court was reviewing involved only the right to have the flats kept open; and the court said that solid structures might be built on the flats so as to obstruct the flow and reflow of the tide, without objection, provided a neighbor's access to his house or land was not wholly cut off. Beside crossing the flats the railroad company had crossed the channel from which the tide did not entirely ebb, and had built there the bridge without a draw, and although the exception did not directly involve the right of navigation to it, yet the court took the occasion to make the observations stated above, so that it plainly intended to rule that as against the public interest a wharf owner cannot complain that his access is cut off from the sea, if access to the water still exists.

And that case was followed in *Thayer v. New Bedford R. Co.* 125 Mass. 253, in which case a railroad was built across a dock so as to prevent boats coming up to plaintiff's wharf. The court said each individual as one of the public has a right to use navigable waters with his boats and vessels at pleasure, but it is in the exercise of a public and not a private right. He cannot thereby acquire a private right, for his use cannot in law be adverse. In that case plaintiff's dock opened from the end of a dock belonging to other persons through which he claimed a right of way by prescription, and it was this right of way which he claimed had been interfered with. The court denied his alleged right of way, and the case may possibly fall within the class which denies relief to persons injured by an obstruction of a stream, although from the peculiar circumstances of the case the plaintiff was practically the only one injured, since the railroad crossed the dock but a short distance below his own, thereby shutting off access to it.

In *Blackwell v. Old Colony R. Co.* 123 Mass. 1, which was an action for damages for building a bridge across a navigable arm of the sea, the court says that a private action could not be maintained for it because the injury was to the public navigation, and the mere fact that the plaintiff alone had a wharf above the bridge did not alter the case, the injury being only in degree and not in kind. It is further said that the case has no analogy to those in which the obstruction, being in front of complainant's land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate.

Messrs. John K. Brown and F. B. Tipton for intervenor:

The prohibition contained in subdivision 2 of § 28 of article 2 of the Constitution does not apply to streets in cities.

Re Woolsey, 95 N. Y. 185; *Re Lexington Ave.* 29 Hun, 804, Affirmed, 92 N. Y. 629.

If the passage to the wharf is filed up beyond the plaintiff's land the damage is the same to him as to the remainder of the public, and he cannot maintain a private action. *Breed v. Lynn*, 126 Mass. 367.

In *Drury v. Midland R. Co.* 127 Mass. 571, it was held that the right of free access to tide water is a right the obstruction of which is an element of damages to be considered in making compensation for the taking of land for railroad purposes. The court does not refer to the *Davidson* and *Thayer* Cases, and the only case in point cited is the head-note statement in the *Ashby* Case. The trial judge in that case said the mere fact that the road crosses the main channel there, with or without a bridge, standing alone, does not entitle the petitioner to damage if the railroad does not cross his land, but if the road does cross his land between the portion thereof on the main land and the channel, cutting him off from the use of that channel, which otherwise he could have made in connection with that portion, the petitioner is entitled to damages.

In *Boston & W. R. Corp. v. Old Colony R. Corp.* 12 Cush. 605, where there was a claim for damages for injuries to a wharf by the constructing of a railroad bridge in such a way that a pier of the bridge occupied space which could have served the purpose of a vessel's berthing at the wharf, the court said if petitioner sustained any loss by the bridge it was a damage arising from a partial impairment of the use of a public right and damages sustained by him in common with all the rest of the community and for which they could have no claim for damages. They had no right to occupy that part of the channel as a vessel's berth because it was upon a public navigable stream, and if occupied in fact more extensively by them than by others it would be by sufferance, and not of right. A claim for impeding access by vessels to the wharf was also made, but the court does not express any separate opinion upon that.

The cases holding the opposite rule.

A few courts have established a rule denying the existence of a riparian right of access which cannot be cut off by the state at its pleasure. The extent of this opposition may best be ascertained by examining the decisions.

New York.

The rule denying riparian rights started in New York in the case of *Gould v. Hudson River R. Co.* 6 N. Y. 522.

In *Lansing v. Smith*, 8 Cow. 146, improvements in the bed of the Hudson river, made under authority of the legislature, were made the basis of an action by a riparian owner on the ground that they impaired the use of his wharf. But the court said the right of plaintiff to navigate to and from his wharf is not denied. All that is contended for on the part of defendants is that the mode in which his right shall be exercised is subject to be controlled and regulated by the legislature as in their judgment the interest and convenience of the public may require. And it was further held that plaintiff could not maintain an action because the injury for which he sought remuneration was not peculiar to himself. It has been equally felt by a hundred others whose property is similarly situated.

That case was affirmed in *Lansing v. Smith*, 4 Wend. 21, 21 Am. Dec. 80, where Chancellor Walworth in the course of his opinion states that the 40 L. R. A.

The fact that the statute gave plaintiff a preference right to purchase tide lands abutting upon his upland gave him no vested right as against the state in such tide lands, until something in the nature of a contract had come into existence between himself and the state.

Allen v. Forrest, 8 Wash. 700, 24 L. R. A. 606.

legislature could authorize erections in front of the wharf, as was done in *Queen v. Smith*, 2 Dougl. 445. The latter case, however, was an indictment against the owner of the wharf for cutting down erections made in front of his wharf, which were not on his land, and the case did not involve the power to place the erection so as to cut off his right to the wharf, but the rightfulness of his method of getting rid of them.

In *Gould v. Hudson River R. Co.* 6 N. Y. 522, where a railroad company under authority of the state had laid its tracks below highwater mark along the shore of the Hudson river so as to cut the riparian owner off from access to the stream, the court draws a distinction between the power of the King of England and of the state in this country, holding that the power of the state is the more extensive, and then adopts the language of the chancellor in *Lansing v. Smith*, placing the decision on that case without any reference to the fact that in the *Lansing* Case the riparian owner was injured only in so far as his wharf was further up the river than the obstruction to navigation, so that he was injured in common with all others situated as he was; while in the *Gould* Case the plaintiff alone was injured in his private right of access. It is held that the language of the chancellor denies to the plaintiff any private right to the waters where the railroad is constructed, and that he has no claim to damages. It is said that the exclusive right of access does not belong to the plaintiff because his lands adjoin navigable waters, but because no other man can enjoy them, for the reason that if he enters on the plaintiff's land without his permission he becomes a trespasser. The judge says: "I can see nothing peculiar in these rights which are not possessed by any other person living 1,000 miles from navigable waters, as I suppose he would have the right to the exclusive possession of his land, to come and go to and from it with teams and produce; and should any other person attempt to exercise the same right without the permission of the owner, he would be a trespasser." Edmonds, J., dissents. The question of the right of access, which was the principal one raised in the case, was not discussed, or even noticed, in the prevailing opinion.

The lower court said the plaintiff is in the position of thousands whose lands are deteriorated in value in consequence of improvements lawfully made upon the lands of others. *Gould v. Hudson River R. Co.* 12 Barb. 616.

That case was recognized in *People v. Tibbetts*, 19 N. Y. 523; *People, Loomis, v. Canal Appraisers*, 38 N. Y. 461; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 398; *Langdon v. New York*, 98 N. Y. 129, and followed in *Getty v. Hudson River R. Co.* 21 Barb. 617, and in *Re New York, W. S. & B. R. Co.* 29 Hun, 269.

But in *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618, the court held that the owner of land bounding upon a navigable river has the right of access to the navigable part of the river and the right to construct a landing or wharf. In that case the court, speaking of *Gould v. Hudson River R. Co.*, says it believes that the proposition decided by it is not supported by any other judicial decision in this state, and if they were dealing with the question now as an original one it would not be difficult to show that the judgment in that case was a departure from precedent and contrary to reason and justice. It further says: The *Gould* Case has

The law authorizing the leasing of the harbor area is merely a grant of power to be exercised in the discretion of the harbor-line commission, and in such a case mandamus will not lie to compel the grantees of the power to exercise it.

Boyne v. Ryan, 100 Cal. 265; *Euerding v. McGinn*, 23 Or. 15.

been frequently criticised and questioned, and it is believed has never been fully acquiesced in by the courts or the profession as a decisive authority or a correct exposition of the rights of riparian owners.

And in *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L. R. A. 645, the court said the Gould Case has been frequently criticised, and cannot be regarded as a decisive authority upon the point adjudged therein.

In *Rumsey v. New York & N. E. R. Co.* 34 N. Y. S. R. 454, a second appeal of the case reported in 133 Y. N. 79, the court says, if the former decision deserves to be followed to its full extent it has no application to this case.

The *Rumsey Case* was followed in *Hedges v. West Shore R. Co.* 150 N. Y. 156.

The grant by the state of the right to build a railroad along the shore below high-water mark cannot extinguish or impair the easement of riparian rights which the owners of the upland have in the river. *Saunders v. New York C. & H. R. R. Co.* 144 N. Y. 75, 26 L. R. A. 378.

It thus appears that the riparian right of access is recognized, so far, at least, that it cannot be cut off by the erection of a railroad along the shore without compensating the owner.

Many of the cases in New York state have arisen out of controversies concerning the water front of Manhattan island. These cases have been decided as though they established the general rule, and cases from the island and those elsewhere have been cited indiscriminately in discussions of the law. But there is very strong reason for making a distinction between them. Before any private titles had been acquired on the island the municipality obtained a grant of a strip 400 feet wide around the whole island, so that all private titles were subordinate to this grant, and persons taking them cannot be regarded as in the true sense of the term riparian owners. Of course such owners could not complain of the use by the municipality of its property.

The city of New York took the absolute title to the tide ways surrounding the island, which enabled it to cut off the riparian owner from access to the water. *Sage v. New York*, 10 App. Div. 294.

In that case the right of the riparian owner against the right of the public to improve navigation arose, and the court adopted a middle ground between the Gould and *Rumsey Cases*.

It held that the riparian owner is entitled as against all but the Crown as trustee for the public at large to the right of access. But that a riparian owner's right of ingress and egress to his water front does not include a right to compensation for an interference therewith caused by a public improvement on the water front for the benefit of navigation. *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606.

The court said that while the general rule prevents disturbance of riparian rights by public authority without making compensation, when the interest of the whole people requires the improvement of a water front for the benefit of navigation it seems to be the rule for the state, or the city of New York by permission of the state, to make such improvements upon the tide-water front without compensating the riparian owner other than by giving him the paramount right of purchasing in 40 L. R. A.

A writ of mandamus should not issue where relator's claim to relief is based upon the unconstitutionality of an act of the legislature.

14 Am. & Eng. Enc. Law, p. 100; *Wright v. Kelly* (Idaho) 43 Pac. 565; *State, Goodloe, v. Lanier*, 47 La. Ann. 568.

The validity of the grant is not questioned on account of any irregularity in the manner

case of sale. The foundation of the rule does not seem to have been clearly pointed out. The right of the government rests upon the principle of implied reservation, and in every grant of land bounded by navigable water where the tide ebbs and flows, made by the Crown or the state as trustee for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public without compensation to the riparian owner. The implication springs from the title to the tide-way, the nature of the subject of the grant, and its relation to the navigable tide water.

The court in that case does not keep the distinction between Manhattan island property and other property, and between common and individual injuries, as clear as might be desired. The distinction made between rights against the state and those against its grantees is a new one in the form there presented, and, as will be seen above, has not been made in England.

The following cases were governed by the Gould Case or were from Manhattan island, and therefore subject to its peculiar law.

In *People v. New York & S. I. Ferry Co.* 68 N. Y. 71, the land under water had been granted to the owner of the adjacent upland, but the court in discussing his right says the ownership of the adjacent upland, however, gave him no title to or interest in the lands under water in front of his premises.

In *Furman v. New York*, 5 Sandf. 16, an attempt was made to enjoin the conveyance of land under water to a third person. But the court refused to interfere. The claim was not placed on the right of access to the water, but on the right to the soil under water. The court says the most that the owner of the upland can ask is the first offer in case the city decides to sell.

And that was affirmed in *Furman v. New York*, 10 N. Y. 567.

The owner of a pier which is obstructed by the deposit of refuse about it so as to prevent access to it has no claim to relief as a riparian owner, but his right, if any, is with the other people of the state whose use of the highway has been obstructed or disturbed by an individual. *Hudson River R. Co. v. Loeb*, 7 Robt. 418.

In *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233, which was a motion to restrain the deposit of refuse in a public river in such a way as to impede access to the plaintiff's property, the court, on the authority of the Gould Case, said it cannot be inferred from the mere fact of proximity that the owner of land adjoining a public highway or fronting on a river which is a public highway has some interest therein simply by reason of his proximity. This is an error which has been extensively indulged in.

In *New York v. Hart*, 95 N. Y. 443, the court, in discussing the rights of an owner whose title went to high-water mark, says, after referring to the nature of the injury which the owner will suffer by being cut off from the water and the privileges which he will thereby lose, that the state may, by virtue of its ownership of the tide way, destroy them by a use or grant for public purposes and without compensation.

But it is held that when the city decides to sell its tide-way for the construction of wharves the riparian owner has a prior equity in the right to make the purchase.

of making it, but on account of lack of power to make it at all.

19 Am. & Eng. Enc. Law, p. 353, and cases cited under note 4.

Reavis, J., delivered the opinion of the court:

The owner of a bulkhead cannot enjoin the erection of a pier beyond it in the water under permission of the proper authorities. His remedy, if any, is an action for damages. *Taylor v. Brookman*, 45 Barb. 106.

New Jersey.

In New Jersey the question developed a difference in opinion between Chief Justice Beasley and Chancellor Zabriske, in which the chief justice finally prevailed, but the chancellor was very tenacious in holding to his opinion even after the law had been established against him.

In *Gough v. Bell*, 22 N. J. L. 441, where the question was as to the title to improved land on the water front, Carpenter J., cites cases holding that a riparian owner has a right of access to the water; and he says if this doctrine can be maintained it would seem to follow that no grant for a mere private purpose can be supported, which interferes with the established rights of such owner. It would simply be to take the property of one person in order to transfer it to another. But he says the decision of that question was not necessary in that case. Randolph J., however, says the rights of a person whose boundary is the sea extend only to high-water mark. What right has he beyond this boundary? All beyond belongs to the state; and although that may be slow to deprive him of any privilege, yet, can it be disputed that the state would have a right to fill up in front of any riparian owner to high-water mark, and erect there a fortification or lighthouse? And if no land was taken above high water would any private property be taken for public use which the riparian owner must be paid for under the Constitution? And on appeal, although the question was not discussed by all the judges, Potts, J., says (*Bell v. Gough*, 23 N. J. L. 875) the rights of the riparian owner are as sacred and inviolable as any others. They are appurtenances to the estate, constitute part of its intrinsic value, and can no more be taken from him contrary to law than any other portion of his property. Among these rights is that to the water as appurtenant to the upland. These doctrines rest upon sound and safe principles, and interpose an impassable barrier behind which the citizen may find protection against the power of the state itself. The doctrine that the legislature could grant to any private person for private use a strip of land along all the navigable water ways for private use, so as to destroy every pre-existing right of the riparian owner and interpose new owners between him and the navigable waters, would certainly be received with equal surprise and consternation. In this conclusion Nevius, J., concurred, but Valentine held that no such right existed.

In *State, Roberts, v. Jersey City*, 25 N. J. L. 525, which was an attempt to tax an improvement which had been made out into the water, the judge says it must now be accepted as the established law in New Jersey that the right of the owner of land bounded by a navigable river extends only to the actual high-water mark. The land under water may be granted by the state to a stranger at any time before it is reclaimed and annexed to the upland. Such is unquestionably the common law.

In *Tinsman v. Belvidere Delaware R. Co.* 26 N. J. L. 143, 60 Am. Dec. 565, a railroad company built

Plaintiff applied to the board of state land commissioners to lease from the state the harbor area in front of certain tide lands of the city of Seattle owned by him. The uses for which he sought to lease the harbor area were as follows: "For the purpose of receiving by

an embankment which injured a right which plaintiff had to float timber in the mouth of a creek, upon land belonging to another person some distance from his saw-mill, and it was held that he had a right of action for the injury.

In *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269, the chief justice, with whom concurred a majority of the court, says that he has not found that any other judge than Nevius and Potts and Edmunds, dissenting in *Gould v. Hudson River R. Co.*, has ever based a decision on the ground of a riparian right in navigable waters. And he states that the theory of this position is based upon a misconception. That the right of access is not held by virtue of property, but that it attaches to the riparian owner as an individual, and he holds it in common with other citizens. The case is merely this: The man who owns the land next to navigable water is more conveniently situated for enjoying the public easement than the rest of the community. But a mere enumeration of the advantages of the position falls far short of showing that such proprietor has, in the *jus publicum* by the common law, more or higher rights than others. He further says that no ancient authority can be found which gives countenance to the notion that any such privileges as those claimed are appurtenant to the bank or ripa of a navigable river. The argument is built largely on the fact that the King had granted shore lands in gross. It is held that the license of the state to the owner to fill out upon the shore may be revoked at any time before it is exercised, and the shore may be granted to a third person. It is said that by such an appropriation the shore owner may sustain a greater inconvenience than will other citizens whose land does not run along the water, but the injury is in its essence and character the same, the difference being only in degree. From this decision Zabriske, Ch., and Clement and Ogden, judges, dissented.

In 34 N. J. L. 533, Chancellor Zabriske says that Judge Grier ruled in the unreported case of *Bell v. Coles* that the owner of land under the tide water could not cut off the access of the riparian owner to the water or fill up the land, and that because of this opinion the owner of the submerged land purchased a strip of the upland in order to acquire the right to utilize the land under water.

In *Keyport & M. P. S. B. Co. v. Farmers' Transp. Co.* 18 N. J. Eq. 13, the chancellor, speaking of *Gough v. Bell*, says, of eight judges who delivered opinions only one is silent upon the point in question. All the others more or less strongly maintain that in New Jersey the shore owner has vested rights in the water in front of him that cannot be taken away. And not only the opinions of the judges, but the history of public, professional, judicial, and legislative opinion on this matter, shows that this was and had been for years the prevalent view in the state.

And in *Keyport & M. P. S. B. Co. v. Farmers' Transp. Co.* 18 N. J. Eq. 511, where the question was as to the right of a wharf owner to have the space at the side of his wharf kept open, it is said that public sentiment from the earliest times to this day, and the whole course of legislative action in this state, have recognized a natural equity, so to speak, in the riparian owner to preserve and improve the contact of his property with the navigable water.

rail and water, shipping by rail and water, fish and other food products of the water, curing and canning cod, salmon, and other fish and water products; of keeping and maintaining a retail and wholesale fish market for the handling of shell and other fish from the waters of the Pacific Ocean, Alaska, and the inlets, bays

and arms of the Pacific Ocean, and the lakes and rivers of Oregon, Washington, British Columbia, and Alaska; and in the handling of fresh, salt, cured, and canned fish in and between the city of Seattle and the markets in the state of Washington and other states and foreign countries; and for the manufacture or

The state may grant the right to a railroad company to bridge a stream, and it may take the necessary land under water for the purpose of the bridge, although the effect will be an interference with the wharfage rights of the riparian owner. *Pennsylvania R. Co. v. New York & L. E. R. Co.* 23 N. J. Eq. 187.

The riparian owner who has not in fact reclaimed the land under water in front of his bank has as riparian owner no legal right to or in respect to the land in front of his property which will prevent the state from granting it to any person, and that without compensation to such owner. *American Dook & Improv. Co. v. Public Schools*, 39 N. J. Eq. 409.

But it has been said that the state cannot license a person to erect wharves in front of land owned by a corporation, although the corporation cannot itself acquire such a right. *State v. Brown*, 27 N. J. L. 18.

Washington and Oregon.

The Washington Constitution provides that the state asserts its ownership of the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in the waters where the tide ebbs and flows, and up to and including the lines of ordinary high water within the banks of all navigable rivers and lakes; and it was held in *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632, that by reason of that provision the riparian owner has no special or peculiar rights in the water as an incident to his estate. The authorities on the subject are considered, and support for the judgment is found in them. But Stiles, J., delivers a strong dissenting opinion.

In Oregon a series of decisions established that the tide lands belonged to the state. *Hinman v. Warren*, 6 Or. 411; *Parker v. Taylor*, 7 Or. 446; *Parkers v. Rogers*, 8 Or. 183, and in the opinions it was incidentally remarked that the state was under no obligation to recognize the rights of individual owners.

So, in *Shively v. Welch*, 10 Sawy. 136, it is said by way of argument that the owners of upland in Oregon had no right to or interest in land under the water, or any right to purchase the same until and except for the act of 1872.

At the same time, in *Wilson v. Welch*, 12 Or. 353, Thayer, J., recognized riparian rights as property which could be taken only for public use and upon giving compensation.

So, in a Federal case it was held that the owner of land abutting on tide lands in Oregon, and not disposed of by the state or the United States, has a right of access from his land to the water, and may erect and maintain a private wharf for his own convenience so long as he does not interfere with the public use, and subject to the regulating power of the legislature. *Case v. Loftus*, 39 Fed. Rep. 730, 5 L. R. A. 684.

In *Parker v. West Coast Pkg. Co.* 17 Or. 510, 5 L. R. A. 61, it is stated in a headnote by the court that an owner of land bounded by navigable waters possesses important riparian rights, and in the opinion, from which there is no dissent, it is stated that the bed of the river belongs to the state in its sovereign capacity, subject to the riparian rights of the owner of the land above and adjacent thereto. The state, however, cannot sell it, nor can the state control its use except to increase the facilities for navigation and commerce.

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Finally, in *Bowly v. Shively*, 22 Or. 414, the court, after a full review of the authorities in that state, held that the expressions of opinion that riparian proprietors had a right to wharf out, of which they could not be deprived, were mere *dicta* or the individual opinion of the judge making them; and the rule was announced that the state had an absolute right to dispose of the tide lands, and that the riparian proprietor had no right whatever therein.

This decision was placed upon the ground that the question was settled by the prior Oregon decisions. But decisions holding that the title to the tideways in the state are not necessarily inconsistent with a riparian right of access to the water.

Another claim made in the opinion is that the state has the King's *jus privatum* in the property which it can dispose of as he could. But the claim of a private right resting in the public, even when that public is organized, is not a satisfactory one. The only question is for what purpose the public holds its title. Furthermore the court relies on *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269, and *Gould v. Hudson River R. Co.* 6 N. Y. 522, saying that the rule of that case is a rule of property in New York, and has never been questioned. It thereby overlooks the fact that that case had been expressly overruled by the New York courts two months before, and in the overruling case it was stated that the Gould Case had never been held to represent the true rule upon the subject.

Lord, J., who delivered the opinion, announced his disapproval of the rule of the case.

The Bowly Case was affirmed by the Supreme Court of the United States upon the ground that the rule was fixed by the state law, which was binding upon the United States courts.

The rule of the Federal courts.

The question of riparian rights against a state or individuals is one of state law which is binding on the Federal courts. *Shively v. Bowly*, 152 U. S. 1, 38 L. ed. 331.

The Federal courts have, however, expressed opinions upon the question, which have more or less influenced the decisions in state courts. *Dutton v. Strong*, 1 Black, 23, 17 L. ed. 23; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

And in *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74, the court apparently assumed that it was settled that riparian owners had rights in the adjacent waters.

In *Avery v. Fox*, 1 Abb. (U. S.) 246, where, for the purpose of improving navigation, the channel of a river which flowed past plaintiff's land was moved so that the water would be diverted from the old course, it was held that the riparian owner had the right to have the water flow past his land, of which he could not be deprived without compensation.

But when the right of the Federal government to make improvement in aid of commerce conflicted with the right of the individual, the right of the individual was held not to exist.

In *Hawkins' Point Light-House Case*, 39 Fed. Rep. 77, where the United States had placed a lighthouse in the water in front of property the owner of which had by the state statutes the title to the soil and the right to wharf out, the court says it is by no means true that any dealing with a navigable stream which impairs the value of the

storage of ice to be used in the packing and handling of fish and other food products of the water, and the furnishing ice to the steamers and other craft touching at said city of Seattle, and to the towns and places upon Puget Sound and tributary country." The board of harbor-line commissioners rejected

the application of plaintiff to lease on two grounds: "First. That the plaintiff, A. A. Denny, must adjust or acquiesce in the adjustment of tide lands purchased by him as aforesaid to the new plat thereof, before any lease will be granted him for the harbor area aforesaid, or any part thereof. Second. That the

rights of riparian owners gives them a claim for compensation. The contrary doctrine that, in order to develop the greatest public utility of a water way, private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the supreme court. If necessary to the free navigation of the stream the owner will be prevented from extending any structure into it.

In *Gibson v. United States*, 166 U. S. 299, 41 L. ed. 996, the United States government had built a dike in the Ohio river and confined the water to the main channel, the effect of which was to prevent the free ingress and egress of boats to the landing of plaintiff, a riparian owner, so that at the time of year when the landing was most needed it could not be reached by boat. The court held that the riparian owner's rights were subject to the consequences of the improvement by the government of its navigable waters, and that the constitutional provision requiring compensation for private property taken for public use does not apply because the private property was not taken, but only damaged. The effect of that decision is that the right of access is not property, although the opinion does not directly say so.

But the lower court, whose opinion was affirmed (*Gibson v. United States*, 29 Ct. Cl. 18), directly held that the owner of a wharf on the bank of a river has no right of property below low water mark, and no property in the flow of water or in the approach to land. The court says that if the riparian owner had any such right it must be based on prescription, which is at variance with the doctrine of *Lyon v. Fishmongers' Co.*, which holds the right to be a natural one. It is further said that the riparian owner's right was a mere license which might be revoked at any time, relying on *Lansing v. Smith*, *Homochitto River Comrs. v. Withers*, and *Stevens v. Paterson & N. R. Co.*

When the court denies the existence of property in the right of access to the water it follows a very small minority of the courts which have considered the question.

A change in the channel of a river so as to prevent the flow of the water to the land of a riparian owner will not render the United States liable to make compensation as for property taken. *Friend v. United States*, 30 Ct. Cl. 94. In that case stones and dirt were dumped in the channel of the river, by which the access to the plaintiff's land was cut off.

The right to regulate commerce involves the right to regulate navigation, and this involves the use of submerged lands. The title of the riparian owner, although extending to the current of the stream, is subject to the right of Congress to occupy the submerged land for the erection of structures in aid of commerce between the states, and it is immaterial that such structures are placed in the water in such a way as to interfere with the riparian owner's access to deep water. The right of access to deep water is a right subordinate to the right of the state and the Federal government to control the stream in so far as necessary for purposes of commerce. *Scranton v. Wheeler*, 18 U. S. App. 152, 57 Fed. Rep. 803, 6 C. C. A. 585. This case was reversed in 41 L. ed. 313, evidently for lack of jurisdiction.

Some of the state courts have followed the above decisions.

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Although the riparian owner takes the title to the soil under water his right is subordinate to that of the United States government to make improvements in aid of navigation, so that he is entitled to no compensation, although the government erects a pier in such a manner as to cut him off from access to the navigable water. *Scranton v. Wheeler* (Mich.) 71 N. W. 1091.

The right of access of a riparian owner is subordinate to the power of Congress over the subjects of interstate commerce. *Winifrede Coal Co. v. Central R. & Bridge Co.* 24 Ohio L. J. 173.

Other decisions which have denied the riparian owner's right.

In *Philadelphia v. Scott*, 51 Pa. 30, 22 Am. Rep. 738, it is said that while the owner of land on a tide river has an absolute title to the soil to ordinary high-water mark, between this line and the ordinary low-water line his title is qualified by the public right of navigation. This prevents his use of the soil to the prejudice of the public right, and confers on the state the right to improve the intermediate space for public use without compensation.

All land below high-water mark belongs to the state, and before it is reclaimed by the riparian owner the state may grant it for public use to whoever it sees fit. *New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398, 1 L. R. A. 133.

In *Hoboken v. Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543, the court said that over submerged land of the navigable waters of the state of New Jersey the state had absolute and exclusive dominion, including the right to appropriate them to such use as might best serve its views of public interest.

In *Homochitto River Comrs. v. Withers*, 29 Miss. 21, 64 Am. Dec. 123, where the state had diverted a stream from its ancient course, which flowed through plaintiff's land, the court said the state, in virtue of her right of eminent domain, has the paramount right to control and dispose of everything within her limits which is not absolutely and exclusively private property, to the promotion of the public good.

It is competent for the legislature to grant to municipal corporations the exclusive right to build wharves on public navigable rivers without compensation to the adjacent landowner for the land so taken for the purpose. As against the state the riparian owner has no rights to the river below high-water mark. *Ravenswood v. Fleming*, 22 W. Va. 52, 45 Am. Rep. 435, the court, from its argument as well as from its citation of authorities, apparently intended to follow the rule of *Gould v. Hudson River R. Co.* and *Stevens v. Paterson & N. R. Co.*

But in *Barre v. Fleming*, 29 W. Va. 314, Snyder, J., cites the rule of *Yates v. Milwaukee*, that the riparian owner has the right of access to the navigable part of the river in front of his land and to make a landing, wharf, or pier, and states that the only question involved and actually decided in *Ravenswood v. Fleming* was that the statute denying to a riparian owner of a lot within an incorporated town the right to build a wharf, pier, or bulkhead without the consent of the town council was constitutional. And he further said that in the execution of the public trust the state may by statute confer upon her municipal corporations

use for which the plaintiff, A. A. Denny, desires to lease said harbor area is not a convenience of commerce or navigation, and the structure which, according to said application, he contemplates placing on said

harbor area, is not a wharf, dock, or other structure, within the meaning of the Constitution and tide-land laws of the state of Washington."

In the view of this cause taken by the court,

the right to authorize the establishment of public wharves or landings within their corporate limits without compensation to the owner of the fee.

In *Tomlin v. Dubuque*, B. & M. R. Co. 32 Iowa, 106, it is said that by the rules of the common law the owner of land along the shore of a navigable river is entitled to no right either in its shores or waters as an incident of his ownership, except the contingent ones of alluvion and dereliction. He is not entitled to damages for an embankment made along the banks of such river by authority of the state, the effect of which is to deprive him of free access to the stream. This ruling is placed upon the authority of *Gould v. Hudson River R. Co.* and *Stevens v. Paterson & N. R. Co.*

And that case was followed in *Ingraham v. Chicago & M. R. R. Co.* 34 Iowa, 249.

The state may reclaim the submerged land for park purposes without paying compensation to an abutting owner for deprivation of his right of access to the water. The court says no court has yet gone so far as to hold that the owner of a natural shore is entitled to riparian rights as against the sovereign. When one man buys a lot whose boundaries are certain and defined it is his privilege to permit it to remain open, uncultivated, and unproductive so long as he pleases. Until he improves it the owner of the adjoining lot has an implied license to pass over it, to enjoy the benefits of the light and air and other incidental advantages which it affords him, but the former may cut off these advantages by building upon his lot, without being liable in damages to the person who has hitherto enjoyed them. And the same rule applies in favor of the government in respect to its public waters. *People, Atty. Gen., v. Revell*, 29 Chicago Legal News, 345.

The effect of statutes.

In almost every instance in which the court has denied the riparian right the legislature has nullified the decision by recognizing it.

Under the New Jersey act of March 21, 1871, a grant of the land under water could be made only to the owner of the upland adjoining. *Poibemus v. Bateman*, 60 N. J. L. 163.

A license under the act of 1851 to fill in the tide lands confers rights on riparian owners only. *New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398, 1 L. R. A. 133, Citing *Brown v. Morris Canal & Bkg. Co.* 27 N. J. L. 648.

The statutory law in New Jersey gave riparian owners the right of erecting wharves and piers, and in case of their neglect to take from the state its grant on the terms offered, then it gives the lands to a stranger making compensation to the riparian owner for the value of his privilege, and who, succeeding to the state's title, would have no relation to the riparian owner except that of common boundary. *Hoboken v. Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543.

Under the New York statutes the commissioners of the land office can convey titles to the lands under the waters only to the owners of the upland. *E. G. Blaklee Mfg. Co. v. E. G. Blaklee's Son's Iron Works*, 129 N. Y. 155.

In Iowa a statute has provided that a railroad company must make compensation for erecting a railroad between high and low water mark. *Renwick v. Davenport & N. W. R. Co.* 49 Iowa, 664, Affirmed, *Davenport & N. W. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51.

Under a statute giving riparian owners the exclusive right to wharf out, deposits made in front

of a wharf by a municipal corporation without authority will be a nuisance for which the owner may maintain an action. *Garitee v. Baltimore*, 53 Md. 422.

The Florida act of 1866 divested the state of its title, and gave the land under water to the owner of riparian land as far as the edge of the channel. *Geiger v. Filor*, 8 Fla. 326; *Sullivan v. Moreno*, 19 Fla. 200.

Access cut off by railroad.

So far as this question has been considered, it seems that a railroad cannot be permitted to cut off the right of a riparian owner without making compensation to him. *Gould v. Hudson River R. Co.* 6 N. Y. 522, was overruled by *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618.

In Iowa it was held that because a riparian owner has no right of access to navigable water he is not entitled to damages for being deprived of such access by the construction of a railroad along the shore. *Tomlin v. Dubuque, B. & M. R. R. Co.* 32 Iowa, 106, 7 Am. Rep. 176.

And in *Houghton v. Chicago, D. & M. R. Co.* 47 Iowa, 370, where a railroad was placed between plaintiff's land and the water, it is said that *Tomlin v. Dubuque, B. & M. R. R. Co.* was not questioned, but that the question was whether or not the place where the railroad was built was below high-water mark.

But that rule was changed by statute, and in *Backus v. Detroit*, 49 Mich. 110, 43 Am. Rep. 447, *Cooley, J.*, says that the doctrine of the *Tomlin* Case is unsound.

A riparian owner cannot be deprived of the right of access by a railroad company in building its works on the shore of a river without compensation. *Organ v. Memphis & L. R. R. Co.* 51 Ark. 235.

In *Chicago & P. R. Co. v. Stein*, 75 Ill. 41, where the claim was made that access to plaintiff's property had been injured by the erection of a bridge over the river, there seems to be no question on the part of the court that in case of injury compensation must be made, but it was held that no injury was shown in that case.

Right as against private individual.

The owner of a wharf cannot willfully and unreasonably moor boats along the front of the wharf in such a way that they overlap and prevent access to the slip of an adjoining owner. *Delaware River S. B. Co. v. Burlington & B. Steam Ferry Co.* 81 Pa. 103.

In *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644, where a wharf boat had been obstructed by steamers tying up at an adjoining wharf, the court said if the navigator cannot load his boat in *invitum* against the soil, or obstruct the proprietor's access to the river, still less should he be allowed thus to use the wharf boat.

The right of a riparian owner to wharf out is not affected by the allotment of the ground in front to another person as an oyster bed under the state statutes. *Prior v. Swartz*, 62 Conn. 139, 18 L. R. A. 668.

A riparian owner may maintain an action against a third person who interferes with his right of access to his wharf. *Folsom v. Freeborn*, 13 R. I. 200.

Rafts cannot be moored so as to deprive wharf owners of access to their wharves. *Harrington v. Edwards*, 17 Wis. 587, 84 Am. Dec. 768.

A riparian owner may maintain an action to enjoin the obstruction by a private owner of the public stream in such a way that access to his property is cut off. *Blanc v. Klumpke*, 29 Cal. 156.

it is not necessary to discuss the first ground of the rejection of the application to lease by the board of harbor-line commissioners. Article 15, § 1, of the Constitution of the state, relating to tide lands, among other things de-

clares: "Nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than 50 feet nor more than 600 feet of such harbor line (as the commission shall determine), be sold or

An action may be maintained against a boom company for cutting off access to the landing place of a riparian owner. *French v. Connecticut River Lumber Co.* 145 Mass. 351.

An owner of a private wharf, who is in possession, may enjoin the construction of another wharf in front of it which will cut him off from navigable water, unless the persons making it show a lawful right to erect it. *Cowell v. Martin*, 43 Cal. 606.

A settler on public land bordering on tide water has, as against a private individual, a right of access to the water which the courts will interfere to protect. *Lewis v. Johnson*, 76 Fed. Rep. 476. The court says that the law of the *Buocleuch* and *Lyon Cases* was affirmed in *Shively v. Bowlby*.

A tenant cannot during the term acquire a right to maintain a pier in front of the landlord's wharf which he can retain after surrendering the wharf. *Bedlow v. New York Floating Dry Dock Co.* 112 N. Y. 263, 2 L. R. A. 629, *Reversing* 44 Hun, 378.

Estoppel by grant.

Municipalities have been held to have estopped themselves by their grants of wharf rights from interfering with access to them.

A city which has granted a wharf right cannot cut off access to the wharf by erecting a bulkhead in front of the wharf. *Langdon v. New York*, 93 N. Y. 129; *Williams v. New York*, 105 N. Y. 419; *Kingsland v. New York*, 110 N. Y. 569; *Kingsland v. New York*, 45 Hun, 198.

If the city has granted a right to erect a wharf and take toll it cannot afterwards build a bulkhead beyond the end of the wharf so as to cut off access to it. *Crocker v. New York*, 15 Fed. Rep. 405.

But in *Whitney v. New York*, 6 Abb. N. C. 329, note, it was held that a covenant by the city that the grantee should have the wharfage from a wharf which he should make in the river, not extending to the extreme line owned by the city, would not deprive the city of the power to erect a wharf beyond the end of the former one which would cut the former one off from the water.

Special reasons for refusing relief.

There are some cases in which relief has been refused, which cannot be regarded as direct decisions upon the main question.

Among these are *Lansing v. Smith*, 8 Cow. 146, in which the access was merely rendered more difficult, and complainant was injured as others were.

The owner of a wharf cannot enjoin an adjoining owner from extending his wharf further into the stream, although the effect is to make the access to his wharf more difficult. *Van der Brooks v. Currier*, 2 Mich. N. P. 21.

So, the existence of a street along the river front will cut off the riparian right of the person whose land borders on the street. *United States v. Morris*, 23 Wash. L. Rep. 745, 24 Wash. L. Rep. 168.

If a riparian owner is entitled to compensation for deprivation of his right by the filling up of the flats in front of his property so as to cut him off from the water it must be claimed at the time. In a case where no attempt was made to enforce the right for a long time, the court says: "We do not think that at this late day they afford any ground, if ever they did afford any ground, for the equitable interference of the court." *Clarke v. Providence*, 16 R. I. 337, 1 L. R. A. 727.

Right as against improvement of navigation.

In Wisconsin, New York, and the Federal courts 40 L. R. A.

it is held that the right of the public to improve the navigation of the stream is superior to the riparian owner's right of access. *Black River Improv. Co. v. La Crosse Boom & Transp. Co.* 54 Wis. 669, 41 Am. Rep. 66; *Cohn v. Wausau Boom Co.* 47 Wis. 325; *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606; *Gibson v. United States*, 29 Ct. Cl. 18; *Scranton v. Wheeler*, 16 U. S. App. 152, 57 Fed. Rep. 803, 6 C. C. A. 585.

Summary.

It thus appears that by what may be called the common law because it is that which is almost universally adopted by the courts without the aid of statute, a riparian owner has a right of access which cannot be impaired by the state by granting rights to other individuals which will interfere with it. A railroad, wharf, or embankment cannot be authorized which will cut off the right of access without making compensation to the riparian owner.

This rule has not been adopted in New Jersey, Iowa, Washington, and Oregon. In these states the effect of the decisions has been in part neutralized by statutes giving privileges to riparian owners.

In England and countries following its law the riparian right cannot be taken by the public for improving navigation without compensation.

If the riparian right of access is recognized as property it cannot be taken in this country without compensation because of constitutional protection. To obviate this result the United States Supreme Court has refused, contrary to the rule elsewhere, to recognize it as property.

The same result is obtained in New York by holding that the private right, although property, is subordinate to the public right to improve the waters for navigation. The court holds that in every grant of land bounded on navigable water made by the state, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public without compensation to the shore owner.

And in Wisconsin it is held that the riparian owner holds his rights by implied public license. That the exercise of this right may be prohibited by public law in aid of public use. That it gives way *ex necessitate rei* to public measures in aid of navigation.

From the fact that navigable waters are natural public highways there is very little analogy in other branches of the law to aid in settling the conflict between public and private rights in regard to them. The position taken by the New York and Wisconsin courts, that the right of the riparian owner ceases to exist when it conflicts with the public right to improve navigation, is different from that existing in other departments of the law. Generally the private right is regarded as absolute, and when the public wishes to abridge it compensation must be made. It would seem that the harmony of the law would be much better subserved by extending the same rule to riparian rights, and requiring the public to compensate the owner in case its needs necessitate the destruction of his rights. The Wisconsin method of stating the rule seems preferable to that in New York, but it is likely to prove a surprise to the riparian owner to find that after he has exercised and been regarded as possessing certain rights for years it may be they are in effect only a license which the public may revoke at pleasure. H. P. F.

granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce." As asserted by counsel for plaintiff, the word "commerce" is one of wide significance, and in its general sense may mean almost any transaction or intercourse between men. But the word has been restricted by the courts according to the context in which the term has been used. Section 2 of article 15 of the Constitution of the state declares: "The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in § 1 of this article, but no lease shall be made for any term longer than thirty years; or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures." Counsel for plaintiff contend that the words "navigation and commerce" do not appear in the 2d section, and that the phrase "and other conveniences of navigation and commerce" appears in the 1st section; that the 2d section provides for laws for the leasing of the right to build and maintain wharves, docks, and other structures, and that the purpose for which these "other structures" are to be used, or their nature, is not defined; and also argue that navigation and commerce mean one and the same thing, and that commerce includes navigation, and that the word "commerce" here is used in its broadest import; that the words "navigation and commerce" are words of enumeration, and not those of definition; and that the court is called upon to define their meaning, and such definition should properly be made from a consideration of the people and their wants at the time the Constitution was adopted. It is also argued that the reservation of harbor areas is a very broad one, and a comparison is made between the harbor area in front of the city of Seattle and that of other noted emporiums of the world. The contention that "navigation" is included within "commerce," and means the same thing, cannot be maintained. The word "navigation," as used in the 1st section of the article of the Constitution quoted, is clearly used as a qualification of the word "commerce," and the provisions for maintaining upon the harbor area wharves, docks, and other structures, by or through the state, refers to structures which are conveniences of navigation and commerce. We think the language as well as the sense of these two sections of the Constitution is plain, and the ordinary rules of statutory and constitutional construction fit this sense. It is plainly said in § 2 that the wharves, docks, and other structures are those mentioned in § 1. Then the rule of *ejusdem generis* is plainly applicable here, and "other structures" must fall within the genus "conveniences of navigation and commerce." Our Constitution, in its provi-

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sions relating to harbor areas in front of cities, is unlike that of any other state Constitution that has been submitted to our attention. Therefore it would probably be useless to attempt to find authority to aid in the construction of our Constitution. The state of Washington at its formation had before it the experience of the world in the regulation and control of harbor areas. The constitutional convention well knew that private control of these waters had always been inimical to free navigation and to the public interests. The insidious and plausible pretexts for the establishment of private interests in such waters were also well understood, and, however large the harbor areas within the domain of the state, it was well known, from the history of the past and the tendencies of the present, that the organization of private interests in combination would be sufficiently powerful to pervade all these waters. A very fair comment upon the import of these constitutional provisions is found in the Report of the Massachusetts State Board on Docks and Terminal Facilities (1897) p. 37, in which it is said: "Alive to modern tendencies, the state of Washington, in her Constitution, article 15, declares that no water areas beyond high-water marks shall be sold or relinquished by the state, 'but such areas shall be forever reserved for landings, wharves, and streets, and other conveniences of navigation and commerce.' Subsequently a harbor-line commission established harbor lines in the navigable tide waters of the state adjacent to the cities, with a view to providing for docks having a length of 600 feet and an avenue fronting thereon of from 100 to 250 feet wide. Thus the water front of all the cities in the state is to be forever preserved in uniform condition, under control of the public, in the interest of economical and convenient commercial uses, secure from the encroachment of individuals or corporations." "Curing and canning fish, maintaining a retail and wholesale fish market, and the storage of ice for packing and handling fish," are not conveniences of "navigation and commerce," and maintaining establishments of that character and structures erected for such purposes are not the "other structures" mentioned in the Constitution relating to this subject. The act of the legislature (Laws 1897, p. 229, § 53) does not contemplate a lease for any other purposes than those specified in the Constitution. The act specially reserves to the state of Washington "the right to regulate, either under rules of the commission or legislative enactment, or by both methods, the rates of wharfage, dockage, and other tolls to be imposed by the lessee upon commerce for any of the purposes," etc.

The writ is denied.

Dunbar, Anders, and Gordon, JJ.,
concur.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut

v.

John E. HARBOURNE, *Appt.*

(.....Conn.....)

A state statute making it unlawful to keep a place in which the business of transmitting money to be placed or bet on any horse race, etc., whether within or without the state, is permitted or carried on, or to be concerned in such business, is not an unconstitutional regulation of interstate commerce as applied to an agent of a telegraph company, who keeps such place or is engaged in such business, and transmits the money to another state by telegraph.

(May 3, 1898.)

A PPEAL by defendant from a judgment of the Superior Court for New Haven County, Waterbury District convicting him of keeping a place where betting was carried on and transmitting money to another state to be wagered on a horse race. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles E. Perkins and M. Kenealy, for appellant:

The business of sending telegraphic messages from one state to another is interstate commerce.

Prentice, *Pol. Powers*, p. 280.

The sending money by telegraph is as much interstate commerce as sending messages.

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 806.

Interstate commerce is protected against legislation by states in exactly the same way, and to the same extent, as foreign commerce.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649.

A state cannot be allowed to fix for itself whether certain articles or the dealing in them are so injurious or deleterious as to take them out of the protection of interstate commerce.

Leisy v. Hardin, 185 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 86.

The state cannot, under any circumstances, make regulations as to telegraph companies sending money or messages to other states, as that matter is entirely under the control of Congress.

Pennacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1087; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 806.

Whenever the law of the state amounts essentially to a regulation of commerce with foreign nations or within the states, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity, it comes in conflict with a power which in this particular has been exclusively vested in the general government.

Re Leisy v. Hardin, 185 U. S. 100, 34 L. ed. 128,

NOTE.—For statutes against betting on horse races in other states, see *Ex parte Lacy* (Va.) 81 L. R. A. 822; *State v. Stripling* (Ala.) 36 L. R. A. 81, 40 L. R. A.

8 Inters. Com. Rep. 86; *Re Pennsylvania Teleph. Co.* 48 N. J. Eq. 91; 25 Am. & Eng. Enc. of Law, pp. 769-780; *Dinsmore v. New York Bd. of Police*, 12 Abb. N. C. 439; *Robbins v. Shelby County Tazang Dist.* 120 U. S. 489, 30 L. ed. 694.

Mr. Nathaniel R. Bronson, for the state:

The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation is sometimes exceedingly dim and shadowy. It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that, to whatever extent ground shall be covered by these directions, the exercise of state power is excluded. Cooley, *Const. Lim.* p. 722.

In establishing police regulations, a state may incidentally affect commerce; but they, when not in conflict with any act of Congress, are valid.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 467, 24 L. ed. 529, quoted approvingly in *Plumley v. Massachusetts*, 155 U. S. 478, 39 L. ed. 229; *Sherlock v. Alling*, 98 U. S. 104, 23 L. ed. 820.

A distinction is drawn between acts passed regulating certain commerce for the preservation of the public good, and acts intended to produce a revenue from the trade or commerce regulated.

Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1087.

A state may require that employees on railroads shall be examined for color blindness.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238.

The running of railroad trains in the state and through it from one state to another on Sunday may be regulated or prohibited.

Conn. Gen. Stat. Rev. 1888, § 3523; *State v. Baltimore & O. R. Co.* 24 W. Va. 788; *Western U. Teleg. Co. v. New York*, 38 Fed. Rep. 552, 2 Inters. Com. Rep. 533.

The states have the right to forbid acts prejudicial to the public good.

Cooley, *Const. Lim.* p. 742; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Morgan's L. & T. R. & S. Co. v. Louisiana*, 118 U. S. 464, 30 L. ed. 241.

One of the powers most often exercised, commonly called "police," is that of restraining and abating nuisances.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; Cooley, *Const. Lim.* p. 741.

Game laws are passed in many states.

State v. Geer, 61 Conn. 144, 13 L. R. A. 804, 3 Inters. Com. Rep. 732.

Lotteries have been legislated against, and even out of existence, by the various states.

Vannini v. Paine, 1 Harr. (Del.) 65, quoted approvingly in *Patterson v. Kentucky*, 97 U. S. 508, 24 L. ed. 1118; *Phalen v. Virginia*, 8 How. 167, 12 L. ed. 1032; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

A lottery is recognized as a means of gambling, and state legislation with regard to it is upheld by virtue of the state's inherent right, never relinquished, to pass laws for its internal government and regulation; an exercise, that is, of its police powers.

Brien v. Williamson, 7 How. (Miss.) 14.

Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded.

Mobile County v. Kimball, 102 U. S. 698, 26 L. ed. 240; *Bacanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 687, 27 L. ed. 442; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 808; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649; *Norfolk & W. R. Co. v. Pennsylvania*, 186 U. S. 114, 34 L. ed. 394, 8 Inters. Com. Rep. 178; *License Cases*, 5 How. 504, 12 L. ed. 256.

May not a state provide for the seizure and destruction of a gambling outfit or lottery tickets, although the gambling is carried on by the help of a confederate without the state, or the tickets issued by some lottery licensed or even chartered by another state?

Com. v. Huntley, 156 Mass. 236, 15 L. R. A. 839; 18 Am. & Eng. Enc. Law, p. 751, and cases cited; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Mugler v. Kansas*, 128 U. S. 623, 31 L. ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232; *State, Waterbury, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 68.

The transaction is by its very terms one form of gambling, and nothing is better established in our jurisprudence than that this is one of the vicious practices which it is the province of the legislature to regulate and prohibit by virtue of its police powers.

Edwards v. State, 8 Lea, 411; *Moore v. State*, 48 Miss. 147, 12 Am. Rep. 367; 18 Am. & Eng. Enc. Law, p. 1169; *Tanner v. Albion*, 5 Hill, 121, 40 Am. Dec. 337; *Phalen v. Com.* 1 Rob. (Va.) 718; *Phalen v. Virginia*, 8 How. 167, 12 L. ed. 1032; *Stone v. Mississippi*, 101 U. S. 819, 25 L. ed. 1080; *State v. Lovell*, 39 N. J. L. 463; *McClellan v. State*, 49 N. J. L. 471; *Haring v. State*, 51 N. J. L. 386.

Hall, J., delivered the opinion of the court: The act creating the offense charged is directed against that form of gambling known as "pool selling," including bets or wagers on the result of any trial of speed, skill, or endurance. Pub. Acts 1893, p. 240. It prohibits (1) keeping any place with apparatus or devices for the purpose of carrying on such gambling; (2) keeping any place where pool selling of any kind, either directly or indirectly, is permitted or carried on; (3) keeping any place in which the business of transmitting money to any race track or other place, there to be placed or bet on any horse race, etc., whether within or without the state, is permitted or carried on; (4) making any such

wager, or buying or selling any such pools; (5) being concerned in buying or selling any such pools; (6) being concerned in carrying on the business of the transmission of money to any race track, etc. The defendant is charged in the first count with a violation of the third prohibition, and in the second count with a violation of the sixth. The defense relies on the alleged unconstitutionality of the act.

The following case is presented by the record:

"On the trial of the case to the jury, upon the plea of not guilty, the state claimed and offered evidence to prove that on the 29th day of January, 1897, the defendant, in the city of Waterbury, was employed by the New Jersey News & Electric Telegraph Company as the manager of its telegraph office there located; that, as such manager, he received from one — a telegraphic message in the ordinary form used for transmitting messages, addressed to the Jersey City Commission Company, Jersey City, New Jersey, directing the said Jersey City Commission Company there to bet for the sender of said message the sum of money named therein, and to draw upon Mills & Company, New York city, New York, for said money; that, at the time of delivery of said message to the defendant, the said — deposited with the defendant said sum of money, to be by him transmitted by telegraph to Mills & Company, New York city, subject to the draft of the said Jersey City Commission Company; and that said telegraph message was by the defendant transmitted by telegraph to the Jersey City Commission Company, and said money was by the defendant transmitted by telegraph to Mills & Company; and that the defendant knew that the purpose in said transmissions was to have said money bet upon a horse race without this state. The state offered evidence of no other violation of the law. The defendant claimed, and offered evidence to prove, and claimed he had proved, that, in the receipt of said message and of said money, he was acting as the agent of his said employer, in the ordinary course of business of a telegraph company engaged in the business of telegraphing of messages and moneys. The defendant admitted that he knew the purpose for which said money was sent and said message transmitted.

"The defendant, in writing, requested the court to charge the jury as follows: '(1) That if the jury shall find that the accused, as charged in the first count of the complaint of the prosecuting attorney, did possess, keep, manage, maintain, and occupy a certain room, office, and place in which the business of transmitting money to a certain race track or race tracks, or other places without this state, there to be placed or bet on certain horse races, games, and competitions, with full knowledge thereof, and that said keeping, possessing, managing, maintaining, and occupying was in the ordinary course of business of a telegraph company, he is guilty of no offense against the laws of this state, as any statute of this state prohibiting such acts would be, and is, in violation of and against the provisions of the Constitution of the United States vesting in the Congress of the United States the power of regulating commerce between the states.

(2) That if the jury shall find that the accused did in fact, as charged in the second count of said complaint, transmit (by telegraph) money from the city of Waterbury to a place without this state, for the purposes alleged in this complaint, and that said transmission was in the ordinary course of the business of a telegraph company, he is not guilty of any offense against the laws of the state; and that a statute of this state which prohibits such act is void, being contrary to said provision of the Constitution of the United States.' The court refused to so charge the jury, but did charge the jury as follows: 'That notwithstanding the jury should find that in the keeping, etc., of the place as set forth in the complaint, the accused kept said place for the ordinary purposes of a telegraphic business, yet, if the business of transmitting money for the purposes charged in the complaint was carried on in said place, the accused was guilty of a violation of the laws of this state, and the statute prohibiting such act was constitutional; and that if the jury should find that accused did, as charged in the second count of said complaint, knowingly transmit (by telegraph) moneys from the city of Waterbury to a place without this state, to be bet upon a horse race, that the accused is guilty of a violation of the laws of this state, notwithstanding such transmission may have been in the ordinary course of the business of a telegraph company, and that the statute of this state prohibitive of such act is constitutional.'" To the court's refusal to charge as requested, and to the charge as delivered, the defendant duly excepted.

The case was submitted in this court on briefs. In that of the state, it is stated that "the facts are not disputed, nor is it denied that the statute concerning pool selling distinctly prohibits the act done by the accused. He claimed, however, that the law was unconstitutional. No other line of defense was adopted, and no evidence put in to confuse the issue." The brief filed by the defendant in reply commences thus: "It appears from the brief of counsel for the state that the only question in this case is that of the unconstitutionality of the act of 1898 (page 240 of the Public Acts of that year). He also admits that the act would be invalid as a restraint of interstate commerce, if it cannot be brought within the limits of the police power of the state. This limits the question to the precise point as to whether, under any claim of police power, the state can interfere with messages sent from one state to another, because the legislature thinks that the matters concerning which the messages are sent are such as it does not approve of." We shall dispose of the appeal on the question to which the counsel on both sides have thus addressed themselves, and which they seem to agree in regarding as the only one presented on the record; assuming that the attention of the jury was properly directed by evidence and instructions (to which it was thought unnecessary to refer in the finding) to the necessity of proof, under the second count, that the defendant, at the time of transmitting the money to be bet, was unlawfully concerned in the carrying on of the business of the transmission of money to places without the state, there to be

placed or bet. The decisions in respect to the power of Congress to regulate commerce among the several states, which is granted by the Constitution, have been numerous, and not altogether consistent; but they seem to have established the following propositions: A state law dealing directly and only with interstate commerce is void. A state law purporting to deal with domestic matters, but being in its effect and essence merely a regulation of interstate commerce, is void. A state law plainly and in good faith dealing only with state matters is valid, notwithstanding it may incidentally affect interstate commerce, unless it comes in conflict with some valid statute of the United States on that subject, or, in the absence of legislation, affects such commerce in a particular where the silence of Congress is equivalent to legislative prohibition. The power of regulating commerce covers such a wide field that cases must arise where a law passed in the legitimate exercise of the power of domestic legislation is also, in a sense, a regulation of commerce. But it is not therefore necessarily an invasion of the jurisdiction of Congress.—i. e. an exercise of the "power" of regulation. It is an exercise of the "power" of domestic legislation, and is valid unless it conflicts with some existing law, or so essentially affects interstate commerce as substantially to disturb those channels of commerce which Congress has seen fit to leave undisturbed. In dealing with such legislation, the courts have given a much wider latitude to what is called "police legislation" than to other forms of domestic legislation, because police regulations are absolutely essential to the protection of society, and in the main can only be established by the state government.

The law in question is purely a police regulation. For more than 200 years we have treated wagering as against public policy, and playing at the games which promote wagering has been illegal. The restrictions on playing the games have been removed, but playing for anything of value is still an offense. Gen. Stat. §§ 2557, 2558. A wager of any kind is illegal. The loser can recover the money lost, and, if he does not sue, any person may sue for and recover treble the amount. Id. §§ 2552, 2553 (passed in 1797); Rev. Stat. 1808, p. 861. Betting on horse races is a penal offense. Gen. Stat. § 2556. Since the establishment of our government wagering has been held to be, if not absolutely immoral, yet so injurious in its results as to require suppression by penal legislation. Such legislation has for many years past been directed against the business of promoting wagering in its various forms; and the keeping of places where such business is carried on has been treated as an offense. Indeed, throughout the United States the business of gambling is now recognized as illegitimate, and one whose contracts the courts will, in many cases, refuse to enforce. Within the past two years the United States Supreme Court has said: "This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous, when placed in contrast with the widespread pestilence of lotteries. *Douglas v. Kentucky*, 168 U. S. 488, 496, 42 L. ed. 553, 555. Similar language may appropriately be used in respect

to the pool selling against which the act in question is directed; especially since the perversion of the telegraph to its uses has multiplied many fold its capacity for harm.

The act of 1893 attempts to reach the root of the evil by prohibiting the keeping of a place in which this kind of gambling, in any of its ramifications, is carried on. One of the most dangerous forms is that for which the telegraph is utilized. In prohibiting the keeping of a place in which such a business is carried on, or being concerned in such a business, the state does not attempt to, and does not in fact, exercise any exclusive power vested in Congress over interstate commerce. It simply prohibits in this state the business of aiding crime; and, if such commerce is thereby affected at all, it is the incidental effect of depriving those here engaged in telegraphing of the profits they might make through the business of promoting gambling in this state. That business is prohibited; and it is immaterial whether it be carried on by an individual in his own house, or by a telegraph company apart from, or as a part of, its ordinary business of telegraphing. In whatever place and by whomsoever the business of promoting gambling is carried on, the offense is committed, and cannot be justified because in committing it a telegram is sent from Connecticut to New Jersey.

In *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, it was claimed that the power of regulating interstate commerce involved the right in all citizens to introduce and sell in any state any harmless article of food, unrestricted by state legislation; but it was held that a police regulation forbidding the sale in such manner as was likely to induce the citizens of Massachusetts to buy one article under the belief they were buying another was not a restriction of interstate commerce. The court said (p. 479, 155 U. S., and page 229, 39 L. ed.): "The Constitution of the United States does not secure to anyone the privilege of defrauding the public." No more does it secure to anyone the privilege of promoting gambling. The same principle—*i. e.* that a police regulation, pure and simple, does not become a regulation of interstate commerce merely because it may incidentally affect the bringing into the state, or sending out, of certain articles of commerce—was affirmed in *Geer v. Connecticut*, 161 U. S. 519, 534, 40 L. ed. 798, 798. But when a state attempts to regulate domestic commerce in an article which it recognizes as a legitimate subject of commerce, so as to discriminate in favor of domestic commerce and against interstate commerce in that article, the law ceases to be a pure police regulation, and becomes a direct interference with interstate commerce. *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632. The law before us is not analogous to the South Carolina dispensary law, condemned in *Scott v. Donald*. There might be some analogy if the legislature had recognized gambling by telegraph as a legitimate subject of commerce, and had undertaken to authorize the business of transmitting money for the purpose of gambling when the transmission was to places within the state, and to forbid or to regulate it when the transmission was to places without the state. The law comes within the principle illustrated by the cases of *Plumley v.*

Massachusetts, 155 U. S. 461, 39 L. ed. 223, and *Geer v. Connecticut*, 161 U. S. 519, 534, 40 L. ed. 798, 798, and *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 618, 43 L. ed. 878, as well as by many other cases unnecessary to cite. It is closely analogous, so far as the principle involved is concerned, to the Georgia law forbidding the running of railway trains on Sunday, which was sustained, although the channels of interstate commerce were thereby blocked for one day out of every seven. The language of the court in announcing the decision is applicable to the present case, and would seem to be conclusive. After reviewing various prior decisions, the court, speaking by Mr. Justice Harlan, says: "These authorities make it clear that the legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight." *Hennington v. Georgia*, 163 U. S. 299, 317, 41 L. ed. 166, 173.

In the case at bar the defendant's sole claim was that if he kept the place as charged, and was concerned in the business as charged, yet, inasmuch as some of the acts essential to constitute these offenses consisted in the transmission of the information and money to another state, he was guilty of no offense, because a law restricting the ordinary business of telegraphing among the states is void; and his sole grievance is that the court did not so charge. For the reasons given, we think the charge on that point was correct. When one opens an office, and makes arrangements and furnishes facilities to enable his customers to sit in his office, and gamble upon the results of horse races in this state and other states, he keeps a place in which the business forbidden by the statute is carried on; and, if he knowingly assists in making the transmission of money in the course of that business, he is concerned in the business. It is immaterial whether the illegal business is carried on as a wholly independent business, or as a part of an otherwise legitimate

business in telegraphing. For a telegraph company to transmit a single message, and make a single transfer of funds, such as is stated in the finding of the court in the case before us, would not, standing alone, constitute a carrying on of the business of transmitting money for betting purposes. It would, however, be relevant evidence to show that fact, and might be sufficient in connection with

proof that the company furnished special conveniences for the use of those desiring to make such bets, or had no substantial business of any other description.

There is no error in the judgment of the Superior Court.

The other Judges concur.

ILLINOIS SUPREME COURT.

C. V. BANTA, Jr., *Appl.*,
v.

City of CHICAGO.

(172 Ill. 204.)

1. A license tax on brokers extends to a member of a stock exchange who buys and sells stocks, bonds, or securities on the floor of the exchange in his own name, and makes or receives delivery and payment in the execution of orders for his customers.

2. "Goods, wares, and merchandise" for the sale or negotiation of which a broker is required to pay a license tax include shares in the capital stock of incorporated companies and other securities which are the subject of common barter and sale, and which are given visible and palpable form by means of certificates, bonds, or other evidences of indebtedness.

3. A tax upon occupations or employments, whether for revenue or as an exaction for the privilege of pursuing a calling, may be imposed and collected in the form of a license fee.

4. Either regulation or revenue may be the purpose of a license tax imposed on the occupation of a broker and other trades or occupations mentioned in Const. 1870, art. 9, § 1, and it is not material to determine which may be the purpose of the license.

5. A delegation of the power to impose license taxes on occupations may be made by the legislature to municipal corporations.

6. The requirement of uniformity in respect to both persons and property in Const. 1870, art. 9, § 2, applies only to taxes collected by assessments upon assessable property.

7. The uniformity of a license tax on occupations is required by Const. art. 9, § 1, only as to the class upon which it operates.

(April 21, 1898.)

A PPEAL by defendant from a judgment of the Criminal Court of Cook County convicting him of violating an ordinance of the city of Chicago prohibiting persons from acting as brokers without a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hamline, Scott, & Lord, for appellant.

The business carried on by the defendant was that of a factor, and not a broker.

It is a fundamental principle of jurisdiction that the city can exercise only such powers as are expressly enumerated in its charter.

Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196.

Courts are authorized to indulge in no presumptions in favor of the validity of the ordinances of municipal corporations.

Schott v. People, 89 Ill. 195.

Powers conferred by the statute when exercised through the ordinances are penal in their character. All penal statutes must be strictly construed.

Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196; *Wright v. People*, 61 Ill. 382; *Waddle v. Duncan*, 63 Ill. 233; *People v. Peacock*, 98 Ill. 172; *Illinois & St. L. R. Co. v. People*, 19 Ill. App. 141; *Watson v. People*, 27 Ill. App. 493; *Belles v. Anderson*, 88 Ill. App. 129; *Chapman v. Wright*, 20 Ill. 120; *People v. Feeler*, 145 Ill. 150; Endlich, Interpretation of Statutes, § 381.

The meaning of strict construction is that penal statutes will not be extended by implication to causes which are not expressly provided for by the very terms of the act.

Casper v. People, 6 Ill. App. 28; *Belles v. Anderson*, 88 Ill. App. 129; *Chapman v. Wright*, 20 Ill. 120; 28 Am. & Eng. Enc. Law, p. 374, and the cases cited in the note thereto; *Schott v. People*, 89 Ill. 195; *Cairo v. Bross*, 101 Ill. 475; *Emmons v. Lewistown*, 133 Ill. 884, 8 L. R. A. 328; *Cerro Gordo v. Rawlings*, 135 Ill. 40; *Twining v. Elgin*, 88 Ill. App. 356; *Delisle v. Danville*, 86 Ill. App. 659; *Olney v. Todd*, 47 Ill. App. 440.

It is legally impossible to say that Banta was a broker or anything else than a factor.

Murray v. Doud, 187 Ill. 368; *Saladin v. Mitchell*, 45 Ill. 79; *Warren v. First Nat. Bank*, 149 Ill. 1, 25 L. R. A. 746; *Winne v. Hammond*, 87 Ill. 99; *Eaton v. Trueedahl*, 52 Ill. 811.

If an agent has possession of the goods he sells for a principal, and sells said goods in his own name, then he is a factor.

Braun v. Chicago, 110 Ill. 194; 4 Am. & Eng. Enc. Law, 2d ed. p. 961; *Story, Agency*, § 84; *Baring v. Corrie*, 2 Barn. & Ald. 138; *Crane v. Nolan*, 19 L. C. Jur. 309; *Slack v. Tucker*, 23 Wall. 321, 23 L. ed. 143; *Perkins v. State*, 50 Ala. 154; *Saladin v. Mitchell*, 45 Ill. 79; *Braun v. Chicago*, 110 Ill. 188; *Haas*

NOTE—As to the constitutionality of a license tax, see also *State v. Harrington* (Vt.) 34 L. R. A. 100.

As to the rule of uniformity in license taxes, 40 L. R. A.

see also *State v. Moore* (N. C.) 22 L. R. A. 472; *Denver City R. Co. v. Denver* (Colo.) 29 L. R. A. 608; *State, Tol. v. French* (Mont.) 30 L. R. A. 415; and *Singer Mfg. Co. v. Wright* (Ga.) 35 L. R. A. 497.

v. *Ruston*, 14 Ind. App. 8; *Graham v. Duckwall*, 8 Bush. 12; *Butler v. Dorman*, 68 Mo. 298, 80 Am. Rep. 795; *Bernhouse v. Abbott*, 45 N. J. L. 581, 46 Am. Rep. 789; *Third Nat. Bank v. Snyder*, 10 Mo. App. 215; *Higgins v. Moore*, 34 N. Y. 417; *Spears v. League*, 6 Coldw. 422; *Price v. Wisconsin M. & F. Ins. Co.* 43 Wis. 276.

For all purposes of sale, pledge, lien, possession, or delivery, the certificate when indorsed is the share, the corpus of the property.

Kellogg v. Stockwell, 75 Ill. 68; *Evans v. Wood*, L. R. 5 Eq. 9; *People's Bank v. Gridley*, 91 Ill. 457; *Fisher v. Essex Bank*, 5 Gray, 378; *Protection L. Ins. Co. v. Osgood*, 93 Ill. 69; *Otis v. Gardner*, 105 Ill. 436.

The legal title to stock as between the parties passes by the assignment and delivery of the certificates.

See *First Nat. Bank v. Lanier*, 11 Wall. 869, 20 L. ed. 172; *Leitch v. Wells*, 48 N. Y. 585; *Johnston v. Lafin*, 103 U. S. 804, 26 L. ed. 535; *National Bank v. Watontown Bank*, 105 U. S. 221, 26 L. ed. 1042; 18 Am. & Eng. Enc. Law, p. 610; *Wilson v. Little*, 2 N. Y. 446, 51 Am. Dec. 309; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779; 1 Cook, Stock & Stockholders, 3d ed. par. 465; *Fairbanks v. Merchants Nat. Bank*, 80 Ill. App. 28; *Fairbank v. Merchants Nat. Bank*, 132 Ill. 132.

When Banta buys stock for his customers, the relation of pledgee and pledgee is created between them.

Markham v. Jaudan, 41 N. Y. 235; *Brewster v. Van Liew*, 119 Ill. 561, 59 Am. Rep. 823.

But how can Banta have a lien as pledgee on property of which he has not possession? When Banta's customer delivered possession of the certificates indorsed in blank, Banta became possessed of the shares of stock themselves. Hence, if he sells the stock for his customer while such certificates are in his possession, he is a factor pure and simple.

Atkinson v. Foster, 134 Ill. 472; *Neiler v. Kelley*, 69 Pa. 407; *Ayres v. French*, 41 Conn. 152; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28.

The modern courts have given the same character to certificates of stock duly indorsed as the courts of England at an early day gave to warehouse receipts and bills of lading.

Lickbarrow v. Mason, 1 Smith, Lead. Cas. Hare & W.'s notes, 417; *Burton v. Curyea*, 40 Ill. 320, 89 Am. Dec. 350; *Underwood v. Hosack*, 38 Ill. 214; *Mida v. Geissmann*, 17 Ill. App. 207; *Ohio & M. R. Co. v. Kerr*, 49 Ill. 459; *Michigan C. R. Co. v. Phillips*, 60 Ill. 190; *Taylor v. Turner*, 87 Ill. 296; *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281; *German Nat. Bank v. Meadowcroft*, 95 Ill. 180, 35 Am. Rep. 137; *Western Union R. Co. v. Wagner*, 65 Ill. 197; *Corbett v. Underwood*, 88 Ill. 326; *Hoffman v. Schoyer*, 148 Ill. 598.

The delivery of the shipping receipt was equivalent to the delivery of the property.

Rumsey v. Nickerson, 35 Ill. App. 194.

The pledge of a warehouse receipt as collateral security for a note is in legal effect a sale to the pledgee, for a valuable consideration, of the property called for by the receipt, and vests in him the legal title thereto.

Hanchett v. Buckley, 27 Ill. App. 159; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Northrop* 40 L. R. A.

v. *First Nat. Bank*, 27 Ill. App. 527; *Union Trust Co. v. Trumbull*, 137 Ill. 173.

The ordinance does not cover brokers in stocks.

Hamilton v. Harvey, 33 Ill. App. 499; *O'Neill v. Sinclair*, 158 Ill. 581; *Rhea v. Riner*, 21 Ill. 530.

Shares of stock are not goods, wares, or merchandise.

Colonial Bank v. Whinney, L. R. 30 Ch. Div. 261; *Pickering v. Appleby*, 1 Comyns, 354; *Watson v. Spratley*, 10 Exch. 222; *Bowley v. Bell*, 3 C. B. 287; *Heseltine v. Siggers*, 1 Exch. 856; *Walker v. Bartlett*, 18 C. B. 845; *Tempest v. Kilner*, 3 C. B. 249; *Bradley v. Holdsworth*, 8 Mees. & W. 422; *Knight v. Barber*, 16 Mees. & W. 66; *Hibblewhite v. M'Morine*, 6 Mees. & W. 200; *Duncuft v. Albrecht*, 12 Sim. 162; *Humble v. Mitchell*, 11 Ad. & El. 205; *Somerby v. Buntin*, 118 Mass. 285; *Hinchman v. Lincoln*, 124 U. S. 88, 31 L. ed. 337.

The Constitution forbids the legislature authorizing the city to require Banta to take out a license as the price or condition precedent of being permitted to follow the business of a broker.

The right to make contracts is a property right, which the state cannot deprive the individual of without due process of law.

Ramsey v. People, 142 Ill. 880, 17 L. R. A. 853.

The privilege or liberty to engage in or control the business of selling goods as a broker on commission is one of profit,—of presumptive value; and if Banta is denied the right to contract with respect thereto, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.

Fraser v. People, 141 Ill. 171, 16 L. R. A. 492; *Millet v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Eden v. People*, 161 Ill. 303, 32 L. R. A. 659; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340; *Patterson v. Kentucky*, 97 U. S. 502, 24 L. ed. 1116; *Dennedy v. Chicago*, 120 Ill. 687.

If the so-called license fee be a tax, it is in violation of § 1 as well as § 9 of article 9 of the Constitution of 1870.

Hamilton v. Harvey, 33 Ill. App. 499.

Messrs. **Howard S. Taylor and George McA. Miller**, for appellee:

Appellant is a "broker," within the meaning of the statute (chap. 24, art. 5, § 1, cl. 91) of Illinois.

Biddle, Stock Brokers, p. 35; Story, Agency, § 32; Russell, Factors and Brokers, p. 16; *Janssen v. Green*, 4 Burr. 2104; *Clark v. Powell*, 4 Barn. & Ad. 846; *Cope v. Rowlands*, 2 Mees. & W. 149; *Scott v. Cousins*, L. R. 4 C. P. 177; *Hustus v. Pickands*, 27 Ill. App. 275.

Appellant is a broker within the meaning of the ordinances set out in the stipulation of facts.

The phrase "goods, wares, and merchandise" in the ordinance includes stocks.

Pray v. Mitchell, 60 Me. 430; *Doudel v. Hamm*, 2 Watts, 61; *Ryall v. Rolle*, 1 Atk. 180; *Crichton v. Symes*, 3 Atk. 62; *Moore v. Moore*, 1 Bro. Ch. 128; *Somerby v. Buntin*, 118 Mass. 285, 19 Am. Rep. 459; *Jackson v. Robinson*, 1 Yeates, 101, 1 Am. Dec. 293; 8 Am. & Eng. Enc. Law, article Goods; Anderson, Law Dict.;

Bouvier, Law Dict.; *Hustis v. Pickands*, 27 Ill. App. 275.

Neither the words "including real estate brokers and insurance brokers," directly following the word "broker," nor §§ 214, 215, and 216 of said ordinance, modify or limit the meaning of that word in such a manner as to take a stockbroker out of the definition of broker, but are interpretation clauses intended to extend its meaning.

Queen v. Kershaw, 6 El. & Bl. 1007; *Pound v. Plumstead Bd. of Works*, L. R. 7 Q. B. 183; *Sutherland, Stat. Constr.* p. 516; *Hustis v. Pickands*, 27 Ill. App. 275.

The fact that appellant incidentally performed some of the functions of a factor does not take him out of the general definition of "broker."

Appellant does not do business in his own name in such a way as to characterize him as a factor only.

Herrlich v. McDonald, 80 Cal. 472; *Chapman v. Forsyth*, 2 How. 202, 11 L. ed. 236; *Matteson v. Kellogg*, 15 Ill. 549.

Appellant does not have custody of the property bought or sold, inasmuch as certificates of stock are not the property in which he deals, but mere paper evidences of title to the same.

Anderson, Law Dict. Custody; *Burrill, Law Dict. Custodia*; *Hawley v. Brumagin*, 33 Cal. 399; *Van Allen v. Assessors*, 3 Wall. 598, 18 L. ed. 229; *Cincinnati, U. & F. W. R. Co. v. Pearce*, 28 Ind. 502; *Campbell v. Morgan*, 4 Ill. App. 103; *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *Mitchell v. Beckman*, 64 Cal. 117; *Johnson v. Albany & S. R. Co.* 40 How. Pr. 193; *Arnold v. Suffolk Bank*, 27 Barb. 424; *McAllister v. Kuhn*, 96 U. S. 89, 22 L. ed. 616; *Hubbell v. Drexel*, 11 Fed. Rep. 115; *Forbes v. Memphis, E. P. & P. R. Co.* 2 Woods, 323; *Jermain v. Lake Shore & M. S. R. Co.* 91 N.Y. 493.

Appellant's lien is special or particular, and not general, as is the case with a factor.

Russell, Factors & Brokers, p. 127; *Thompson v. Beatson*, 1 Bing. 145; *Markham v. Jaudon*, 41 N. Y. 242.

If appellant has title and receives symbolic delivery, he does so in a fiduciary relation, and such title and delivery pass, *eo instanti*, to his principal.

Herrlich v. McDonald, 80 Cal. 472; *Matteson v. Kellogg*, 15 Ill. 549.

Appellant acts in the double capacity of factor and broker, but his character as broker is not thereby destroyed.

Story, Agency, § 32; *Russell, Factors & Brokers*, pp. 53, 54; *Northrup v. Shook*, 10 Blatchf. 243; *Braun v. Chicago*, 110 Ill. 186.

The ordinance of the city of Chicago in question and statute authorizing it are not unconstitutional.

People v. Thurber, 13 Ill. 556; *Firemen's Benev. Asso. v. Lounsbury*, 21 Ill. 513, 74 Am. Dec. 115; *Illinois Mut. F. Ins. Co. v. Peoria*, 29 Ill. 180; *East St. Louis v. Wehrung*, 46 Ill. 392; *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Chicago Packing & P. Co. v. Chicago*, 88 Ill. 227, 30 Am. Rep. 545; *Walker v. Springfield*, 94 Ill. 372; *Lovington v. Board of Trustees*, 99 Ill. 564; *East St. Louis v. Trustees of Schools*, 102 Ill. 489, 40 Am. Rep. 606; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Timm v.* 40 L. R. A.

Harrison, 109 Ill. 593; *Braun v. Chicago*, 110 Ill. 186.

Boggs, J., delivered the opinion of the court:

The city of Chicago adopted an ordinance declaring it unlawful for any person, association, or corporation to engage in business in the capacity of a "broker" within said city without having paid a license fee and obtained a license authorizing such person, association, or corporation to transact business in that capacity. The appellant was tried upon a stipulated state of facts, by the court without a jury, and was convicted of violating said ordinance, and a fine of \$25 was assessed against him. This is an appeal from such judgment of conviction.

Council for appellant urge the court erred in its rulings upon propositions submitted to be held as the law of the case, and in their brief, with reference to such alleged erroneous rulings, say, "It will be perceived that the propositions given and refused present squarely these questions: First. Was not the business carried on by Banta that of a factor, and not a broker? Second. If Banta is a broker, is he not such a broker as is not covered by the ordinance in question? Third. Does not the Constitution forbid the legislature empowering the city of Chicago to require one engaged in the avocation of a broker to take out a license as a condition precedent to the right to carry on his business? Fourth. If the ordinance levies a tax, is it not in violation of the constitutional requirement that taxes on brokers should be uniform, and the constitutional requirement that taxes for corporate purposes should be uniform in respect to persons and property?" We will consider and dispose of these questions in the order as stated by counsel.

The stipulation as to the facts and the ordinance are as follows:

"It is hereby stipulated by the parties hereto that the defendant, Banta, is a citizen of Chicago, and a member of the Chicago Stock Exchange, a voluntary association composed of 445 members, which members become members thereof upon election thereto by the governing committee of said board, payment of an initiation fee, and signing the constitution and by-laws thereof; that said stock exchange has a board room in the city of Chicago, to which none but members are admitted, and at which room stocks, bonds, and other securities are bought and sold by the members thereof as agents for others, on a call made daily, excepting Saturdays, from 10 A. M. until 2 P. M. Under the rules of said exchange no member thereof can buy or sell stocks or bonds or other securities save in the room of said exchange, and between the hours aforesaid, and no member can belong to any similar association within the state of Illinois. By the constitution of said exchange no fictitious sales can be made, and no fictitious or trifling bids or offers can be made, and all bonds, securities, and all certificates of stock dealt in are obliged to be delivered on the floor of said exchange or at the place of business of the member who is the purchaser; and under said constitution every member must have in the

vicinity of the exchange a place of business other than the exchange, where comparisons may be made at any time during the day, and where notices may be served. The constitution and by-laws are signed by every member on joining said exchange, and any violation of such constitution or by-laws subjects the offender to fine, suspension, or expulsion at the instance of the governing committee of said exchange. The defendant's sole business consists in buying and selling stocks, bonds, and other securities on the floor of said exchange for customers from whom he receives orders at his office to buy or sell said stocks, bonds, or other securities on said exchange, and the manner of his doing said business is invariably as follows, to wit: A customer gives him an order to buy stocks. Defendant goes onto the stock exchange, makes a contract with a member of the exchange for the purchase of stock, and in all cases receives from such member on the floor of the exchange or at his office the certificates of stock so bought, indorsed with blank assignment of shares of stock, and blank power of attorney to make necessary transfer on books of the corporation issuing such stock, and in payment therefor the defendant gives to such member his own check. Defendant then delivers to his customer said certificates of stock so bought, upon receiving from said customer a check for the purchase price thus paid, plus the defendant's commission for making such purchase. In case of a sale, it is defendant's invariable custom to receive the certificates of stock from the customer, indorsed with blank assignment of shares of stock and blank power of attorney to make necessary transfer on books of the corporation issuing such stock, sell the stock, and deliver the certificates thereof to the member of the exchange buying, receive from him his check for the purchase price, and give to his customer defendant's check for the stock sold, less his commissions. In every case of purchase or sale the certificates of stock are actually delivered. In the case of a purchase they are delivered to defendant by the member selling, and then by defendant to his customer. In case of sale they are received by defendant from his customer, and delivered to the member of the exchange buying the same. Such delivery to the purchasing member of such stock so sold by defendant is invariably made within a short time after the sale,—at the latest by 10:30 o'clock of the morning after the sale. In some cases, where the parties so require, said delivery takes place at the instant of the sale. It is also agreed that this defendant always buys or sells on the stock exchange in his own name, but he acts exclusively for others, and does not buy or sell on his own account, and that this is true, generally, of the transactions of members of the exchange. The person for whom the member of the exchange buys stock from this defendant is not usually known to this defendant. The commissions in the case of purchase or sale are those specified in article 19 of the constitution of the Chicago Stock Exchange, § 1 of which is as follows, to wit: "Sec. 1. Commissions shall be charged and paid under all circumstances, and upon all transactions, both purchases and sales, or upon contracts for the re-

ceipt or delivery of securities. Such commissions shall be calculated in all cases upon the par value of securities, and shall be at the rates hereinafter named; and such rates shall be in each case the lowest commission that may be charged by any member of the exchange, and shall be absolutely net, and free from all or any rebatement, return, discount, or allowance in any shape or manner whatsoever, or by any method or arrangement, direct or indirect. And no bonus, percentage, or portions of the commissions so established shall be given, paid, or allowed, directly or indirectly, to any clerk or person, for business sought or procured for any member of the exchange." The commissions vary with the price or quantity of stock, bond, or other securities sold or bought. In some cases it happens that defendant receives orders from customers to buy or sell shares of stock, which are in conflict with the orders received from other customers. In such event defendant procures another member of the board to act as his agent in making purchase or sale, and pays him one half of the commissions for his services, unless, at the end of the day, by agreement between defendant and such other member of the board, the trade is retransferred back to the defendant, in which case defendant pays the other member of the board at the rate of \$2 per 100 shares for his services. But in every case the certificates of stock that the defendant is ordered to sell are delivered by the defendant, and not by such agent, to the purchaser, and the certificates of stock defendant is ordered to buy are received by defendant, and not by his agent, from the seller, and are delivered by defendant to the customer. Defendant does no other business save that above stated, and could not do any business in stocks, bonds, or other securities in any other way without violating the rules of the stock exchange, in which event defendant would be liable to fine, suspension, or expulsion therefrom.

"It is further stipulated that the city of Chicago is a municipal corporation in the state of Illinois, is incorporated under the general city and village act, and that there is now, and has been since the 11th of June, A. D. 1897, an ordinance in force, the same being the ordinance for the alleged violation of which the defendant was arrested and fined, and which is as follows, to wit:

"Sec. 213. It shall be unlawful for any person, firm, corporation, or association in the city of Chicago to engage in the business or act in the capacity of a broker, including real estate brokers and insurance brokers, without first obtaining a license therefor, and paying a license fee in the sum of \$25 per annum, the issuance of such license to be regulated by the general ordinances now or hereafter in force.

"Sec. 214. A broker is one who, for commission or other compensation, is engaged in selling or negotiating the sale of goods, wares, merchandise, produce, or grain belonging to others.

"Sec. 215. A real-estate broker is one who, for commission or other compensation, is engaged in the selling of or who negotiates sales of real estate belonging to others, or obtains or places loans for others on real estate.

"Sec. 216. An insurance broker, within

the meaning and intent of this chapter, shall include any and every person, firm, corporation, or association engaged in soliciting, procuring, or placing, for a consideration received or to be received, insurance on lives, or on buildings, vessels, or other property, either directly or through any other broker or through any insurance agent, in or with any insurance company or association other than an insurance company or association of which such person, firm, corporation, or association soliciting, procuring, or placing the insurance in any case shall be the duly authorized agent.

"Sec. 217. Any person, corporation, or association violating any of the provisions of this chapter shall, upon conviction thereof, be fined not less than \$25 nor more than \$200 for each offense."

"In the case of bonds and securities other than stocks, defendant receives them from his customers, sells them in his own name, and delivers them, and in case of purchase buys them in his own name, receives them, and delivers them, to his customer."

The insistence of counsel for appellant is that it appeared from the stipulated facts that appellant had possession of the stocks, bonds, or other securities which he sold or undertook to sell, and that he received stocks, bonds, or other securities bought by him, and that the transactions, whether purchases or sales, were made in his own name, and that he paid for all stocks, bonds, or securities which he purchased, and received the price for all those sold. Upon this insistence counsel contend that the business in which the appellant was engaged was that of a factor, and not of a broker, and cite in their brief an array of authorities in support of the proposition that a broker is a mere negotiator of contracts for other parties; that his duties are confined to the matter of making contracts between others concerning their goods or effects; that he does not have possession of the property or thing to be bought or sold; that he cannot buy or sell in his own name; that he does not pay for that which he bought or receive the price for that which is sold. This definition of the term "broker" is broader than that given in the earlier books, and narrower than that which is accepted at the present day. A broker, as defined in the earlier authorities, is a person employed by merchants English and merchants strangers in contriving, making, and concluding bargains and contracts between them concerning their wares and merchandise, and the moneys to be taken up by exchange between such merchants and tradesmen. Comyns' *Dig. Merchant, C.* The operations of brokers gradually extended, however, to the affairs of others than merchants domestic and merchants foreign, and they engaged generally in business as negotiators of contracts and bargains between others. Their transactions were, however, confined to the negotiation of contracts as "middlemen" empowered to explain the intentions of both parties, and to put them in condition to come together personally, and conclude the contract of bargain and sale. A broker was not, therefore, intrusted with the possession of what he was employed to sell, nor empowered to make a contract in his own name, or receive the money paid for the article

sold, or pay for the article bought. During this period brokers restricted their operations to the negotiations of contracts for the purchase and sale of tangible things, and while their business was thus restricted the definition adopted by the appellant was applicable and correct. But the business of brokers continued to expand, and they subsequently undertook to effect the negotiation of bonds and other evidences of indebtedness, and certificates of shares in the capital stock of incorporated companies. The advent of brokers into this branch of business is referred to by Chief Justice Beck in the early case of *Gibbons v. Rule*, 12 J. B. Moore, 589, which was decided in 1827, as follows: "The statute 8 & 9 Wm. III. chap. 20, by which the first government loan was raised, speaks of a new description of brokers, —persons employed in buying and selling tallies, the government securities of those days. These have since been called stockbrokers." The statute referred to was enacted by the Parliament of England in the year 1697. The transition from the restricted to the more enlarged sphere was attended with additional powers corresponding to the new duties by brokers, and a new definition of the term "broker," or qualifications and exceptions to the former definition, became imperatively necessary. Speaking upon this subject, Mr. Russell, in his work on *Factors and Brokers* (published in 1845), on page 16, says: "Each of these definitions, however, must, at the present day, be regarded as somewhat too limited. By the two former, for instance, the employment of brokers is confined entirely to dealings between merchant and merchant,—a description which, it will at once be seen, would exclude stockbrokers, a class most extensively engaged on behalf of persons not merchants; and by the last, they are described to be persons engaged in making private bargains only,—a limitation which would equally exclude those of them who are in the habit of attending public sales, such as the sales of the East India Company, and who, whilst acting in that capacity, can scarcely be said to enter into none but private contracts." And with reference to the power of a broker to contract in his own name, the same author, on the same page, says a broker must, as a "general rule," contract in the name of his principal. Mr. Edwards, in his work on *Factors and Brokers* (1870), in § 109, says a broker is at liberty to buy in his own name if such be the custom among brokers. And Mr. Story, in his work on *Agency* (§ 109), says there are exceptions, by the usages of trade, to the rule that a broker cannot make a contract in his own name. And, speaking to the same point, Russell on *Factors and Brokers* (p. 52) says: "They [brokers] may, however, contract in their own names, provided their principals have given them authority to that effect, or if the usual course of dealing warrants them to do so." In Edwards on *Factors and Brokers* (§ 97), speaking with reference to the possession of the property negotiated by a broker, it is said that "ordinarily he [the broker] does not have or acquire the possession of the property." And in Story on *Agency* (§ 84) speaking to the same point, it is said "the broker does not usually have possession."

With relation to the old-time rule that a broker did not pay the purchase price of goods bought or receive the price of those sold, like exceptions and qualifications may be noted. Mr. Story, in his work on Agency (9th ed. p. 36), says: "But it may be the duty of a broker, under the employment he has undertaken, to see to the delivery of the goods and the payment of the price." And in Russell on Factors and Brokers (p. 54) it is said: "But if the custom of trade or the usual course of dealing between himself [the broker] and his principal warrant him to do so, he may receive payment for goods so sold." In large commercial centers those brokers who negotiated purchases and sales of securities and certificates of shares in incorporated companies found it convenient and greatly to their advantage to establish some convenient place for transacting the business of brokerage in stocks, and to form associations, commonly called "stock exchanges," and to adopt rules and regulations for the government of the members of such exchanges in the transaction of their business as brokers. These associations or exchanges have become almost the sole medium for the purchase and sale of stocks, bonds, and other securities in all our great cities, and the prices current from day to day in such exchanges practically fix the value of such securities and stocks. The rules and regulations adopted by such exchanges prescribe the duties, declare the powers and liabilities of the members, and control the course of dealing between them. The members of such boards are, and have long been, universally recognized as brokers, and so denominated. The author of the article on stockbrokers in 23 Am. & Eng. Enc. Law, page 700, says: "A stockbroker is a broker who, for a commission, attends to the purchase and sale of stocks or shares, and of government and other securities, in behalf and for the account of clients. Even before the organization of stock exchanges, and as early as the latter part of the seventeenth century, persons who engaged in the business of buying and selling securities were denominated 'stockbrokers.' The functions of the stockbroker are broader than those of the ordinary broker, who, as a rule, acts as a mere negotiator, and is not intrusted with the possession of the property concerning which he acts, while the stockbroker frequently is intrusted with the possession of the securities, and may even take and transfer them without the name of his principal appearing in the transaction, and often pays or advances the price and receives payment." Some of these broader duties and powers possessed and exercised by the class of brokers who, as members of stock exchanges, deal in evidences of indebtedness, certificates of shares in the capital stock and assets of incorporated companies, in some respects pertain more nearly to the functions of factors or bankers; but, as we have seen, they are now, and for many years have been, exercised and possessed by such brokers as well. A broker may, in the course of a transaction, exercise some of the functions of a factor or of a banker, and be none the less a broker. It is believed the meaning now most usually given, in common acceptance, to the word "broker," is, one who

transacts the business in which it appears from the stipulated facts this appellant is engaged.

We cannot assent to the view urged by counsel for appellant, that the ordinance does not include brokers who deal in stocks, bonds, and securities. The argument in support of this view is that § 214 of the ordinance was adopted by the city council for the purpose of interpreting the word "broker" employed in § 213, and that, properly construed, appellant, even if deemed a broker, is not one of the class of brokers defined by § 214 as intended to be required to pay a license fee under the provisions of § 213. Section 214 is as follows: "A broker is one who, for commission or other compensation, is engaged in selling or negotiating the sale of goods, wares, merchandise, produce, or grain belonging to others." It is urged that it appeared from the statement of agreed facts that appellant was engaged in buying and selling stocks, bonds, and other securities,—not goods, wares, and merchandise, or produce and grain,—and hence his business was not that contemplated to be included in the provisions of § 213 as interpreted and limited by § 214. But we think the better and more firmly established doctrine is that, in the absence of any qualifying or restricting clause, the phrase "goods, wares, and merchandise" includes and comprehends shares in the capital stock of incorporated companies, and other securities which are the subject of common barter and sale, and which are given visible and palpable form by means of certificates, bonds, or other evidences of indebtedness. *Tisdale v. Harris*, 20 Pick. 9; *Baldwin v. Williams*, 3 Met. 365; *Pray v. Mitchell*, 60 Me. 430; *Dowdel v. Hamm*, 2 Watts, 61; *Ryall v. Rolle*, 1 Atk. 180; *Crichton v. Symes*, 3 Atk. 62; *Moore v. Moore*, 1 Bro. Ch. 123; *Somerby v. Buntin*, 118 Mass. 285, 19 Am. Rep. 459; *Jackson v. Robinson*, 1 Yeates, 101, 1 Am. Dec. 293; 8 Am. & Eng. Enc. Law, article *Goods*; *Anderson, Law Dict.*; *Bouvier, Law Dict.*

Nor do we think the ordinance contravenes any constitutional provision. It is a well-recognized attribute of the sovereign power to tax any and every occupation and employment for the purpose of raising revenue. *Cooley, Taxn.* pp. 570-572, 592. Like power also rests with the sovereign to impose a tax in the nature of an exaction for the privilege of pursuing certain callings; namely, those which the sovereign, by virtue of the police power, may interdict or regulate, or those wherein the privilege is in the nature of a franchise, or others which, because of exceptional and particular reasons affecting public policy, are deemed proper subjects for supervision or regulation by the state. *Cooley, Taxn.* pp. 570-572, 592; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Braun v. Chicago*, 110 Ill. 156. The tax upon occupations or employments, whether for revenue or as an exaction for the privilege of pursuing a calling, may be imposed and collected in the form of a license fee. *Cooley, Taxn.* pp. 591, 592, 597. The Constitution of 1870 has no provision limiting the power of the state to exercise this sovereign right of taxation, whether the tax be laid for revenue or for purposes of regulation. *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560, except that, as § 1 of article 9 of

the Constitution specifically mentions certain occupations which may be taxed, the right to tax others is denied by the familiar rule of construction that the enumeration of certain occupations implies the exclusion of all others. *Cairo v. Bross*, 101 Ill. 475. Section 1 of article 9 of the Constitution of 1870 expressly authorizes the general assembly to tax various occupations, including brokers, the only restriction being the requirement that such tax should be uniform as to the class upon which it operated. The general assembly delegated to the cities in the state the power to impose such taxation within their respective jurisdictions. Rev. Stat. chap. 24, § 62, cl. 91. It was competent for the general assembly to delegate the exercise of such power within the limits of cities and villages to such municipalities. *East St. Louis v. Wehrung*, 46 Ill. 392; *Howland v. Chicago*, 108 Ill. 496.

It is not urged the ordinance is unreasonable or oppressive in respect of the amount of the license fee, but it is urged the business of a broker is not hurtful to the public peace, safety, or morals, and that no other reason can be given why such business should be deemed a proper subject of regulation or prohibition, under the police power or otherwise. It is therefore asserted the city is driven to the position that the ordinance is a revenue measure, and is lawful as such. The terms of the ordinance do not indicate whether the license fee is required for the purposes of revenue or for regulation merely. It is true that, in order to be effectual, a license must confer authority to do that which, without the license, would be illegal; but it does not follow that only such occupations as might be inhibited or regulated under the police power, or for other similar reasons hereinbefore referred to, may be required to take out license in order to legally transact business. The occupation may be lawful in itself, and not subject to prohibition or regulation by the state, yet it may be prohibited, in order to compel the taking out of a license, if the purpose is to raise revenue by means of license fees. *Cooley, Taxn.* pp. 596, 597. Therefore the mere fact that the effect of the ordinance is to declare it to be unlawful to transact the business of a broker without license does not indicate whether the purpose is to raise revenue or to regulate and control the business. Mr. Cooley, in his work on *Taxation* (p. 597), says that the language of the ordinance, or its terms, may be expected to indicate with sufficient precision whether the license is required for purposes of revenue or for regulation merely, the intentment being that regulation is the object, unless there is something in the language indicating with sufficient certainty that the purpose is to produce revenue. In the view we take of the case, it is not material to determine whether the license fee is for revenue or for purposes of regulation. We think it is well settled by repeated decisions of this court that the state in its sovereign capacity, and the cities and villages of the state by virtue of the grant of the power by the general assembly, have ample power and authority to impose license fees upon the occupation of a broker and the other trades or occupations mentioned in § 1 of article 9 of the Constitution of 1870, for

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the purposes either of regulation or revenue. *People v. Thurber*, 13 Ill. 556; *Firemen's Benev. Asso. v. Lounsbury*, 21 Ill. 513, 74 Am. Dec. 115; *Illinois Mut. F. Ins. Co. v. Peoria*, 29 Ill. 180; *East St. Louis v. Wehrung*, 46 Ill. 392; *Ducat v. Chicago*, 48 Ill. 172; *Chicago Packing & P. Co. v. Chicago*, 88 Ill. 227, 80 Am. Rep. 545; *Walker v. Springfield*, 94 Ill. 372; *Lovington v. Board of Trustees*, 99 Ill. 564; *East St. Louis v. Trustees of Schools*, 102 Ill. 489, 40 Am. Rep. 606; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Timm v. Harrison*, 109 Ill. 593; *Braun v. Chicago*, 110 Ill. 186. Whether the exaction of a license fee is for either purpose, it is essential the ordinance providing for the license be so framed that it will have uniform operation as to the class upon which it operates, for such is the positive requirement of said § 1 of article 9 of the Constitution.

Counsel insist that the provisions of § 9, art. 9, of the Constitution of 1870 are equally applicable to the power of the city to exact the payment of license fees, and that the requirement of the said latter section that municipal taxes shall be so laid that they shall be uniform in respect to both persons and property must be complied with in an ordinance enacted for the purpose of raising revenue through the medium of license fees. The ordinance under consideration levies a license fee upon each person pursuing the occupation of a broker, and requires that all such persons shall pay a uniform fee, without regard to the amount or value of the business transacted by the said brokers, or the capital they have, if any, invested in the business. The argument therefore is, the ordinance is not uniform in respect to persons and property, and for that reason is in contravention of said latter section of the Constitution. We think said § 9 has reference only to taxes to be collected by assessments upon assessable property. Such was the view expressed by this court in *Walker v. Springfield*, 94 Ill. 372. When revenue is sought to be raised by the imposition of license fees, the authority exercised is that given by the provisions of § 1 of article 9 of the Constitution of 1870, and it is only necessary, in order to comply with the provisions of that section, that the ordinance shall be "uniform as to the class upon which it operates." The ordinance under consideration excuses no one of the class upon which it operates from the payment of the license fee, but exacts a uniform fee from each person in said class. It is uniform in respect to the persons affected, and more is not required by the Constitution.

The judgment is affirmed.

Adam FLETCHER et al., Appts.,

v.

John WALL.

(172 Ill. 426.)

Pasting or sticking another ticket on an official ballot is not a lawful mode of

NOTE.—As to use of paster ballots, see also *De Walt v. Bartley* (Pa.) 15 L. R. A. 771; *People, Bradley, v. Shaw* (N. Y.) 16 L. R. A. 606; *State, Phelan v. Walsh* (Conn.) 17 L. R. A. 364; *Re Contested Election of School Directors* (Pa.) 27 L. R. A. 234.

voting, under the act of 1891, requiring the names of all candidates to be printed on one ballot, except names written thereon by the voter, and requiring the voter to prepare his ballot by marking a cross opposite the name of each candidate voted for.

(April 21, 1898.)

A PPEAL by defendants from a judgment of the Circuit Court for Bureau County in favor of contestant in a proceeding to contest the election of defendants to the office of president and clerk of the village of Ladd. *Reversed.*

The facts are stated in the opinion.

Messrs. Owen G. Lovejoy and Alfred R. Greenwood, for appellants:

The statute having specially provided that the voter may vote for persons other than those whose names are on the ballot when he receives it, by writing in the names of such other persons in blank spaces thereon, the voter is confined to that manner of placing such names on the ballot.

Little Beaver Twp. School Directors' Election, 165 Pa. 283, 27 L. R. A. 294.

People, Columbia Constr. Co., v. Hinrichsen, 161 Ill. 226; *Sanner v. Patton*, 155 Ill. 565.

The statute must be substantially complied with. To permit the voter to substitute some other method of his own of marking his ballot to express his choice, for the one provided, would practically nullify the statute.

Apple v. Barcroft, 158 Ill. 650; *Detroit v. Rush*, 82 Mich. 539, 10 L. R. A. 171.

Mr. William Hawthorne, for appellee: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Federal Const. 14th Amend.

All elections shall be free and equal.

Ill. Const. art. 2, § 18.

The validity of ballots defective in form depends on the ascertainment of the intention of the voter; if the intention of the voter is plain, the ballots should be given effect accordingly.

People, Akin, v. Matteson, 17 Ill. 167; *McKinnon v. People, Malzacher*, 110 Ill. 305.

The statute is not mandatory, but directory merely, as regards the details of an election.

Behrensmeyer v. Kreitz, 135 Ill. 591.

Votes cast for a person not nominated for office in any of the ways provided by statute, but whose name, not being printed upon the official ballot, was written by each voter in a blank space upon the same and marked with a cross, are legal votes.

Sanner v. Patton, 155 Ill. 553.

A voter should not be deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot.

Parker v. Orr, 158 Ill. 609, 80 L. R. A. 227.

Section 23 of the ballot law clearly recognizes the right of the voter to add new names to the ballot. That the voter must "write" in any particular manner does not appear.

Jones v. State, Atherby, 1 Kan. 273; *Sanner v. Patton*, 155 Ill. 553.

The voter may write or paste upon his ballot the name of any person for whom he desires

to vote for any office. To hold otherwise would be to disfranchise, or to disqualify, the citizen, as a voter or a candidate, and to affect the law quite unnecessarily with the taint of unconstitutionality in such respects.

People, Bradley, v. Shaw, 133 N. Y. 493, 16 L. R. A. 606.

The intention of the voter must govern.

McKinnon v. People, Malzacher, 110 Ill. 305.

That provision of the Constitution which declares that "elections shall be equal" means that the vote of every elector shall be, in its influence upon the result, equal to the vote of every other elector.

People, Grinnell, v. Hoffman, 116 Ill. 587, 59 Am. Rep. 793.

Wilkin, J., delivered the opinion of the court:

This is a proceeding by appellee to contest the election of appellant Fletcher to the office of president, and appellant Weissenberger to the office of clerk, of the village of Ladd, in Bureau county. The petition avers that at an election of officers in said village on April 20, 1897, John Rolando received more than 200 legal votes for president, and John Gillen more than 190 legal votes for village clerk; that said Fletcher and Weissenberger each received no more than 140 legal votes, respectively, for said offices, but the judges of election refused to count over 190 votes cast for Rolando and Gillen, and declared that Fletcher and Weissenberger had received the highest number of legal votes cast for president and clerk; and thereafter the president and certain of the trustees of the village declared the latter elected to said offices. It thus appears that the only ground of contest set forth in the petition is that votes legally cast for Rolando and Gillen were not counted by the judges and clerks of the election.

It appears from the record that a certificate of nomination had been filed with the village clerk, on which the names of Rolando and Gillen appeared for said offices; but, objections thereto being filed and sustained, no further steps were taken to have their names as such candidates placed upon the official ballot. The ballot as prepared by the village clerk and furnished to the judges of election was as follows:

<input type="radio"/>	Petition.	<input type="radio"/>	Petition.
<input type="checkbox"/>	For Village President, ADAM FLETCHER.		
<input type="checkbox"/>	For Village Clerk, A. H. WEISSENBERGER.		
<input type="checkbox"/>	For Village Trustees, MICHAEL CONWAY.		
<input type="checkbox"/>	J. P. BUTLER.		
<input type="checkbox"/>	ANTON BRASSA	<input type="checkbox"/>	For Village Trustee, JAMES McQUAID.

Upon the canvass of the votes there was

found in the box a great number of ballots on which were pasted the following ticket:

<input checked="" type="checkbox"/>	For Village President, JOHN ROLANDO.
<input checked="" type="checkbox"/>	For Village Clerk, JOHN GILLEN.
<input checked="" type="checkbox"/>	For Village Trustees, JOHN RIVA.
<input checked="" type="checkbox"/>	JOHN WHELAN.
<input checked="" type="checkbox"/>	J. V. JONES.
<input checked="" type="checkbox"/>	For Trustee to fill Vacancy, ED. A. CARR.

These were pasted on the official ballots, most of them being attached on the margin, to the right of the blank space in the right-hand ticket. Some were put on "upside down." One was on the left margin of the ballot, and another was pasted lengthwise in the blank space on the right. All these ballots were rejected by the judges and clerks of the election in the canvass of the vote. The tickets so attached were printed as above, except the crosses in the squares opposite the names of the candidates. The back of each paster was gummed, so it could be attached by simply wetting it.

The testimony is to the effect that Rolando, Gillen, and Riva, three of the candidates named in this ticket, were during the election in the vicinity of the polls, each having in his possession numbers of the tickets which were furnished to voters, some of them being already marked with a cross in the squares opposite the names. One witness testified: "I saw John Rolando, candidate for village president, have these ballots there that day. I jokingly says, 'I wish I had a paster, so I could vote;' and he says, 'I will give you one;' and he pulled out a handful, some of them marked, and some of them weren't marked. That was 12 or 15 feet from the voting place." Another said: "I was in Ladd on April 20, 1897,—the time of the village election. I saw some paster tickets there that day, about 20 or 30 feet from the polls. John Gillen had them. He was running for clerk on the paster ticket. He showed the pasters to some other people, and gave the pasters to them. It was a paster marked just the same as 'Exhibit 5.'" Exhibit 5 showed the paster ticket marked with a cross in the square opposite the names of the candidates. The testimony of these witnesses is fully corroborated by that of others, and wholly uncontradicted.

The only question in the case is, Were the tickets so prepared and voted legal ballots? If they were not, appellants were legally elected, and the circuit court erred in its finding and decree to the contrary. The method of conducting the election on the part of Rolando and Gillen in the use of these pasters, and the manner in which they were furnished to voters, was, in our opinion, violative of the

spirit and intent of the election law of this state in force since July 1, 1891. The several sections of that law provide ample opportunity for all persons to have their names placed upon the official ballot as candidates, and clearly contemplate that candidates shall avail themselves of that opportunity. Section 14 provides: "The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot, . . . and the ballot shall contain no other names, except that in case of electors for President and Vice President of the United States the names of the candidates for President and Vice President may be added to the party or political designation." It is true that, in order that no voter shall be deprived of the right to cast his ballot for whomsoever he will for any office, he is authorized by § 23, when the name is not printed thereon, to prepare his ballot by writing the name of the candidate of his choice in a blank space on said ticket, making an "X" opposite thereto. It is, however, plainly prescribed by the statute that the ballot furnished by the judges to the voter must be prepared by him individually, after he enters the booth, except in so far as he may be assisted as an illiterate voter, under the provisions of § 24, and that he shall be allowed to do so uninfluenced or in any way controlled by being electioneered or furnished with tickets or pasters by outsiders. Section 21 requires the officers upon whom is imposed by law the duty of designating or providing polling places, to furnish a sufficient number of booths, "which shall be provided with such supplies and conveniences, including shelves, pens, penholders, ink, blotters, and pencils, as will enable the voter to prepare his ballot for voting, and in which voters may prepare their ballots screened from all observation as to the manner in which they do so. . . . The arrangement shall be such that the voting booths can only be reached by passing within said guard rail. They shall be within plain view of the election officers, and both they and the ballot boxes shall be within plain view of those outside of the guard rail. . . . No person other than the election officers and the challengers allowed by law, and those admitted for the purpose of voting as hereinafter provided, shall be permitted within the guard rail, except by authority of the election officers to keep order and enforce the law. The number of such voting booths shall not be less than one to every seventy-five voters or fraction thereof, who voted at the last preceding election in the district." The following section provides that the voter, upon entering the place of voting, shall give his name, and, if required to do so, his residence, to the judges of election, one of whom shall thereupon announce the same, etc., and provide him with the official ballot. Section 23, which prescribes the manner of voting, is in part as follows: "On receipt of his ballot the voter shall forthwith, and without leaving the inclosed space, retire alone to one of the voting booths so provided, and shall prepare his ballot by making in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making

a cross (X) opposite thereto." The next section authorizes two of the election officers, of different political parties, to be selected from the judges and clerks of the precinct in which they are to act, to assist any voter who may declare, upon oath, that he cannot read the English language, or that, by reason of any physical disability, he is unable to mark his ballot, and requests such assistance. Section 28 prohibits every person from doing any "electioneering or soliciting of votes on election day within any polling place or within 100 feet of any polling place," and provides that "no person shall interrupt, hinder, or oppose any voter while approaching the polling place for the purpose of voting." Section 29 also provides that "any voter who shall, except as herein otherwise provided, allow his ballot to be seen by any person with an apparent intention of letting it be known how he is about to vote, or who shall make a false statement as to his inability to mark his ballot, or any person who shall interfere or attempt to interfere with any voter when inside said inclosed space or when marking his ballot, or who shall endeavor to induce any voter, before voting, to show how he marked or has marked his ballot, shall be punished by a fine," etc.

These several sections clearly show that it was the intention of the legislature, by the passage of the ballot law, to carry out the purpose of the act as indicated in its title,—that the voting shall be by ballots printed and distributed at public expense, for candidates nominated for public offices, to regulate the manner of holding elections, and to enforce the secrecy of the ballot. The well-known object of the law was to prevent the pernicious practices, theretofore existing, of peddling tickets at the polls, electioneering voters, and, by corrupt and fraudulent methods, interfering with the free and unrestrained exercise of the right of the voter. It seems too clear for argument that if the practice resorted to in the use of pasters, as was here done, is to be legalized, the whole purpose and object of the law will be practically abrogated. There would in that case be no substantial difference between the operation of the present law and the old method. Under that law, candidates, and those acting in their behalf, provided themselves with tickets often marked as they desired them to be voted, furnished them to voters, and, by persuasion, purchase, or otherwise, induced the voters to deposit such ballots in the ballot box. Under the method here adopted, they could furnish the ticket as they desired it to be voted, marked, or with instructions to the voter how to mark it, and, by the same methods, induce him to attach it, as furnished, to the official ballot, and then procure it to be deposited in the ballot box. The manner of voting prescribed by the act is thereby wholly changed, and the secrecy of the ballot entirely destroyed.

It seems to be thought, however, that to deprive a candidate of the right to have such ballots counted in his favor would be to interfere with the privilege of the voter to cast his ballot for the candidate of his choice. We do not think so. Under the provisions of § 23, authorizing the voter to write the name of the candidate of his choice upon

the ballot, as construed in *Sanner v. Patton*, 155 Ill. 553, every voter is guaranteed the right to vote for any person for an office, whether the name of such person is printed upon the official ballot or not. The number of booths required to be furnished, and the facilities provided therein—"shelves, pens, penholders, ink blotters and pencils"—to enable the voter to prepare his ballot, together with the assistance which he is entitled to receive from the judges, amply secure to him every right of a voter. The mere fact that the methods thus provided may be less convenient than the use of pasters or stickers furnishes no sufficient reason for changing or modifying the requirement of the law, wisely designed for the purposes above mentioned. The inconvenience here would have been no greater than in any other case where the voter writes the name of a candidate on the ballot. All that was necessary if a voter desired to vote for Rolando for president was to write his name under that of Fletcher, making a cross opposite it.

It seems to be thought that because, under the provisions of § 23, the voter may prepare his ballot by writing the name of the candidate of his choice in a blank space on said ticket, he may also indicate his choice by printing such name, not on the ticket merely, but by pasting the printed name in the space on the ticket; and, in support of the position, reference is made to that provision of the statute (3 Starr & C. Anno. Stat. 2d ed. chap. 181, § 1, cl. 15) in regard to the construction of statutes, which says: "The words 'written' and 'in writing' may include printing and any mode of representing words and letters." This statute has no proper application to the construction of the language of § 23. There is no reference to a "written" instrument or matter "in writing" in this section, but it expressly says that the voter "shall prepare his ballot by . . . writing in the name of the candidate of his choice;" and the preceding § 21, by requiring the officers to provide pens, penholders, ink, blotters, and pencils, and no other means or conveniences for preparing the ballot, clearly indicates that the name of the candidate shall be inserted by writing,—that is, it commands the act of the voter to be performed in a certain manner. Of course, the form of the letters is a matter of no consequence. Nor are we disposed to hold that a ballot should be rejected merely because the name appears in print, provided it is prepared by the voter himself in that way after entering the booth; but we do hold that it is not lawful for him to use stickers or pasters in so doing. We do not attach so much importance in this case to the fact that the statute was violated by candidates distributing the tickets and electioneering, as we do to the fact that by the use of such tickets every facility is furnished for evading and violating the provisions of the law. In Pennsylvania, the act providing that the voter may cast his ballot for persons whose names do not appear on the ballot by "inserting" the names, etc., it has been held the ballot might be prepared by using a sticker instead of writing the name; the court saying, in substance, that the word "writing" was not used in the statute, and using a sticker was a method of "inserting" the name. The language of the New

York statute under consideration in *People, Bradley v. Shaw*, 133 N. Y. 493, 16 L. R. A. 606, relied upon by appellee here, is, "The voter may write or paste upon his ballot the name of any person for whom he desires to vote for any office." Both these statutes materially differ from ours, and hence the decisions of those states are not in point here. Our conclusion is that the ballots to which the pasted tickets were attached were properly rejected in the count by the board of canvassers, and that appellants were properly declared elected.

The judgment of the Circuit Court will therefore be reversed, and the cause remanded to that court, with directions to enter a decree in conformity with the views herein expressed.

HIBBARD, SPENCER, BARTLETT, &
COMPANY, *Appt.*,

City of CHICAGO *et al.*

(173 Ill. 91.)

1. **The permanent use of a public street** for a private purpose cannot be authorized by a city.
2. **An awning** which makes a permanent encroachment on a street is a **purpresture**.
3. **A mere resolution** or order by the city council, not passed and published as an ordinance of the city, will not constitute a repeal of an ordinance.
4. **Discrimination between citizens** cannot be made by a city with respect to the erection of awnings as permanent structures.
5. **A mere order of the city council**, authorizing the erection of an awning, which is prohibited by a general ordinance, is no more than a license, which is subject to revocation by the council at any time.
6. **No estoppel can arise** from an act of a municipal corporation or officer done in violation of or without authority of law.

(April 21, 1898.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendants in a suit brought to enjoin interference with an awning over a sidewalk. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hamline, Scott, & Lord, for appellant:

The council had full power to authorize the erection of the awning and supports by appellant.

The legislature represents the public, and when it or its political agent, a municipal corporation acting under due power conferred by such legislature, abridges, encroaches upon, or completely shuts up or vacates a street, no one can complain but a property owner who suffers damage to his property peculiar thereto and

NOTE.—For right as to awning in street, see note to *Augusta v. Burum* (Ga.) 26 L. R. A. 340; also *State v. Clarke* (Conn.) 39 L. R. A. 670.

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different in kind from that sustained by the public at large.

Smith v. McDowell, 148 Ill. 51, 22 L. R. A. 393.

The legislature delegated to the council the power to regulate and prevent the use of streets, sidewalks, and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, horse troughs, racks, posting handbills and advertisements.

It won't do to say that "regulate" means prevent, as the legislature has added "prevent," and such construction would render idle the use of the word "prevent" in such connection.

If the city council has granted to anyone a license to erect a telegraph pole, or an awning, or awning post, such license legalizes what otherwise might be regarded as a purpresture.

When the council passed its order of December 19, 1887, a license was thereby given Hibbard, Spencer, Bartlett, & Co. to use Wabash avenue with this awning and post, and such use of the avenue was legal, was authorized by statute, permitted by ordinance, and could not be interfered with by anyone, at least until the council rescinded the license.

Quincy v. Bull, 106 Ill. 387; *Chicago Municipal Gaslight & Fuel Co. v. Lake* 130 Ill. 42; *Gregsten v. Chicago*, 145 Ill. 451; *Matthiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155; *Hoey v. Gilroy*, 129 N. Y. 132; *McCormick v. South Park Comrs.* 150 Ill. 529.

The existence of a general ordinance on the subject does not make appellants' license void.

The provision of the Constitution (§ 22, art. 4) which prohibits the legislature from "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever," has no application to a municipal corporation.

Chicago City R. Co. v. People, Story, 73 Ill. 541; *Covington v. East St. Louis*, 78 Ill. 548; *People v. Harper*, 91 Ill. 857.

In dealing with the question of a license to sell liquor the municipal corporation acts in its public capacity, and while it may refuse to license anyone to sell liquor, or may limit the number of saloons, or carve out prohibition districts, yet everybody who is fit to receive a license, who lives within the district in which the liquor business is permitted to be carried on, is entitled to receive and may demand a license to sell liquor.

Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196.

The city may make a contract for the use of the streets by a contract ordinance, and thereby allow its occupation by gas mains, telegraph poles, car tracks, signs, awnings, awning posts, and all the other means by which the legislature has determined trade or commerce, or the public may be inconvenienced.

Chicago City R. Co. v. People, Story, 73 Ill. 548; *Gregsten v. Chicago*, 145 Ill. 462.

If the city can estop itself by contract or by user or by laches from objecting that the occupier has no right to occupy public property, as in *Nelson v. Godfrey*, 12 Ill. 22; *Gridley v. Bloomington*, 68 Ill. 47; *Chicago & N. W. R. Co. v. People, Elgin*, 91 Ill. 251, it can certainly exempt the appellant from prosecution and molestation by express grant.

The order is just as efficacious in granting a license as an ordinance.

Tiedeman, Mun. Corp. § 145, and cases cited in footnotes 5 and 6; *Atchison Bd. of Edu. v. De Kay*, 148 U. S. 598, 37 L. ed. 575; *Quincy v. Chicago, B. & Q. R. Co.* 92 Ill. 21; *Robinson v. Franklin*, 1 Humph. 156, 34 Am. Dec. 631, notes.

Messrs. William G. Beale and George A. Dupuy for appellees.

Phillips, Ch. J., delivered the opinion of the court:

This is a suit in equity to restrain by injunction the city of Chicago, its mayor, commissioner of public works, and superintendent of police, their agents and servants, from interfering with, removing, or injuring an awning erected by appellants in front of their premises. It appears that on December 19, 1887, the following order was made by the city council: "Ordered, that the commissioner of public works be, and he is hereby directed to issue a permit to Hibbard, Spencer, Bartlett, & Co. to erect a cover of glass and iron over the shipping doors on Wabash avenue, corner of Lake street, the plans and specifications for the same to be submitted to and approved by the commissioner of public works, and the work to be done under his supervision." That thereafter appellant submitted plans and specifications to the commissioner of public works of said city, which being by him duly approved, and a permit by him given, appellant proceeded, at a cost of \$3,000, to construct such awning. That said awning is supported at the side over the outer edge of the walk by iron posts, and appellant insists is not an inconvenience to anyone or in any respect a nuisance or obstruction to travel. Appellee in its answer (18) says "that said awning was constructed in violation of the general ordinances of the city of Chicago, duly adopted in pursuance of law, and that it was and is the duty of the commissioner of public works, under such ordinance, to take all steps proper to prevent encroachment upon the rights of the public in the streets and avenues of the city; that the city council can only regulate and control the use of the streets by general ordinances operating equally and uniformly upon all persons; that it has no power by any order to suspend the operation of such general ordinances in favor of particular persons or corporations, and that the order relied upon by the complainant in this case, as a justification for the construction and maintenance of said awning, was and is in violation of common and public right, and is an attempt to confer special privileges upon the complainant, and is therefore null and void, and was and is wholly beyond the lawful power of the council to pass or adopt; that as the said order is and was beyond the power of the council to adopt, and as it cannot have the effect to suspend or annul any general ordinances of the city designed for the protection of the rights of the public in the streets, and as the said awning is constructed and maintained in violation of such general ordinances, these defendants insist that they should not be restrained or enjoined from enforcing such ordinances against the said complainants." A temporary injunction issued by the court,

upon notice and after argument, was upon the final hearing dissolved and the bill dismissed by the trial court, which, on appeal to the appellate court of the first district, was affirmed, and this appeal is prosecuted.

The public streets of a city are dedicated to the public for public use, and are subject to the control and management of the city council, but that body has no power to alien or otherwise incumber such streets, so long as they are public streets, but must hold them in trust for public uses only. The municipal corporation can grant no easement or right therein not of a public nature, and the entire street must be maintained for public use. Hence no individual or corporation can acquire any portion of the street for exclusive private use to the exclusion of the public. The city council has no power to grant such use. *Fied v. Barling*, 149 Ill. 558, 24 L. R. A. 406. While it may grant individuals or corporations a temporary use for such time and way as not to interfere with public use, yet there is no power in the municipality to sell or grant for private use a public street and exclude the public therefrom. *Quincy v. Jones*, 78 Ill. 331, 20 Am. Rep. 243. A permanent encroachment upon a public street for a private use is a purpresture, and is in law a nuisance. *Wood, Nuisances*, §§ 251, 260, 262; *Driggs v. Phillips*, 103 N. Y. 77; *Atty. Gen., Holtz, v. Heishon*, 18 N. J. Eq. 410; *Smith v. State*, 23 N. J. L. 180 and 712; *State v. Woodward*, 23 Vt. 92; *State v. Atkinson*, 24 Vt. 448; *Chamberlain v. Enfield*, 43 N. H. 356; *Com. v. King*, 13 Met. 115.

Section 1492 of the ordinance of the city of Chicago provides: "All awnings in such portion of the streets of Chicago as are or hereafter may be lighted by public lamps shall be covered by cloth or leather, or light and pliable substance, and securely attached to the building and properly supported, without posts, by iron or other metallic fastenings and supports, and shall be elevated at least 8 feet at the lowest part thereof above the top of the sidewalk, and shall not project over the sidewalk to exceed three fourths of the width thereof. Any person who shall erect any awning contrary to the provisions hereof, or refuse or neglect forthwith to remove any awning or awning posts heretofore or hereafter erected contrary to the provisions hereof, shall be subject to a penalty of \$5 for every offense, and to a further penalty of \$5 for every day he shall fail to comply therewith after written notice from the commissioner of buildings to remove the same." That ordinance was in full force and effect at the time an order was adopted by the city council authorizing the construction of this awning. An ordinance of the city can only be repealed or amended by an ordinance of the city. A mere resolution or order by the city council, not passed and published as an ordinance of the city, would not constitute a repeal of an ordinance duly passed. Section 2, art. 5, chap. 24, 1 Starr & C. Anno. Stat. (Ill.) 2d ed., provides that "the style of the ordinances in cities shall be: 'Be it ordained by the city council, etc.'" And § 13, art. 8, of the same chapter, provides: "The yeas and nays shall be taken upon the passage of all ordinances, and on all propositions to

create any liability against the city, or for the expenditure or appropriation of its money, and in all other cases at the request of any member, which shall be entered on the journal of its proceedings; and the concurrence of a majority of all the members elected in the city council shall be necessary to the passage of any such ordinance or proposition." By this provision of the statute, an enacting clause is provided for the adoption of ordinances, and a majority of the members of the city council are necessary to the passage of any such ordinance. A resolution of the city council or an order of that body may be adopted as an order or resolution by a majority of a quorum present, but such order or resolution so adopted would not necessarily require the concurrence of a majority of the members elected in the city council, and in this respect the adoption of an order or resolution materially differs from the adoption of an ordinance. The authority to erect the awning in this case was conferred on appellant by an order of the city council, and in no sense constituted an ordinance. This order amounted to no more than a license, and was subject to revocation by the city council at any time.

Where the city has authorized a temporary use which causes a temporary obstruction, one having been licensed to exercise such temporary use would not be liable for a penalty under the ordinances for obstructing the street, as it was permitted as a matter of grace or favor. That such permission was given may be implied from circumstances. *Gridley v. Bloomington*, 68 Ill. 47. But when the city demands the removal of such a structure, it, if permitted to remain thereafter, becomes a nuisance. *State v. Woodward*, 28 Vt. 92; *State v. Atkinson*, 24 Vt. 448; *Chamberlain v. Enfield*, 43 N. H. 356; *Com. v. King*, 18 Met. 115. With an ordinance in existence prohibiting the erection of awnings, a resolution of this character, amounting to a mere license to this particular firm, is a special privilege granted to one by license, which, by the general ordinance applicable to all the citizens within the corporate limits of the city of Chicago, is prohibited to others; and whatever is prohibited by the Constitution of the state from being done by the legislature cannot be done indirectly through another body; and an ordinance of a municipal corporation must be in harmony with the general laws and Constitution of the state, and

whenever such ordinance comes in conflict with the Constitution it is void. A municipal corporation cannot confer power upon one person to do an act which is prohibited to another having an equal right to do the same act, and ordinances cannot favor or discriminate against any person or class of persons, but must be uniform, and of general operation within the corporate limits. A license to erect an awning of this character, although it might not render the person who erected the same amenable to punishment for the violation of an ordinance of the city, is still not a license binding on the city and irrevocable. Nor is it of such a character that the commissioner of public works in the discharge of his duties may not without the action of the city council remove it, because the city had no power to grant the permanent use of the public street for a private purpose, nor can it discriminate between citizens within the municipality. Having no power to make such discrimination, or authorize the erection of such awning as a permanent structure, without power on its part to have the same removed, no estoppel can be based on mere resolution or order of the city council as enacted; because no estoppel can arise from an act of a municipal corporation or officer done in violation of or without authority of law. *Seeger v. Mueller*, 183 Ill. 86; *Pettis v. Johnson*, 56 Ind. 189; *Stevens v. St. Mary's Training School*, 144 Ill. 836, 18 L. R. A. 832; *Day v. Green*, 4 Cush. 438. The right of the public to the exclusive use of the streets for public purposes is inconsistent with the right of a private citizen to encroach thereon by the erection of a permanent structure. The streets are held in trust by the municipality, and this fact prevents the municipality from authorizing any encroachment on or obstruction of them by such structures; and the mere consent of the city council resolution or order gives no vested right. *Ely v. Campbell* 59 How. Pr. 383; *Brooklyn v. Furey*, 9 Misc. 198; *Eichenlaub v. St. Joseph*, 118 Mo. 895, 18 L. R. A. 590. The averment that the awning so erected does not injure or obstruct any person does not change the case. The sole question to be determined is, Is it an encroachment on the street of the city? and, if so, it is a purpresture.

The judgment of the Appellate Court is affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

George F. STRINGFELLOW, *Appt.*,
v.

Jennie G. SOMERVILLE *et al.*

(.....Va.....)

1. The direction by will that a child shall be reared by the sisters of the testatrix and trained as their own is not limited

NOTE.—For discretion of court in awarding custody of children and the parent's loss of the right thereto, see *Kelsey v. Green* (Conn.) 38 L. R. A. 471, and cases cited in footnote thereto.

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by a subsequent provision for the appointment of her husband as guardian and to manage the business and property of the testatrix.

2. A man who permits the custody of his infant child to pass, in accordance with his wife's will, to her sisters, and allows the child to remain with and be reared and trained by them for five or six years, will not be allowed to reassert his right to the custody of the child, if this is not for the welfare of the child.

3. As between the claimants of the custody of an infant, the question is not, which can surround the child with greater luxury, or give him the greater amount of money or prop-

erty, but with which the child is likely to be reared and trained so as to make the better man and the better citizen.

(March 24, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Culpeper County in favor of defendants in a proceeding to obtain possession of plaintiff's minor child which had been placed with defendants for care and instruction. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. G. D. Gray, Eppa Hunton, Jr., and Grinsley & Miller for appellant.

Messrs. P. P. Barbour and Barbour & Rixey, for appellees:

The law will uphold such a contract as is here established, if it is not proved to be to the disadvantage of the infant.

Merritt v. Swimley, 82 Va. 498; *Coffee v. Black*, 82 Va. 570; *Green v. Campbell*, 35 W. Va. 704; *Barnes v. Cunningham*, — W. Va. —.

In cases where the father has voluntarily relinquished control of an infant, to a female or other suitable relative, and the child has grown and expanded with its new life around her and become alienated, or has grown up a stranger to the paternal home, upon application to the court to break up the formed ties of affection, the case is no longer to be viewed in the light of the father's legal rights, but in the light of a careful regard to the welfare of the infant.

Coffee v. Black, 82 Va. 570; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 596; *Gishwiler v. Dodez*, 4 Ohio St. 617; *Bonnett v. Bonnett*, 61 Iowa, 198, 47 Am. Rep. 812; *Tyler, Infancy*, 283; *Pool v. Gott*, 14 Law Rep. 269; *State v. Smith*, 6 Me. 463, 20 Am. Dec. 824; *Re M'Dougle*, 8 Johns. 328; *State v. Barrett*, 45 N. H. 15; *Dumain v. Gwynne*, 10 Allen, 270; *Com., Goerlitz, v. Barney*, 4 Brewst. (Pa.) 409; *Chapaky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; *Re Goodenough*, 19 Wis. 275; *United States v. Green*, 3 Mason, 482; *Re Waldron*, 13 Johns. 419; *Sturtevant v. State*, *Havens*, 15 Neb. 459, 48 Am. Rep. 350.

The permanent welfare of the child is the guiding principle in all cases, and this principle has been carried so far that when the parent lost control of his child through no fault of his own, he was not allowed to reclaim the custody where the child had formed new relations that could not be severed without detriment to the child.

17 Am. & Eng. Enc. p. 875, citing and quoting *Re O'Neal* (Mass.) 3 Am. L. Rev. 578.

In a case of this kind, in order to show the moral life, character, and habits of the appellant, it is competent to introduce evidence showing given acts of immorality.

McKelvey, Ev. p. 63; Church, Habeas Corpus, 2d ed. § 426, p. 666.

Mr. A. F. Robertson also for appellees.

Keith, P., delivered the opinion of the court:

George F. Stringfellow obtained a writ of habeas corpus from the circuit court of Culpeper county, to which Jennie G. and Kate Somerville were made respondents. The object of the writ was to determine who was entitled to the custody of Glassell Somerville

Stringfellow, an infant of tender years, son of the petitioner, and nephew to the respondents. Ellen S. Stringfellow, who, before her marriage, was Ellen Somerville, died a few days after giving birth to the child who is the subject of this controversy. A short time before her death the petitioner, at her instance, prepared her last will and testament; so much of which as need be here considered being in the following language:

Know all men by these presents, that I, Ellen S. Stringfellow, of the county of Culpeper and state of Virginia, being of sound mind and memory, do make and declare and publish this my last will and testament.

First, I desire that my child be permitted to remain with and be reared by my sisters, Jennie G. and Kate Somerville, and trained as their own, and my husband will aid them in sympathetic affection and support.

Second, I desire that my husband be made guardian for my child, and to manage my business and property as he now does, carrying out all unfinished contracts and agreements made by me; that he shall continue the tin and stove business as long as he sees best for the interest of my child. He shall have the profits from my property to support my child; all above that to be used as he sees proper during his life; and then my entire property to be given to my son, Glassell Somerville Stringfellow.

The purpose disclosed in this will seems to have been long contemplated by the mother, and fully understood and approved by her husband and her sisters. Upon her death this will was admitted to probate, and in accordance with its provisions the infant child was delivered to the care and custody of Jennie G. and Kate Somerville, and was by them taken to their home, where it has since been reared and nurtured with the most loving and tender care. The language of the will leaves no room for doubt or construction as to the wish of the testatrix: "I desire that my child be permitted to remain with and be reared by my sisters Jennie G. and Kate Somerville, and trained as their own." What language could be more explicit? "To remain with;" to continue in an unchanged condition; to abide; to stay. The language employed is not appropriate to a temporary arrangement. No period is fixed to its duration short of the accomplishment of the purpose with which the arrangement was made. "My child," said the dying mother, is to be "reared by my sisters;" that is to say, is to be "educated," "instructed," "brought up to maturity," by them. The measure of authority which she intended to confer is conveyed in language equally apt and comprehensive. What broader terms could the mother have employed than those here used, by which she consigns her offspring, from whom she is to be taken by an untimely death, to the loving care of her sisters, to be "trained as their own?" As far as it was in her power to do so, her sisters were clothed with plenary power and duty with respect to this child, while the husband was reminded that it would be for him to "aid them in sympathetic affection and support." If her will is to prevail with respect

to her child, the sisters are the principals to whom its execution is confided, and the father becomes their aid and auxiliary.

In the second clause of the will, it is true, she declares her desire that her husband "be made guardian for my child, and to manage my business and property as he now does, carrying out unfinished contracts and agreements made by me." Reading the first and second clauses of the will together, placing ourselves as near as may be in the situation of the testatrix, looking to her previously declared intention and to her full knowledge of the whole environment, we cannot doubt that the second clause has reference to the duties of a guardian with respect to the business, the property, the contracts, and agreements, in which she had been interested, and was not intended as a limitation or restriction upon the disposition which she had made in the first clause with respect to the person of her child.

Ordinarily the father is entitled to the care and custody of his infant child. *Merritt v. Swimley*, 82 Va. 438; *Coffey v. Black*, 82 Va. 587. But where the father is before the court, claiming to recover the custody of his child, the court will exercise its discretion according to the facts, and continue what will be best calculated to promote the infant's welfare. *Coffey v. Black*, 82 Va. 587.

In *Green v. Campbell*, 35 W. Va. 699, the above principles are thus stated: "The father is the natural guardian of his infant children, and in the absence of good and sufficient cause . . . is entitled to their custody. . . .

The court is in no case bound to deliver the child into the custody of any claimant, . . . but may leave it in such custody as the welfare of the child at the time appears to require."

We are not dealing with absolute rights of property. Says Judge Brewer in *Chapsky v. Wood*, 26 Kan. 650: "A parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. If it were, it would end this case, and relieve us from all future difficulties." And further on he says: "The paramount consideration is, What will promote the welfare of the child?"

The question is not which of the two claimants can surround the infant with greater luxury, or which of the two will be able to give or bequeath him the greater amount of money or property, but with which of them he is likely to be reared and trained so as to make him the better man and the better citizen.

We do not care to enter upon a detailed discussion of the evidence. It is sufficient to say, as is said by the learned judge of the circuit court, that reputable witnesses do question the morality of the petitioner; and we heartily concur in the conclusion reached by the circuit court "that there can be no question that this little boy, in the home of his aunts, has been kindly cared for and properly nurtured and instructed; that all the surroundings of their home and his daily associations are all that could be desired to promote his happiness and physical development;" and we earnestly unite in the regret expressed by the circuit court that the "relations which have heretofore existed between these litigants up to a short time since had not continued to

the present time, and thus avoided this unhappy controversy." The fitness of the aunts is nowhere questioned, and is beyond the reach of all challenge or debate.

Where a parent has transferred to another the custody of his infant child by fair agreement, which has been acted upon by such other person to the manifest interest and welfare of the child, the parent will not be permitted to reclaim the custody of the child, unless he can show that a change of the custody will materially promote his child's welfare. *Green v. Campbell*, 35 W. Va. 699.

As far as the child is concerned, its present situation leaves nothing to be desired, and we are free to consider the rights of the father, unembarrassed by any apprehension with respect to its welfare.

We do not consider that the mother could by will dispose of or defeat the natural right which the father enjoys to the custody of the child, and the duty which nature imposes upon him to rear and support it; but, as we have seen in the beginning of this opinion, the mother had a clear and settled purpose to intrust her child to her sisters, to the exclusion of the father, so far as it was in her power to do so. Of this purpose the father was fully advised. He wrote the will which declares this intention in words too plain for misapprehension. He assented to its execution, and immediately upon the death of the mother surrendered the custody of this infant to the respondents, and in their care it has remained and "been trained as their own" from that day to the present time. Courts pay great respect to the contemporaneous construction of instruments and contracts given by the parties to, or those interested in, them; and the contemporaneous construction in this case, given at the earliest moment, and acted upon without question or protest for five years, is in accordance with the manifest intention of the mother.

It was claimed in the record and in the argument that the construction placed upon their authority over the child by the respondents subordinated them to the rights of the father, and there is some evidence to the effect that they considered that the law clothed a father with paramount authority with respect to his child, of which he could not divest himself by any contract or act of his own. There never was any doubt on their part as to what their sister intended, or as to what they or the petitioner originally intended; but, moved by the opinion expressed to them by their kinsman and friend, Atwell Somerville, they admitted the father's right, because they believed that, whatever he may have done or said, his authority was fixed by the law, and could not be surrendered or defeated. There are authorities to that effect, and it is true that no contract that the father can make will relieve him of his duty with respect to his child where the interest of the child requires the exercise of parental duties upon his part. Without doubt the petitioner could have asserted his right as father to the custody of his infant upon the death of his wife, and had he done so his demand could not have been successfully resisted; but the whole situation changes when, by his voluntary act, he permits the custody of the child to pass to the

respondents, and while the will of the mother does not constitute a contract, it may with propriety be looked to by the court to ascertain the meaning, intent, and purpose actuating the petitioner and respondents when his child was placed with its aunts, and was allowed to remain with and be reared and trained by them for a period of nearly six years.

In *Pool v. Gott*, 14 Law Rep. 269 (Chief Justice Shaw delivering the opinion), it is said: The facts "furnished reason for supposing that the father surrendered his rights over the child by a tacit understanding, if not by an express agreement. . . . By his own acquiescence he has allowed the affections on both sides to become engaged in a manner he could not but have anticipated, and permitted a state of things to arise which cannot be altered without risking the happiness and interest of his child. He has allowed the parties to go on for years in the belief that his rights were waived."

In *Green v. Campbell*, 85 W. Va. 704, it is said: "The feelings and rights of one whom the father has put in the place of parent, and between whom and the child such relation has created mutual affection, are not to be subject to the whim and caprice of the father; but, unless it appears that the best interests of the child imperiously demand it, the court, in dealing with relations so delicate, so easily set ajar irreparably, will follow the discreet course of letting well enough alone."

Borrowing the language of Justice Brewer in *Chapeky v. Wood*, 26 Kan. 650, and applying it to this case, this record shows that this "child has had and has today, all that a mother's love and care can give. The affection which a mother may have and does have . . . is an affection which, perhaps, no other one can really possess; but so far as it is possible, springing from years of patient care of a little helpless babe, from association, and as an outgrowth from those little cares and motherly attentions bestowed upon it, an affection for the child is seen in . . . respondents that can be found nowhere else."

We do not doubt that the father and mother of the petitioner deserve all that was said in their praise in the record and during the argument, but the weight of years is pressing

heavily upon them both, and in the course of nature any arrangement which devolves duties upon them must be of a temporary nature. To take this child from its present custody in reliance upon any aid which its paternal grandparents might render in its training would be doubtful and hazardous in the extreme, in view of their great age. It is wise to let well enough alone.

We are of opinion that the circuit court committed no error in rejecting the prayer of the petitioner. We are further of opinion that so much of its order as undertakes to regulate the intercourse between the father and the child would be subversive of that discipline which those clothed with the duty of rearing a child must exercise in order that they may well and faithfully discharge their trust.

We are further of opinion that there is nothing in the record to suggest any ground for apprehension that the respondents will fail to instill into the breast of this infant proper love and respect towards his father. Nor is there any reason to apprehend, as is shown by this record, that they will impede, hinder, or obstruct him in his influence over and association with his child. It is true that the kindly feeling which at one time united the petitioner and the respondents as one family seems to have been in some measure interrupted; but that interruption was due to causes which need not here be discussed, but which were wholly unconnected with the relations existing between the father, his child, and the respondents.

An order will therefore be entered modifying the judgment appealed from, and, in lieu of the specific provisions of the order regulating the intercourse between the father and the child, the judgment of the circuit court will be affirmed, with instructions that the case be dropped from the docket, with leave to any party at any time to reinstate it, and ask for any relief which a change of circumstances may render necessary or proper, either with respect to the care and custody of the child or the intercourse between the child and the petitioner.

Cardwell, J., absent.

IOWA SUPREME COURT.

Michael KINNEY, *Appt.*,

v.

Patrick KINNEY.

(.....Iowa.....)

1. Neglect of one adjoining owner to trim a hedge fence standing on part of the division line is not within Code 1873, §1490, providing that if any party neglect to "repair or rebuild" a partition fence the aggrieved party may appeal to the fence viewers, and if they de-

termine the fence is "insufficient" they shall signify it in writing to the delinquent owner, and direct him to repair or rebuild.

2. One who plants a hedge fence on his part of the dividing line between him and the adjoining owner is not required to trim the same to prevent its growing out over the land of such adjoining owner, under the Iowa statute authorizing the growth of a hedge on the division line without specifying its height or how it shall be trimmed.

(April 6, 1898.)

NOTE.—As to trees on boundary lines in general, see note to *Hickey v. Michigan C. R. Co.* (Mich.) 21 L. R. A. 729; also *Robinson v. Clapp* (Conn.) 29 L. R. A. 582.
40 L. R. A.

APPEAL by plaintiff from a judgment of the District Court for Lucas County in favor of defendant in an action brought to

compel defendant to trim a hedge which he maintained as a fence between his property and that of plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. Stuart & Bartholomew for appellant.

Messrs. W. B. Barger and J. A. Penick for appellee:

The statute makes the fence viewers a special tribunal for the adjudication of the rights and settlement of controversies of adjoining owners respecting the erection and maintaining of partition fences, and no action will lie in the courts for that purpose.

Lease v. Vance, 28 Iowa, 509.

Where parties have agreed to maintain a certain kind of fence, the trustees may determine whether such agreement has been performed, and decide as to time and manner of performance.

Huber v. Wilkinson, 48 Iowa, 458.

A fence is a lawful fence, whatever may be its height, if it is of equal strength and security with the standard under § 2840 of the Revision.

Musch v. Burkhardt, 83 Iowa, 801, 12 L. R. A. 484.

Deemer, Ch. J., delivered the opinion of the court:

From the petition we gather the following facts material to the determination of the questions presented: The parties are owners of adjoining tracts of land; plaintiff owning the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 22, and the defendant the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 36 in the same township and range. The lands are inclosed, and the parties maintain a partition fence between their tracts. This fence was built about fifteen years ago by agreement between the parties. It was the duty of plaintiff to maintain the east half of the fence, and of defendant to build and repair the west half. In recognition of this duty, defendant planted and cultivated an osage orange and willow hedge fence upon his part of the division line. It is claimed that, while this hedge fence is sufficient as a lawful fence, yet defendant has failed to trim and cut down said fence to a proper height, and has permitted the limbs to grow out over plaintiff's land to the distance of from 10 to 20 feet, thus depriving him of the use of that much of his land. Plaintiff also charges that defendant has allowed the fence to grow to the height of from 80 to 40 feet, creating a dense shade upon plaintiff's land for a distance of from 80 to 40 feet, effectually hindering and preventing the growth of products thereon. These acts are said to have been done willfully and maliciously, and to plaintiff's great damage. The demurrer raises the question as to the obligation of the defendant to trim the hedge. Appellee insists in argument that the fence viewers have exclusive jurisdiction of the matter at issue. This point was not made by the demurrer, and does not seem to have been presented to the trial court; but, as it goes to the jurisdiction of the trial court, we are required to consider it. Section 1490 of the Code of 1878 is as follows: "If any party neglect to repair or rebuild a partition fence or a portion thereof, which he ought to main-

tain, the aggrieved party may complain to the fence viewers, who, after due notice to each party, shall examine the same, and if they determine the fence is insufficient, shall signify it in writing to the delinquent occupant of the land, and direct him to repair or rebuild the same within such time as they judge reasonable." Section 1492 provides for the settlement of a controversy between the respective owners about the obligation to erect or maintain partition fences, by the fence viewers. The argument is that this case involves the maintenance or repair of a partition fence, and that the fence viewers have exclusive jurisdiction of the controversy. The fault with the argument lies in the assumption that the issue is over the neglect of one of the parties to repair or maintain his part of the fence. Such is not the point in dispute. There is no question that the fence is sufficient for the purpose intended. The complaint is that the fence, as constructed, is an invasion of plaintiff's property rights. The fence viewers have no jurisdiction of such a controversy.

2. The Code of 1878 provides, in substance, that the respective owners of land inclosed with fences shall keep up and maintain partition fences between their own and the next adjoining inclosure. It also provides that a person building a fence may lay the same upon the line between him and the adjacent owners, and that he shall have the same right to remove it as if it were upon his own land. It further provides that a certain fence, built of rails or boards and posts, or its equivalent, shall be a lawful fence. This same Code also recognizes a hedge fence as lawful, and provides for its cultivation, by allowing the owner to enter upon his neighbor's land for this purpose. There is no statute, prior to the enactment of the present Code, regulating the height of such a fence, nor any provision requiring the owner or other person to trim the same. Appellant contends that the owner of the hedge has no right to use more of his neighbor's land than is essential for the purpose of making a lawful fence, or its equivalent, and that when he does this he is liable to respond in damages. The right to plant the hedge upon the line is unquestioned, and defendant is not in fault, unless it be in failing to trim and cut down the hedge to such a height that it will answer the purpose of a lawful fence. As the statute authorizes the growth of such a fence upon the division line, and as there is no express requirement upon the owner to trim it, such duty arises, if at all, in virtue of some implied obligation. The rights and duties of adjacent owners of land with respect to partition fences are purely statutory, and as the statute expressly provides for and recognizes hedge fences, and does not undertake to specify their height, or as to how they shall be trimmed, it follows, we think, that neither party can hold the other responsible for damages incident to the natural growth of the hedge. See *Musch v. Burkhardt*, 83 Iowa, 801, 12 L. R. A. 484. It is a clear case of *damnum absque injuria*. The new Code (section 2855) remedies this mischief by requiring the owner to trim division fences.

The demurrer was properly sustained, and the judgment is affirmed.

MARYLAND COURT OF APPEALS.

STATE of Maryland, to Use of Annie L.
COCKING *et al.*, *Appts.*,

v.

George A. WADE.

(.....Md.....)

1. **The negligent failure of a sheriff to protect a prisoner** from a mob will not make him liable to a civil action on account of the injuries done to the prisoner by the mob.
2. **The failure of a sheriff to resist a mob** that takes a prisoner from a jail, if caused bona fide by the fact that he was physically unable to cope with the force confronting him, does not make him liable for the consequences in a civil action.
3. **The malicious act of a sheriff in aiding a mob** to take a prisoner from a jail and kill him does not create any liability of the sureties on his official bond.

(April 1, 1898.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Charles County in favor of defendants in an action brought to hold defendants liable upon a sheriff's bond for the alleged negligence of the sheriff in permitting the lynching of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. John Greason, Randolph Barton, Jr., and Herbert B. Stimpson, for appellants:

It is the duty of the sheriff as an officer of the state appointed for that particular purpose to see that the duty of protecting the prisoner in his person and his life is performed; and if through any negligence on his part the prisoner should suffer any injury or lose his life, then the sheriff becomes liable in damages to the prisoner or whosoever may suffer thereby.

South v. Maryland, Pottle, 18 How. 401, 15 L. ed. 484; *State, Creecy, v. Lawson*, 2 Gill, 62; *Stemmer v. Marriott*, 5 Gill & J. 406.

If a sheriff is held liable for his negligence in regard to mere goods placed in his custody (Cooley, Torts, p. 394 (463)), he owes an equal duty toward the life of a human being that is placed in his control and custody.

Where an individual or a municipality acts as a conservator of the peace, he or it represents the sovereign power of the state for that purpose, and is entitled to all the immunities of such sovereign; and the right to hold the state, or its duly delegated agents, responsible for a failure to conserve the peace, rests only upon express statute, and does not exist otherwise.

South v. Maryland, 18 How. 396, 15 L. ed. 483; *New Orleans v. Abbagnato*, 28 U. S. App. 588, 62 Fed. Rep. 245, 26 L. R. A. 829; *Gianfortone v. New Orleans*, 61 Fed. Rep. 64, 24 L. R. A. 592; *Louisiana, Folsom, v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Baltimore v. Poultny*, 25 Md. 107; *Hagerstown v. Dechert*,

NOTE.—As to liability on official bond for trespasses or unauthorized acts done *colore officii*, see *McLendon v. State, Kennedy* (Tenn.) 21 L. R. A. 788, and note.

40 L. R. A.

32 Md. 369; *Hagerstown v. Sehner*, 37 Md. 180.

Where a duty has been imposed by statute and no remedy prescribed, the right of action accrued at common law, for otherwise there would be a right without a remedy.

Anne Arundel County Comrs. v. Duckett, 30 Md. 468, 88 Am. Dec. 557; *Anne Arundel County Comrs. v. Duvall*, 54 Md. 355, 89 Am. Rep. 393; *Willy v. Mulledy*, 78 N. Y. 314, 34 Am. Rep. 586; *Philadelphia, W. & B. R. Co. v. Stebbing*, 62 Md. 516; *Owings v. Jones*, 9 Md. 108; *Atkinson v. New Castle & G. Waterworks Co. L. R.* 6 Exch. 409, Reversed L. R. 2 Exch. Div. 441; *Couch v. Steele*, 3 El. & Bl. 402; *Bott v. Pratt*, 83 Minn. 823, 83 Am. Rep. 47; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410; *Clark v. Miller*, 54 N. Y. 584.

The sheriff shall safely keep all persons committed to his custody by lawful authority, until such persons are discharged by due course of law.

Md. Code, art. 87, § 43.

The facts of the declaration show that the negligent breach of this duty, as it is imposed by the statute, was the direct and immediate cause of the injury complained of, and that the death of the prisoner would not have occurred but for the violation of that duty.

Hixon v. Cupp, 5 Okla. 545; *Asher v. Cabell*, 2 U. S. App. 158, 50 Fed. Rep. 818, 1 C. C. A. 693.

The bond is liable for the nonperformance of the ministerial and statutory duties of the sheriff.

Skinner v. Phillips, 4 Mass. 68; *Logan v. State, Nesbitt*, 39 Md. 188; *Turner v. Killian*, 13 Neb. 582; *People, Kellogg, v. Schuyler*, 4 N. Y. 179; *Mechem, Pub. Off. §§ 664, 667, 672, 682, 798; South v. Maryland, Pottle*, 18 How. 396, 15 L. ed. 483; *Huffman v. Kopplkom*, 8 Neb. 348; *Ing v. State, Lewis*, 8 Md. 287; *Moulton v. Jose*, 25 Me. 81; *Clancy v. Kenworthy*, 74 Iowa, 740; *Asher v. Cabell*, 2 U. S. App. 158, 50 Fed. Rep. 826, 1 C. C. A. 693; *State, Baltimore County Levy Ct. Justices v. Dorsey*, 3 Gill & J. 98.

State, Vanderwerker, v. Brown, 54 Md. 318, was a suit against a constable and his bond by the owner of goods improperly seized under a writ of execution.

It is incumbent on the relator to show his demand against the sheriff is for some default in a matter transacted by him in virtue of his office, or for the omission of some act which, as sheriff, it was his duty to perform.

State, Allen, v. Conover, 28 N. J. L. 234, 78 Am. Dec. 54; *Ex parte Reed*, 4 Hill, 572; *Alcock v. Andrews*, 2 Esp. 542, note; *State v. Brown*, 38 N. C. (11 Ired. L.) 144.

The real question is, not whether the acts complained of constitute an actionable wrong on the part of the sheriff as such, but whether they constitute a ground of action at all.

Elliott v. Duke Norfolk, 4 T. R. 789; *South-cole's Case*, 4 Coke, 84b; *Alsept v. Eyles*, 2 H. Bl. 108; *Wilckens v. Willet*, 1 Keyes, 521; *Shattuck v. State* 51 Miss. 575; *Smith v. Hart*, 2 Bay, 895.

Messrs. Allison Wilmer and Adrian Posey, for appellees:

The declaration is faulty in that it contains "no cause of action entitling the plaintiff to recover against the sheriff and his sureties within the condition of the official bond, according to the laws of the state of Maryland."

South v. Maryland, Pottle, 18 How. 399, 15 L. ed. 433.

There is no case to be found in England or in this country where a sheriff and his bondsmen have been held responsible for the safe keeping of a prisoner committed to his charge by due process of law, except to the person who committed such prisoner to the sheriff.

In the old *ca. sa.* cases the sheriff was held liable for escapes, and so when slaves were committed to the custody of the sheriff and, through negligence, they escaped. In such cases the persons committing had a property interest in the prisoners, and the sheriff and his bondsmen were held liable if through negligence they escaped.

State, Creecy, v. Lawson, 2 Gill, 62; *State v. Walsh*, 2 Gill & J. 406.

Where the prisoner is committed by the state the liability is to the state, and the officer is liable to punishment by indictment (*South v. Maryland, Pottle*, 18 How. 402, 15 L. ed. 439); if under civil process he is responsible to the person who caused the commitment, and no one else.

The person to whom the sheriff is liable is the one to whom he owes a duty. The sheriff is not liable in a civil suit for a failure to keep the public peace, whereby a person is injured.

22 Am. & Eng. Enc. Law. p. 555; *South v. Maryland, Pottle*, 18 How. 398, 15 L. ed. 433; *Watson, Sheriff*, 2; *Thurman v. Wilde*, 3 Perry & D. 297; *Holroyd v. Breare*, 2 Barn. & Ald. 475.

No action will lie except for a pecuniary injury.

1 Poe, Pl. § 453.

The pecuniary loss of a child is not the necessary consequence of the death of the father. The father may be a cripple or a lunatic.

Ellicott v. Lamborne, 3 Md. 186; *McTavish v. Carroll*, 13 Md. 439; *Shafer v. Wilson*, 44 Md. 268; *Gladfelter v. Walker*, 40 Md. 14; *Lawson v. Price*, 45 Md. 188; *Cooke v. England*, 27 Md. 34, 92 Am. Dec. 618; *Camden Consol. Oil Co. v. Schlens*, 59 Md. 45, 43 Am. Rep. 537; *Abbott v. Gateh*, 13 Md. 333, 71 Am. Dec. 635; 1 Poe, Pl. § 534.

Mr. Sydney E. Mudd also for appellees.

Page, J., delivered the opinion of the court:

This is a suit on the bond of George A. Wade, sheriff of Charles county, to recover damages for his alleged neglect in the performance of his duty, whereby the father of the equitable plaintiffs lost his life.

After setting out the bond, it is alleged in the narr. that Joseph Cocking, on the 21st of May, 1896, was indicted by the grand jury of Charles county for the crime of murdering his wife, Fannie Cocking, and her sister (though he was "innocent of the same"); that thereupon he was delivered to the custody of said

sheriff, to safely keep until discharged in due course of law; that owing to intense excitement throughout Charles county, and to the great danger to the said prisoner from mob violence, the said Cocking had been "removed" to the jail in Baltimore city, but on the same day on which the indictment was found, the said sheriff again "removed" him to "an old dilapidated building, used as the jail of Charles county, at Port Tobacco" (which said building was afterwards superseded as jail of the said county by a strong new building in the town of La Plata, the said new jail being delivered, ready for use, to the said sheriff on or about the 15th day of June, 1896); that on the 22d May a change of venue was granted to St. Mary's county, and this caused increased excitement to prevail throughout Charles county; that the said sheriff had full knowledge thereof, yet he refused to remove the prisoner to the jail in Baltimore city, though he was requested repeatedly so to do by the said prisoner and his counsel, or to the new jail at La Plata; that not only did the said sheriff so refuse, but also in spite of warnings by the prisoner and his counsel, the guards to the said building at Port Tobacco were removed "and the keys of the said building were placed in the custody and keeping of 'an aged and infirm negro' who did not reside in the premises," and "the said building and the said prisoner were left wholly unprotected and at the mercy of evilly disposed persons;" that on the 26th day of June, in the night time, the jail was attacked by an unknown "body of men" and the said negro, upon the request of said men, "opened the doors of said building and delivered the said Cocking to the said unknown body of men," who took him from thence and in the most atrocious, brutal, and unlawful manner conveyed him to a point near by, and there, in the "presence of the said sheriff, who had been warned by 'the negro,' and who did not offer the slightest resistance to the said unknown body of men in their unlawful purpose, hanged the said prisoner by the neck until he was dead;" so that the plaintiffs say "that by reason of said gross negligence of the said sheriff Wade in the custody of said prisoner, and his failure in his duty to safely and properly keep said prisoner as aforesaid, the violent and premature death of said prisoner was occasioned as aforesaid, and that the equitable plaintiffs, children of said prisoner, as aforesaid, have thereby been deprived of the support and maintenance of their father, the said prisoner."

The appellee demurred, the court sustained the demurrer, and the appellant appealed; so that the sufficiency or not, of this narr., is the only question before us.

It may be proper to observe that, in a case like this, whatever right of action belongs to the children of the deceased Cocking must be such only as they may have under the provisions of article 67 of the Code; and to entitle them to sue under that article, the death must be caused "by wrongful act, neglect, or default," such as would have entitled the party injured to maintain an action and recover damages if death had not ensued. It follows from this that the matter first to be determined is whether Cocking himself (had not his death

ensued) would have had a right of action, under all the circumstances, to recover damages for the injuries he received at the hands of the mob.

There is no averment in the narr. that the sheriff has acted with malice or with evil purpose towards the prisoner, or that he has personally assaulted or otherwise maltreated him; but it is contended with force and ability that he should be held civilly liable for the act of the lawless mob, whereby the prisoner lost his life, because, with knowledge of the existence of public excitement about the matter, he failed to remove the prisoner from the jail at Port Tobacco to the jail in Baltimore, or the new building at La Plata, and, having allowed him so to remain at Port Tobacco, he removed the guards who had been stationed there to protect the prisoner, and committed the keys to an "old and infirm negro."

From a very early day the English law has contained provisions defining and regulating the rights and obligations of sheriffs in respect to the custody of persons charged with the commission of crime. As far back as the statute of 14 Edward III., chap. 10, the right to the custody of the gaols was "rejoined" to the sheriffs of the bailiwicks; and by 5 Henry IV. it was ordained that none be imprisoned by any justice of the peace, "but in the common gaol." In our own state, by statute passed in 1809, and now codified as § 16 of article 42, no citizen committed to the custody of an officer for a criminal matter shall be removed from thence into the custody of another officer, unless by habeas corpus or other legal writ, except when the prisoner is delivered to a constable or other inferior officer to be carried to some jail, or shall be removed from one place to another in order to his discharge or trial; or in case of sudden fire or infection, or other necessity, or, etc." Mr. Alexander, in his valuable work on the British Statutes, remarks of this section, that it is "intended to prevent the vexation and danger of protracted imprisonment which might be occasioned by the removal of the prisoner from one custody to another. And it affirms, therefore, the principle that the prisoner ought to be committed to the proper prison in the first instance." This observation is supported by a fair interpretation of §§ 43, 44, and 45 of article 87 of the Code.

The first of these sections provides that the sheriff shall "safely keep all persons committed to his custody by lawful authority until such persons are discharged by due course of law;" and the place where he shall "so keep them" is clearly indicated by the 45th section. That section provides that all persons committed under the authority of the United States, the sheriff shall receive and safely keep in jail, "in the same manner and under like penalties as if such persons were committed under the authority of this state." Now the jail at Port Tobacco was the "common gaol" of the county, though provisions had been made for another at La Plata, but this one was not in use, though it was finished about the 15th day of June. The jail building at Port Tobacco was the place designated by the law for the detention of prisoners, and was the proper place for the detention of Cocking. As a public jail it was

under the supervision of the public authorities. By § 22 of article 51 of the Code it was the duty of the grand jury to visit it, and inquire into its condition, the manner it was kept, and the treatment of the prisoners. If it were that in any of these respects the sheriff had failed in his duty, he was liable to be proceeded against criminally. His duty to keep safe the prisoner was not for the benefit of the prisoner; it was that he might be detained until discharged in due course of law; but the sheriff cannot, under pretense of performing this duty, avail himself of the opportunities his position affords him, to indulge an evil spirit or wreak his malice on those over whom he has control. He must keep his prisoners safe, so that they may be thence discharged in due course of law; he must guard against the prisoners' own devices; he must be prepared, as far as he reasonably can, to prevent evilly disposed persons on the outside from releasing them by force or in any wise against law; and if his jail be attacked he must interpose such resistance as he may be able to employ to defend his building, so that he shall keep his prisoners. How he shall accomplish this may often be a matter of great difficulty, and one calling for the exercise of much judgment and a high degree of courage. He will be required to take careful account of all the circumstances that surround him, estimate in cases of outside attack the forces he must encounter, and compare them with his means of defense, and after due deliberation determine what course is best for him to pursue. If he does this honestly, with a full purpose to perform his whole duty, even though he make a mistake whereby a prisoner is injured, it would be monstrous to hold him civilly responsible for damages to such prisoner. "A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake. A contrary principle would indeed be pregnant with the greatest mischief." *Kendall v. Stokes*, 3 How. 98, 11 L. ed. 512; *Shearm. & Redf. Neg.* § 156, and authorities cited.

So, also, he must detain his prisoner in the common jail, unless some necessity make it proper to remove him; but it is his province to determine when such necessity has arrived; and if, in the honest exercise of his discretion, he fails to remove him in time to avert a prospective danger, he cannot be held civilly responsible. We are not concerned now with a case in which malicious motives are imputed to the sheriff, as, for instance, like that of *Asher v. Cobell*, 2 U. S. App. 158, 50 Fed. Rep. 818, 1 C. C. A. 698, where a United States marshal, having taken a person into his custody and shackled him, "knowingly delivered him over to incompetent deputies and the known hostility of mobs." Such conduct amounted to participation; it imputed to the marshal the wicked purpose of permitting, if not aiding, the mob in its unlawful designs, and is wholly inconsistent with the idea of an honest performance of duty. Here no dishonest or wicked purpose on the part of the sheriff is alleged, nor do the facts as set out in the declaration raise such an implication. If

it could be shown that he placed the keys in the negro's hands with the purpose of facilitating the mob in the accomplishment of its purpose to seize and destroy Cocking, or if the facts alleged implied this, the two cases would be parallel. But Cocking was in the common jail, where he ought to have been kept. If a necessity arose for his removal, the sheriff had power to so remove, but it was within his province to determine when such necessity had arrived, and he cannot be made to answer civilly if he made an honest mistake.

But the case made by the narr. goes much farther than the mere safe keeping of the prisoner. It raises the question how far a sheriff should be held liable for injuries resulting from his failure to preserve the peace from a mob. Stripped of verbiage, the substance of the narr. is that the sheriff is liable in damages for injuries to Cocking, resulting from his failure to preserve the public peace. It is not an escape, for which, if it be a criminal matter, he must answer to the public (1 Bl. Com. 346); or if it be a civil case, to the party injured, as in *Sle-maker v. Marriott*, 5 Gill & J. 406, but a case where a "body of men," unknown and ill-disposed, in defiance of law and order, forced themselves into the jail, conveyed the prisoner from thence, and hung him until he was dead. The narr. alleges the sheriff was warned by the negro, and was present at the final scene, and offered no resistance, but there is no charge that such passivity was with malicious intent. Such an allegation, we think, was necessary; for if with adequate means to resist the attack he forebore to employ them, but quietly permitted the mob to have its will, no other conclusion would be possible than that he was a participant.

As an officer having the jail in charge, and as a conservator of the peace wielding the executive power of the county for the preservation of the public peace, he cannot stand idly by and allow the evil work to proceed at a time when he has at his command the physical means to stay it. But if his failure to do so was caused bona fide by the fact that he was physically unable to cope with the force confronting him, no responsibility would fall on him. The law applicable to sheriffs as conservators of the peace is so well stated in *South v. Maryland*, 18 How. 396, 15 L. ed. 483, that we will quote at length from the opinion delivered in that case. "It is," said Grier, J., "an undisputed principle of the common law, that for a breach of a public duty an officer is punishable by indictment, but where he acts ministerially, and is bound to render certain services to individuals for a compensation in fees or salary, he is liable for acts of misfeasance or nonfeasance to the party who is injured by them. The powers and duties of conservator of the peace exercised by the sheriff are not strictly judicial; but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace. It is a public duty, for neglect of which he is amenable to the public, and punishable by indictment only. The history of the law for centuries proves this to be the case. Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of

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reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections. In the case of *Entick v. Carrington*, 19 How. St. Tr. 1062, Lord Camden remarks: 'No man ever heard of an action against a conservator of the peace as such.' The case of *Ashby v. White*, 2 Ld. Raym. 938, has been quoted to show that a sheriff may be liable to a civil action where he has acted in a judicial, rather than a ministerial, capacity. This was an action brought by a citizen entitled to vote for member of Parliament, against the sheriff for refusing his vote at an election. Gould, Justice, thought the action would not lie, because the sheriff acted as a judge. Powls, because though not strictly a judge, he acted quasi judicially. But Holt, Ch. J., decided that the action would lie: (1) 'Because the plaintiff had a right or privilege; (2) that by the act of the officer he was hindered from the enjoyment of it; (3) by the finding of the jury the act was done maliciously.' The later cases all concur in the doctrine that where the officer is held liable to a civil action for acts not simply ministerial, the plaintiff must allege and prove each of these propositions. See *Cullen v. Morris*, 2 Stark. 577; *Harman v. Tappenden*, 1 East. 555, etc. etc."

For these reasons we are of opinion the narr. does not set out a sufficient cause of action.

We will add that even if it had been charged in the narr. that the sheriff acted maliciously, the official bond of that officer could not be held liable in a case like this. The liability of the sureties is that of an express contract that the sheriff shall well and truly execute the office of sheriff and in all things thereto appertaining, and should well and truly perform all the duties required by the law to be by him performed. This provision, it seems now to be well settled, binds the officer affirmatively to the faithful execution of his office. There is no clause to cover an abuse or usurpation of power,—"no negative words that he will commit no wrong by color of his office, nor do anything not authorized by law." *State, Vanderwerker v. Brown*, 54 Md. 325, 22 Am. & Eng. Enc. Law, pp. 556, 557.

For these reasons it follows from what we have said the judgment must be affirmed.

(Filed April 12, 1898.)

Bryan, J., concurring:

I did not hear the argument in this case; but, having been present at the consultation, I approve in all respects the able opinion which has been delivered. I wish to add a few words in addition to what has been so well said, not, however, as implying that the opinion needs any support.

The deceased came to his death by lynching; and his children have, as equitable plaintiffs, brought an action on the sheriff's official bond to recover damages for his death. At the threshold of the case, we naturally inquire, What is the legal foundation of their claim for damages, and under what circumstances can it be maintained? By the common law, no civil

action could be maintained for the killing of a freeman. A change was made in this respect by the act of 1852, which is at present codified as article 67 of the Code. It was enacted that if anyone, by his wrongful act, neglect, or default, should cause the death of another person, he should be liable to an action for damages, and that this action might be brought in the name of the state, for the use of the wife, husband, parent, and child of the deceased. A cause of action before unknown was granted to these relatives. It depends entirely on the statute, and it must be prosecuted in the manner therein prescribed, and in no other way. It is an action of tort against the individual who did the wrong, and it cannot, by any sort of legal transmutation, be converted into an action *ex contractu*. It is for a death caused by tortious means; and it has no reference whatever to a contract, or a bond, or to any responsibilities arising from them. They do not contain any of the elements of the suit authorized by the statute; and it would be incompetent to set up any such cause of action under its terms. Suppose that the sheriff had executed and delivered to the deceased a bond with sureties, conditioned that he would not kill him, and he had afterwards slain him with his own hand; who could have maintained a suit on such a bond? Most certainly, it is not comprehended within the terms of the statute; and the common law would not give damages in any form of action for the killing. I do not think, therefore, that, under any circumstances, an action on the sheriff's official bond could be maintained for the death of the deceased.

BAGBY & RIVERS COMPANY OF BALTIMORE, *Appl.*,

v.
Arthur D. RIVERS *et al.*

(.....Md.....)

1. The right of one person to use the name of another, given him by contract, cannot be assigned or transferred to a third party, in the absence of an express stipulation to that effect.
2. An agreement by a retiring partner that he will not engage in similar business so long as the other partner shall continue therein terminates when the latter forms a corporation and assigns to it all the rights and business of the old firm.
3. An injunction against the use of a name may be granted in favor of one who has the exclusive right thereto, although no damage is alleged.
4. An assignment to a corporation of the right to use the name of a retiring partner cannot be made by the partner continuing the business under a contract by which he is entitled to continue the use of the name of the retiring partner "in the style of the firm."

NOTE.—For name as part of goodwill of business, see note to *Vonderbank v. Schmitt* (La.) 15 L. R. A. 462; also *Snyder Mfg. Co. v. Snyder* (Ohio) 31 L. R. A. 667; *Chas. S. Higgins Co. v. Higgins Soap Co.* (N. Y.) 27 L. R. A. 42; *Fish Bros. Wagon Co. v. Fish* (Wis.) 16 L. R. A. 453.
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although the corporation is formed by him and others to continue the same business.

(April 1, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court of Baltimore City in favor of plaintiffs in an action brought to enjoin defendant from using the name Rivers as part of its corporate name. *Affirmed.*

The facts are stated in the opinion.

Messrs. William A. Fisher, Pollard & Bagby, and Frank Gosnell, for appellant:

The grant is without reservation or restriction. By it Rivers conveyed to Bagby absolutely every interest he could possibly claim in the assets, goodwill, and business rights of the firm, including the name "Bagby & Rivers."

17 Am. & Eng. Enc. Law, p. 1190; 1 Lindley, Partn. 5th ed. pp. 444, 445; *Churton v. Douglas*, 1 Johns. V. C. (Eng.) 189; *Trego v. Hunt* [1896] A. C. 7; *Brown v. Dennison*, 15 App. Div. 525; *Browne. Trade Marks*, § 524; *Levy v. Walker*, L. R. 10 Ch. Div. 436; *Bank of Tomah v. Warren*, 94 Wis. 151; *Caswell v. Hazard*, 121 N. Y. 484; *Snyder Mfg. Co. v. Snyder*, 54 Ohio St. 87, 31 L. R. A. 657; *Brass & Iron Works Co. v. Payne*, 50 Ohio St. 115, 19 L. R. A. 82.

The fact that the transfer has been made to a corporation is immaterial.

Monarch v. Rosenfeld, 19 Ky. L. Rep. 14; *Chattanooga Medicine Co. v. Theford*, 30 U. S. App. 35, 66 Fed. Rep. 544, 14 C. C. A. 101.

The use of any particular name by a corporation will not be enjoined unless it be clearly proved that the complainant will suffer injury.

Cook, Stock & Stockholders, note 1, § 699, p. 1014; *Drummond Tobacco Co. v. Randle*, 114 Ill. 412; *London & P. Law Assur. Soc. v. London & P. Joint Stock Life Ins. Co.* 11 Jur. 938; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324.

It must be shown to the satisfaction of the court that irreparable injury is threatened.

Robertson v. Berry, 50 Md. 597, 33 Am. Rep. 328; *Parlett v. Guggenheimer*, 67 Md. 542; *Stonebraker v. Stonebraker*, 33 Md. 252.

No trademark or trademark case is reported, in which an injunction was granted, unless the evidence clearly showed that confusion of names was likely to result and consequently irreparable injury be done the plaintiff. In these cases, as in others, the burden of proof is on the plaintiff.

Richardson & B. Co. v. Richardson & M. Co. 27 N. Y. S. R. 808; *Hygeia Water Ice Co. v. New York Hygeia Ice Co.* 140 N. Y. 94; *Drummond Tobacco Co. v. Randle*, 114 Ill. 412; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278; *Thorneloe v. Hill* [1894] 1 Ch. 574; *McGowan Bros. Pump & Mach. Co. v. McGowan*, 2 Cin. Sup. Ct. Rep. 317.

Upon every principle of honesty and fair dealing, Rivers is estopped from claiming that the appellant has no right to the name "Bagby & Rivers."

Clark Thread Co. v. Armitage, 45 U. S. App. 62, 74 Fed. Rep. 936, 21 C. C. A. 178.

The cross bill was filed to enjoin Rivers from violating his covenant not to resume the furniture business in Baltimore city, as such a cove-

nant is a constituent part or attendant of the goodwill, and the appellant, having bought Bagby's business and the goodwill, now has the right to enforce the covenant as his successor.

Guerand v. Dandeleit, 32 Md. 561, 8 Am. Rep. 164; *Atkins v. Kinnier*, 4 Exch. 776; *Greenhood*, Pub. Pol. 733; *Jacoby v. Whitmore*, 49 L. T. N. S. 335; *Palmer v. Toms*, 96 Wis. 367; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464; *Hedge v. Lowe*, 47 Iowa, 137.

Nor can Rivers shield himself behind his corporation.

2 High. Inj. § 1172; *Beal v. Chase*, 31 Mich. 490; *Kramer v. Old*, 119 N. C. 1, 34 L. R. A. 389; *Emery v. Bradley*, 88 Me. 357; *Trego v. Hunt* [1896] A. C. 7.

Rivers' corporation bearing his name, coupled with the fact that it carries on business at the former location of Bagby & Rivers, is misleading to the public.

Myers v. Kalamazoo Buggy Co. 54 Mich. 215. 52 Am. Rep. 811; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324.

Whether or not Bagby is in business can be shown by considering the question, Under what circumstances would Rivers be violating his covenant, if Bagby had made no change in the form of his business? If one is a promoter of a corporation, and a stockholder therein, he is violating a covenant not to engage in business.

Beal v. Chase, 31 Mich. 490; *Emery v. Bradley*, 88 Me. 357; *Kramer v. Old*, 119 N. C. 1, 34 L. R. A. 389.

Messrs. Gans & Haman and Sappington & Rivers, for appellee:

An assignment of the goodwill alone does not carry with it the right to use the firm name of the assignor.

Williams v. Farrand, 88 Mich. 483, 14 L. R. A. 161; *Hove v. Searing*, 6 Bosw. 354; *Parsons*, Partn. § 182, note.

Rivers covenants that he will not go into the furniture business "so long as said Bagby continues said business." He does not covenant that he will never thereafter go into the business, or "at any time thereafter," as in *Guerand v. Dandeleit*, 32 Md. 564, 8 Am. Rep. 164.

Bagby as long as he conducted the business was to use the firm name, and during that time Rivers was not to compete with him, but when Bagby ceased individually to conduct the business as his own, then his right to use the name of Rivers ceased, and Rivers was allowed to enter the field in his own name.

Horton Mfg. Co. v. Horton Mfg. Co. 18 Fed. Rep. 816; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *McGowan Bros. Pump & Mach. Co. v. McGowan*, 2 Cin. Sup. Ct. Rep. 313, Affirmed, 22 Ohio St. 370; *Brown Chemical Co. v. Meyer*, 139 U. S. 544, 35 L. ed. 249.

One who is in business, and uses his name in connection with that business, may restrain the use of his name in a similar business by one who has no right from him so to use it.

McGowan Bros. Pump & Mach. Co. v. McGowan, 2 Cin. Sup. Ct. Rep. 320; *Williams v. Farrand*, 88 Mich. 473, 14 L. R. A. 161; *Holner v. Gratz*, 52 Fed. Rep. 871; *Browne*, Trade-
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marks, §§ 524 *et seq.*; 2 Beach, Inj. § 760; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 295, 9 Am. Rep. 324.

In the sale of a goodwill the vendor may not be legally restrained from soliciting customers.

Williams v. Farrand, 88 Mich. 483, 14 L. R. A. 161; *Cottrell v. Babcock Printing Press Mfg. Co.* 54 Conn. 122.

Briscoe, J., delivered the opinion of the court;

This was a bill in equity filed on the 22d of April, 1897, in the circuit court of Baltimore city, by the plaintiff Arthur D. Rivers, for an injunction to enjoin the defendant, the Bagby & Rivers Company of Baltimore city (a corporation), from using the name Rivers as a part of its corporate title. Subsequently, on the 13th of August, 1897, a cross bill was filed by the defendant corporation against the plaintiff Rivers, and the Rivers Furniture Company, to restrain Rivers from conducting the furniture business in the city of Baltimore, either in his own name or in the name of the Rivers Furniture Company, and, further, to enjoin the Rivers Furniture Company from using the name Rivers as a part of its title in the conduct of the furniture manufacturing business. The facts of the case are substantially as follows: The plaintiff Rivers and Charles T. Bagby had been for many years engaged in the manufacture and sale of furniture in Baltimore city, under the firm name and style of Bagby & Rivers. On the 1st of January, 1894, the copartnership existing between the members of this firm was dissolved by mutual agreement. The articles of dissolution were evidenced by a written agreement and a memorandum of sale. By the express terms of the agreement it is provided that Bagby shall have and own in his own right, free and clear of any interest or claim of Rivers, all the stock, furniture, etc., in the factory and warehouse owned by the firm; and, in addition thereto, the goodwill of the firm, and all business rights thereto belonging. And it further provides that "the said Rivers hereby agrees and covenants that he will permit the said Bagby to continue the use of his name in the style of said firm; provided, however, it be so used, after such necessary legal notice to be given by the said Bagby, as not to make the said Rivers liable for or chargeable with any of the debts or contracts of said business as hereafter to be conducted by said Bagby." "And the said Rivers agrees and covenants that he will not engage in the manufacture of furniture in the city of Baltimore so long as the said Bagby shall continue said business. And in the memorandum of sale, which was executed by Rivers on the same day of the agreement of dissolution, it is further provided that, in addition to the assignment of the stock of goods, etc., the goodwill of the firm, and all business rights thereto belonging or any wise appertaining, shall be sold to Charles T. Bagby; it being the intention of said Rivers to sell to Bagby his entire interest in the business as now conducted by said firm." It further appears that Bagby continued to carry on the furniture business, under the firm name of Bagby & Rivers,

until March 16, 1897, when he and others formed a corporation under the general laws of this state, called the "Bagby & Rivers Company of Baltimore." He then assigned and transferred the business of Bagby & Rivers to this new company, and continued to carry on the furniture business under the name and style of the Bagby & Rivers Company. On July 7, 1897, the plaintiff Arthur D. Rivers formed a corporation, called the "Rivers Furniture Company of Baltimore City," and has been since that date conducting the furniture business; and from a decree enjoining the defendant, Bagby & Rivers Company, from using the name Rivers, and dismissing the appellant's cross bill, this appeal has been taken.

There can be no question, it seems to us, that under a proper construction of the articles of dissolution between the parties and the memorandum of sale signed in execution of this agreement, the right to use the name Bagby & Rivers was conferred upon Bagby so long as he continued the business in the style of the old firm. This was clearly the intention of the parties, as will appear from the language of the agreement itself, which is: "And the said Rivers hereby agrees and covenants that he will permit the said Bagby to continue the use of his name in the style of said firm; provided, however, it be so used, after such necessary legal notice to be given by said Bagby, as not to make the said Rivers liable for or chargeable with any of the debts or contracts of said business as hereafter to be conducted by said Bagby." But the appellants contend they not only had a right to the use of the name of Bagby & Rivers so long as the old firm existed, but they had the right to legally assign the name Rivers to the corporation Bagby & Rivers Company.

This brings us to the main question in the case, and that is, as was stated by the court below, Has a continuing partner who has acquired the right to use the name of a retiring partner, either by a grant in express terms or by legal inference arising from the purchase of the goodwill of the old firm, the right to assign the use of the retiring partner's name to a corporation formed for the purpose of continuing the same business? We are of the opinion, after a careful examination, that the contention of the appellant in respect to the assignability of the rights under this contract cannot be sustained, either from the intention of the parties as manifested by the agreement itself, or by the law applicable to the case. In the case of *Arkansas Valley Smelting Co. v. Belden Min. Co.* 127 U. S. 387, 32 L. ed. 248, Mr. Justice Gray, in delivering the opinion of the supreme court, says: "Everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.'" And in that case the court adopts the rule laid down by Pollock, Contr. 425: "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have in-

tended them to be exercised only by him in whom he actually confided." In the case of *Horton Mfg. Co. v. Horton Mfg. Co.* 18 Fed. Rep. 817, a case involving the same question as is here presented, the court said: "There is certainly no authority . . . for the proposition that a partnership whose name consists in whole or in part of the name of a person who is not a member of the firm can, without the consent of the owner, transfer the right to another company or corporation to make a like use of such name. A man might willingly forego the use of his name in favor of an ordinary partnership, which, whether limited or not to a definite term of existence, is liable, upon many contingencies, to come to an end; but from such a grant there could not reasonably be inferred an intention to authorize a transfer or assignment to other companies or corporations, whereby the owner might be perpetually deprived of the control of his own name." We will not stop to distinguish the many cases upon this question, because it would extend this opinion to an unusual length, but will simply state the conclusion reached by the courts on the subject. It is this: Where the contract is for the sale of or the right to use a fictitious name, or a trade-name, or a trademark, or a corporate name, though composed of individual names, or where the goodwill of a business includes the right to use names of that character, then such right is assignable by the purchaser and follows the business. But where the contract merely gives to one person the right to use the name of another, as in this case, such right is personal, and, in the absence of an express stipulation, cannot be assigned or transferred by the purchaser to a third party. In this case it was stipulated that Bagby should have the right to continue the business under the old name of Bagby & Rivers. It was not agreed that Bagby and his executors, administrators, or assigns, or a corporation, should use it; but, in the language of the contract, "he will permit the said Bagby to continue the use of his name in the style of the firm." If more had been desired it should have been agreed upon and expressed in the contract. This court cannot infer from the language used that Bagby was entitled to transfer to a corporation the right which Rivers had conferred upon him personally. On the contrary, we think the meaning of the contract between the parties is that, so long as Bagby continued to conduct the business in the firm name of Bagby & Rivers, he had the right to use the name Rivers, but when this stopped the right to use the name of Rivers also ceased.

We come, then, to the second proposition relied upon by the appellants, and that is the right of the appellees to an injunction. This is resisted upon the ground that no damage has been alleged and no injunction will lie unless injury has been shown. In the case of *Plant Seed Co. v. Michel Plant & Seed Co.* it is said that when a person or business corporation has assumed the name of some other firm or corporation in the same line of business, or has adopted a name which so closely resembles that of a business rival previously established that the business of the latter is liable to

be diverted, and the public deceived on account of it, it has always been recognized as within the power or jurisdiction of a court of equity to restrain such person or new company from conducting business under the name assumed to the detriment of the older company. And in *Du Boulay v. Du Boulay*, L. R. 2 P. C. 441, this question is thus determined: "In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law; and any person using that name after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or, at least, of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction." And to the like effect are the cases of *McGowan Bros. Pump & Mach. Co. v. McGowan*, 2 Cin. Sup. Ct. Rep. 320; *Williams v. Farrand*, 88 Mich. 473, 14 L. R. A. 161; *Hohner v. Gratz*, 52 Fed. Rep. 871; *Landreth v. Landreth*, 23 Fed. Rep. 41; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 295, 9 Am. Rep. 324; 2 Beach, Inj. § 780; *Brown Chemical Co. v. Meyer*, 189 U. S. 544, 35 L. ed. 249. There was no error, then, in the decree enjoining the Bagby & Rivers Company from using the name Rivers as part of the corporate name of the corporation.

The remaining contention urged by the appellant arises under the cross bill, which was dismissed by the court below, and involves a construction of that part of the agreement which reads: "And the said Rivers agrees and covenants that he will not engage in the manufacture of furniture so long as said Bagby shall continue said business." It is clear, we think, according to the meaning of this part of the contract, that when Bagby formed a corporation, assigned to it all the rights of the old firm, and ceased to do business as Bagby & Rivers, he was not conducting and continuing the old business, and that Rivers was entitled to resume the furniture business himself. We fully agree with the learned court below when it says that, under the provisions of the contract, Rivers has a full right to engage in the business if Bagby quits it; and I do not see how it can well be contended that if Bagby abandons the business himself as an individual, and transfers all his rights to the defendant corporation, assuming to assign to it also the late firm name, that Bagby can still be considered as conducting a business which is absolutely that of the corporation to which he has transferred it. It is no longer Bagby who is doing the business, but the corporation, no matter if he does have an interest in the latter. For these reasons the decree will be affirmed.

Decree affirmed, with costs.

WISCONSIN SUPREME COURT.

City of MADISON, *Appt.*,

v.

C. M. MAYERS *et al.*, *Reepts.*

(.....Wis.....)

1. A street indicated on an ancient plat may be held to have been dedicated to

NOTE.—Right to erect wharves.

If the right of the riparian owner to have access to navigable water exists, so that the state cannot place a wharf in front of his property without his permission, as is the general rule (*ante*, 508) then it is to the interest of the public, as well as to his own, that he should have the right to make wharves so long as he does not interfere with the general right of navigation. And this seems to be the rule which has been generally followed. Some of the courts have gone so far as to hold that the right of access includes the right to connect with the point of navigability.

The rule in England.

In England there were several adverse rights to be considered in determining whether or not a riparian owner had a right to construct a wharf.

First, there was the navigator's right to land his goods, with which a toll wharf interfered. This was settled in favor of the riparian owner in Lord Hale's time, for he states that a man for his own private advantage may, in a port town, set up a wharf or crane. Hale, *De Portibus Maris*, chap. 6. His comment is that he is merely making use of what is his own.

Second, there was the King's *jus privatum* in the soil covered by water. This right could not be in-

the public for its entire width, although as found it does not exactly correspond to the calls on the plat, if from ancient fences and buildings it appears that the street found was a practical construction of the plat.

2. One side line of a street as dedicated to the public will not be affected by a change in the other line by widening one part of the street and narrowing another part.

vaded by the subject, and any attempt to do so was a purpresture, the effect of which was that the structure might be destroyed or seized by the King.

An information in equity will lie to abate a wharf which has been erected over the King's land without right. *Atty. Gen. v. Richards*, 2 Anstr. 603.

If an erection in the river is a purpresture it will be abated, although it was made by leave of the high admiral and was no damage to shipping. *Atty. Gen. v. Philipot*, cited in 2 Anstr. 607.

A wharf erected below low-water mark belongs to the King. *Johnson v. Barret*, Aleyn, 10.

Third, there was the *jus publicum*, which was the right to have the water kept free from obstructions for the purpose of navigation. An interference with this right was a nuisance, and would be abated as such.

In *Atty. Gen. v. Johnson*, 2 Wils. Ch. 87, where an injunction was sought to restrain the building of a pier in the Thames, the defendant claimed the right under license from the city of London, and the chancellor said whether the soil between high and low water mark is the King's or has been granted by the Crown to the city of London, or whether a mere right of conservancy has been granted to the city, it is quite clear that it cannot be used as a nuisance to the King's subjects.

3. Mere nonuser of a portion of the width of a street will not work an abandonment of the public rights therein.
4. A city may maintain an action to enjoin abutting owners from removing materials from the unused part at the side of a street, which will make the opening of the street to its entire width more difficult.
5. The indication of a block upon a plat between a highway and a lake must give way if when the highway is located no land is left between it and the lake shore.
6. Charter power to make general police regulations for the benefit of trade and commerce, and to provide for the abatement and removal of nuisances, will not authorize a city

to maintain a suit to enjoin the filling up of a lake shore along, but outside, the limits of a public street.

7. Owners of land abutting on a lake, the title to which is in the state, have the right to construct in the shoal water proper wharves and piers in aid of navigation, but not obstructing it, far enough to reach water navigable for such boats as are in use.

(November 16, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dane County in favor of defendants in a suit brought to enjoin the depositing of boulders and earth in the shallow waters of Lake Monona. *Reversed.*

Neither the Crown itself nor its grantee can use its title in that manner.

A building placed so near the water of a port as to interfere with mariners in working their boats in and out will be abated. *Bristol v. Morgan*, 11 Car. 1. fol. 303, cited in *Hale, de Portibus Maris*, chap. 6, *Hargrave Law Tracts*, p. 81.

The tide way of a river cannot be interrupted by a wharf in its shallowest part, unless there has been an antecedent execution of a writ of *ad quod damnum*. *Atty. Gen. v. Brittain*, cited in 6 Barn. & C. 579.

In *Atty. Gen. v. Conservators of the Thames*, 1 Hem. & M. 24, 8 Jur. N. S. 1203, 11 Week. Rep. 163, it is said that it cannot be denied that any pier or other projection into a navigable river is a nuisance.

An occupation of 8 feet out of 60 of the bed of a river is an obstruction to navigation which a public authority having power to remove obstructions may proceed to remove. *Atty. Gen. v. Terry*, L. R. 9 Ch. 426, 30 L. T. N. S. 215, 22 Week. Rep. 395. The master of the rolls said in that case, that when the title was in the King the riparian owner had no right to put a stick in the soil, and that in case he owned the soil he could not make a structure which would be a nuisance to navigation.

A corporation which is the conservator of a river and owner of the soil between high and low water mark cannot authorize the erection of a wharf there which produces inconvenience to the public in the use of the river for the purposes of navigation. One who undertakes to make a change in a public highway should proceed before the sheriff in order to ascertain whether or not a change will operate to the prejudice of the public. *Rex v. Lord Grosvenor*, 2 Stark. 511.

In *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 682, 46 L. J. Ch. N. S. 68, 35 L. T. N. S. 569, 25 Week. Rep. 165, the lord chancellor, in speaking of a license by the conservators of the river to a property owner to fill in the bank in front of his property, says that it has a power of granting to individuals, upon a money payment, the privilege of doing what the owners could not do in a navigable river, of pushing out an embankment or wharf in front of their land into the bed of the river.

In one case the rule was attempted to be established that if the general benefit to navigation was greater because of the structure than the loss by reason of the straightening of the channel it would not be a nuisance.

Thus, where a staith erected by a person for his own use in loading coal was afterwards made subject to public use, it was held that if reasonable space was left for navigation, and the public benefit resulting from the erection counterbalanced the prejudice to the rights of individuals in having the exercise of their rights of passage narrowed, there could be no conviction under an indictment for a nuisance. But Lord Tenterden, dissenting, said that the question of benefit to the public could not be 40 L. R. A.

taken into consideration, the question being whether or not the navigation and passage of vessels on this public river was injured by these erections. *Rex v. Russell*, 6 Barn. & C. 566, 9 Dowl. & R. 569.

That distinction did not prevail.

A wharf is a nuisance if it occasions any hindrance or impediment whatever to the navigation of the river by any obstruction of vessels or boats. And the circumstance that a benefit results to general navigation from it is immaterial. *Rex v. Randall*, Car. & M. 496.

In *King v. Ward*, 4 Ad. & El. 384, 1 H. & W. 708, 6 Nev. & M. 88, a causeway connecting with a wharf was held to be a nuisance, the court holding that the fact that it was also a benefit to navigation was not sufficient defense to the indictment.

Fourth, there was the right against other individuals; and it has been generally held that private individuals could maintain an action for a public nuisance only when they were peculiarly injured.

A person who is not injured by the erection of a wharf cannot maintain an action for its abatement. *Brown v. Gugsy*, 10 Jur. N. S. 525, 2 Moore, P. C. C. N. S. 341, 10 L. T. N. S. 45, 12 Week. Rep. 492.

But a riparian proprietor on a tidal river, although he owns the soil, cannot erect there a pier for the purpose of protecting his bank if the result is to damage the bank of the opposite riparian proprietor. *Atty. Gen. v. Earl Lonsdale*, L. R. 7 Eq. 377, 88 L. J. Ch. N. S. 336, 20 L. T. N. S. 64, 17 Week. Rep. 219.

Wharves are as essential to commerce as is the waterway itself. If each of the conflicting rights in the waterway, the soil, and the banks, had been maintained to its fullest extent, no wharf could have been built. So, a compromise was absolutely necessary. This was effected by the King surrendering his *jus privatum* to the public (*Freeman, Const. Hist.* 2d ed. pp. 139 *et seq.*), and the establishment of rules by which the public rights could be protected when the wharf was erected by the owner of the upland.

The proceeding at English common law to obtain leave to build a wharf on the King's tide land was a writ of *ad quod damnum* to ascertain what injury would ensue. Upon the return of a favorable verdict, the proposed work was authorized by the King's license. *Concord Mfg. Co. v. Robertson*, 66 N. H. 19, 18 L. R. A. 679.

In *Atty. Gen. v. Brittain*, cited in 6 Barn. & C. 579, the lord chancellor was of opinion that the tide way of a river in the shallow part of it could not be interrupted by quays unless there had been an antecedent execution of a writ of *ad quod damnum* by a jury.

The result of this seems to be that the owner of the upland may erect the wharf, but unless he first obtains a writ of *ad quod damnum* he takes all the risk of his structure proving a nuisance, and having it abated as such.

Statement by **Cassoday**, Ch. J.:

This action is to restrain the defendants from removing any earth, stone, or other materials from the limits of Spaight street, between Patterson and Livingston streets, and to restore said street to its prior condition, and to restrain the defendants from filling in the lake opposite to or in front of said portion of said street, and to abate the nuisance created by them. The complaint is to the effect that the plaintiff is a municipality, and has control of the streets and sidewalks therein; that Spaight street, between Patterson and Livingston streets (formerly known as "Rutledge Street"), lying south of block 149, is a regularly laid out and platted, traveled street,

being laid out, platted, and recorded as 66 feet wide; that the south line of said street, opposite said block, and particularly that part of said line opposite lots 7, 8, 9, and 10 in said block, as originally platted and recorded, and ever since, has extended out into the waters of the lake a distance of 10 or more feet; that that portion of said street not covered by the waters of the lake is 15 or 20 feet above the surface of the waters; that the traveled portion of the street is separated from the lake by an embankment wholly within the limits of the street, and that the plaintiff has for several years last past maintained a substantial sidewalk along the inner edge of said embankment, and within the limits of the street; that

Whatever may have been the theory in England it would seem that practically the right to wharf out in front of his land was exercised by the riparian owner, taking care not to interfere injuriously with the interests of navigation. *Clement v. Burns*, 43 N. H. 618.

A riparian owner may moor to his bank a floating wharf and boathouse if they do not interfere with navigation of the river, and may maintain an action against a third person who causes injury to them by refuse cast into the stream. *Booth v. Ratte*, L. R. 15 App. Cas. 188.

Although a statute does not expressly authorize the construction of a wharf, legislative recognition of the right in subsequent statutes will be sufficient to protect the one building it from actions of adjoining lot owners. *Standly v. Perry*, 2 Ont. App. Rep. 195.

The rule in this country.

In this country there was only the right of the riparian owner and the *fus publicum* to be considered. In the early days the navigable channels were in most cases ample, the need of wharves urgent, and the public funds deficient. So, by common consent, supplemented in some instances by legislation, the riparian owner was permitted to erect wharves, and his right to do so was unquestioned. Necessary regulations were adopted from time to time as needed, and in some few instances the right was denied altogether and the rule established that the public or its grantees had the exclusive right to make wharves, and that there was no right in the riparian owner.

Cases recognizing the right of the riparian owner.

The doctrine that the soil under tide water is a private emolument of the sovereign, and that, without express or implied license, abutters cannot build wharves, is not introduced here by applying the dictates of justice and reason to the situation of the American people. *Concord Mfg. Co. v. Robertson*, 66 N. H. 19, 18 L. R. A. 679.

In *Alexandria & F. R. Co. v. Faunce*, 31 Gratt. 761, Staples, J., says it has been held in numerous cases that the owner of land bounded by a navigable stream has certain riparian rights, whether his title extends to the middle of the stream or not. Among these are free access to the navigable part of the stream and a right to make a landing, wharf, or pier.

The riparian proprietor upon a navigable lake has the exclusive right of access to and from the lake in front of his land, and in building wharves and piers in aid of navigation. *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 886; *Boorman v. Sunnucks*, 42 Wis. 238; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 890; *Cohn v. Wausau Boom Co.* 47 Wis. 314; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808.

A riparian proprietor who owns the land to the side of the stream may construct docks or landing

places for goods or passengers, taking care that vessels are not impeded in their passage, nor prevented from the use of all parts of the stream where it is navigable. And one owner cannot so use his property as to impair the rights of an adjoining proprietor. *Walker v. Shepardson*, 4 Wis. 486, 65 Am. Dec. 324.

At common law and under the Virginia statutes the riparian owner has a right to erect wharves, piers, and bulkheads for his own use, subject only to the general rules and regulations which the legislature may prescribe; and the only limitation upon such right is that navigation must not be obstructed or the rights of others injured.

And this right is sufficient to enable the owner to maintain an action of unlawful entry and detainer against one who attempts to build a structure upon the water lot under a void grant from the state. *Norfolk City v. Cooke*, 27 Gratt. 490.

A riparian owner has a right to construct wharves on his water front, which cannot be taken from him for public use without condemnation proceedings as prescribed by law. *Buffalo v. Delaware, L. & W. R. Co.* 39 N. Y. Supp. 4.

In North Carolina the riparian owner has a right to enter the water front up to deep water for the purpose of erecting wharves. *Gregory v. Forbes*, 96 N. C. 77.

In *Saunders v. New York C. & H. R. R. Co.* 30 Abb. N. C. 83, the rule is recognized that the riparian owner has the right to construct wharves, subject to the right of the public.

And that was followed in *Saunders v. New York C. & H. R. R. Co.* 54 N. Y. S. R. 364.

But modified in *Saunders v. New York C. & H. R. R. Co.* 144 N. Y. 75, 26 L. R. A. 878, but the court recognized the right to wharf out.

An owner of lots abutting on the Mississippi river possesses the riparian right of constructing thereon suitable landings and wharves for the convenience of commerce and navigation, and to extend such obstruction out into the river to the point of navigability. *Rippe v. Chicago, D. & M. R. Co.* 23 Minn. 18; *Morrill v. St. Anthony Falls Water Power Co.* 23 Minn. 222, 30 Am. Rep. 599; *Union Depot Street R. & Transfer Co. v. Brunswick*, 31 Minn. 297, 47 Am. Rep. 789; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406.

In *State v. Wilson*, 42 Me. 9, it is stated that in Maine it has never been held that a proprietor of land adjoining flats upon or at tide waters is precluded from erecting wharves and piers on his own flats, provided he does not thereby materially interrupt general navigation.

The owner may lawfully erect wharves upon his own flats for his own use and benefit. *Deering v. Proprietors of Long Wharf*, 25 Me. 51.

Riparian owners may extend wharves into the Ohio river provided they do not unnecessarily obstruct navigation. *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644.

said street and walk are, and for many years past have been, continuously used and traveled at all times of the day, and at all seasons of the year; that the defendants have combined together, and did remove and are now removing large quantities of earth, stone, and other materials from the limits of that portion of said street, and particularly from the foot and face of the embankment, and have deposited and are now depositing earth, stone, and other materials in the waters of the lake beyond the limits of the highway, and that the earth, stone, and other materials are necessary for the preservation of the embankment and the street, and to maintain the proper grade thereof; that such conduct on the part of the

defendants was to the irreparable injury of the plaintiff. And for a second cause of action the complaint alleges, in addition to the allegations contained in the first cause of action, in effect, that from that portion of the street the people have an unobstructed view and access to the waters of the lake; that the lake is a meandered body of water, and is navigable in fact to the south line of the street; that the defendants have taken the earth, stone, and other materials referred to, and other earth, stone, rubbish, and other materials, and deposited them in the navigable waters of the lake, within the limits of the section of the street mentioned, and intend to erect buildings thereon, and forever close all

An owner of land on a navigable river has withdrawn special legislative authority the right to erect wharves conforming to the regulations of the state. But that right terminates at the point of navigability unless special authority is conferred. *Chicago v. Van Ingen*, 152 Ill. 624.

Under the laws of Florida wharves when constructed by riparian proprietors are not presumptures nor presumed to be nuisances as constituting an obstruction to commerce. One who alleges that a wharf is not for the benefit of commerce has the burden of proving his allegation. *Sullivan v. Moreno*, 19 Fla. 200.

The right of wharfing out, doing no damage to the free navigation, is one of the rights of a riparian proprietor. *Mather v. Chapman*, 40 Conn. 382, 16 Am. Rep. 48.

The riparian right in the Ohio river extends to the water, and no supervening right over any part of this space can be exercised or maintained without the consent of the proprietor. *Bowman v. Wathen*, 2 McLean, 378.

Under the colonial law of Massachusetts, and by the common practice of the country, wharves may be built out to low-water mark considering the river in its natural state, or further, if not injurious to public interests. And if the river recede by natural cause the wharf may follow it, but not if it is made to recede by some act of man. *Com. v. Pierce*, 2 Dane, Abr. 696.

At common law a riparian owner has a right to erect wharves, piers, or bulkheads for his own use, or the use of the public, subject only to such general rules and regulations as the legislature may prescribe. *Norfolk City v. Cooke*, 27 Gratt. 490.

In *Musser v. Hershey*, 42 Iowa, 365, it is said that it is true that a riparian owner, although owning only to high-water mark, will have the right to construct below high-water mark, bridges, piers, and landing places, and to reclaim the soil, if he conforms to the regulations of the state and does not obstruct the paramount right of navigation. This ruling was upon the authority of *Dutton v. Strong*, *St. Paul & P. R. Co. v. Schurmeir*, and *Yates v. Milwaukee*.

In *Tuck v. Olds*, 29 Fed. Rep. 738, where the question was as to the character of wharf property, the court says it would seem safe to hold that the owner of the adjacent land has at least a qualified interest in the soil under the edge of the water at the shore, so as to give to him the right to construct and maintain a dock along the shore and extending the necessary distance into the water.

A riparian owner specially interested may recover for the wrongful filling up of a harbor to the injury of navigation. *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654.

Rule where title extends to thread of stream.

The title of a grantee of land on the Illinois river extends to the middle thread of the stream, and he 40 L. R. A.

has a right to extend wharves into the stream providing he does not obstruct navigation or interfere with the rights of others. *Chicago v. Laffin*, 40 Ill. 172.

Where the ownership of the bed of the stream is private, the public rights are simply easements or privileges upon it, and the owner may do as he pleases so long as he does not injuriously affect the public enjoyment. The owner's use is lawful until it is shown to be unlawful. It can never be unlawful for a landowner to make such wharves as will accommodate all vessels ordinarily using the stream, unless there is some exceptional circumstance which may in particular cases render his structure improper. *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154.

If an individual has received a grant of the flats he may devote them to wharves without being subject to the control of the public, if they are not permitted to become a common nuisance. *Galveston v. Menard*, 28 Tex. 404.

Effect of custom.

In *Bell v. Gough*, 23 N. J. L. 624, it is said that it has been common understanding that owners of land bounding on navigable waters have an absolute right to wharf out and otherwise reclaim the land down to, and even below, low water, provided they do not thereby impede the paramount right of navigation, and that statement was repeated in *New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398, 1 L. R. A. 133.

In this country a usage sprang up which at length acquired the force of law, and gave to the riparian owner upon navigable water either the absolute title to the soil or the exclusive right to erect wharves and to reclaim from the sea the flats in front of his land. *Clement v. Burns*, 43 N. H. 618.

A grantee of riparian land acquires no peculiar rights as incident to his estate in the land beyond the high-water line lying in front of his land. But in virtue of a local custom long prevailing in New Jersey, and now having the force of established law, the adjacency of his land to the stream vests him with a license to fill and wharf out on the public domain to such an extent as does not interfere with the public rights of fishing and navigation. And this license when executed becomes irrevocable and confers on the riparian owner a good and indefeasible title to the land thus reclaimed. *New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398, 1 L. R. A. 133, citing *Gough v. Bell*, and *Stevens v. Paterson & N. R. Co.*

A canal company which acquired by condemnation a right of way for its canal along the high-water mark of a navigable stream does not deprive the former owner of his riparian rights. *New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398, 1 L. R. A. 133.

Statutory right.

In *Ball v. Slack*, 2 Whart. 506, 80 Am. Dec. 273, it

access and travel to and from the lake. The several defendants each separately; answered by way of admissions and denials, and allegations to the effect that the street mentioned was established and dedicated under and by virtue of a plat of the city duly made and executed according to law and recorded by James D. Doty, then owner of all the property and real estate upon which is now the city of Madison, May 7, 1887; that November 27, 1868, the common council of the city altered and changed the said street, and widened the same by extending the northerly boundary thereof several feet into block 149, along the eastern portion thereof, as therein alleged; that December 4, 1868, the common council vacated a por-

tion of the street opposite lot 1 in block 149; that lots 6 and 7 in block 150 were platted by the Doty plat, and as a part thereof; that the southerly boundary of the street extends no further south, or nearer to the waters of the lake, than a certain iron railing, which now extends along said street south of the sidewalk, on the south side thereof, and that the northerly boundary of said lots 6 and 7 extends to the said iron railing; that the jurisdiction of the city over the lake is for limited and special purposes only, and not for the purposes set forth in the complaint; that the placing of stone and earth in the shallow waters of the lake, as alleged, prevents the nuisance and accumulation of *débris* and dead fish on the

is said that our acts of assembly would seem to have recognized the right of the owner to erect wharves down to low-water mark.

The Oregon statute gave persons who had purchased tide lands from riparian owners the right to acquire the state's title to the same. *De Force v. Welch*, 10 Or. 507.

The New York act of 1813 provided for giving the owners of land abutting on the navigable water of New York city a right to erect wharves. *Verplanck v. New York*, 2 Edw. Ch. 228.

Riparian landowners to whom the land under water has been granted under the acts of 1813 and 1815 may erect wharves and piers into the water in front of their property, which the interests of commerce require. *People v. New York & S. I. Ferry Co.* 68 N. Y. 71.

The statutes giving the owners of land abutting on navigable waters in New York city a right to erect wharves does not make the wharves when erected public property subject to the right of any one to use them upon paying reasonable fees. *Wetmore v. Atlantic White Lead Co.* 37 Barb. 78.

In New York the legislature has given the owners of lands in Brooklyn the right to erect bulkheads as far into the East river as the permanent water line established by law. *Wetmore v. Brooklyn Gaslight Co.* 42 N. Y. 884.

In *Morris Canal & Hkg. Co. v. Central R. Co.* 16 N. J. Eq. 419, there was an express grant of the right to build wharves.

By the New Jersey wharf act the right to reclaim the shore in front of his land was vested in the shore owner. *Stockham v. Browning*, 18 N. J. Eq. 260.

But the rights conferred by the wharf act are revocable at any time before they are executed by the owner, and the state, having the title to the land under the navigable waters, may grant it to a third person without making compensation to the owner of the adjoining shore. *Stevens v. Paterson & N. R. Co.* 84 N. J. L. 532, 3 Am. Rep. 299.

On the other hand, in Massachusetts a statute authorizing a wharf proprietor to extend it into the channel to the harbor line is a grant, and cannot be revoked by a subsequent grant to a railroad company to lay tracks along the shore between the wharf and the water. *Fitchburg R. Co. v. Boston & M. R. Co.* 3 Cush. 58.

So, in *Casey v. Inloes*, 1 Gill, 501, 39 Am. Dec. 658, it is said that the right of wharfing out under the statute granting that right is a vested right peculiar in its nature; a quasi property of which the owner could not be deprived without his consent. And if a third person made the improvement the title would vest in the owner of the upland.

The Massachusetts act of 1806 gave to the owner of lots adjoining the Acushnet river, power to erect and maintain wharves extending to the channel of the river. *Hamlin v. Pairpoint Mfg. Co.* 141 Mass. 51; *Hastings v. Grimshaw*, 153 Mass. 497, 12 L. R. A. 617.

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Under the Massachusetts colonial act wharves could be built out to the channel if a sufficient passage or way was left for public navigation. *Com. v. Crownshield*, 2 Dane, Abr. 697; *Com. v. Pierce*, 2 Dane, Abr. 696.

Under the Maryland statute the riparian proprietor has the exclusive right of making improvements into the waters in front of his lands, with the proviso that they shall not interfere with navigation. *Goodsell v. Lawson*, 42 Md. 548; *Hess v. Muir*, 65 Md. 586.

The Louisiana statute of 1857 authorizes the construction of wharves upon the Bayou Teche. *Stevens v. Walker*, 15 La. Ann. 577.

Under the New Jersey act of 1851, the riparian owner had a right to wharf out. *Keyport & M. P. S. B. Co. v. Farmers Transp. Co.* 18 N. J. Eq. 13.

In Iowa a riparian owner has a right to construct below high-water mark piers and landing places, if he conforms to the regulations of the state. *Mills v. Evans*, 100 Iowa, 712.

The law of Virginia gives the riparian owner title to low-water mark, and authorizes him to extend wharves from the land to the channel, provided navigation is not thereby obstructed. *United States v. Bain*, 3 Hughes, 593.

Rights as against individuals.

An individual who is specially injured by the erection of a wharf may maintain an action for the nuisance. *Harrison v. Sterett*, 4 Harr. & McH. 540.

But the mere building of a wharf beyond the wharf line does not give a private person a right to maintain a bill to have it removed if it is not in fact a nuisance. *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435.

The fact that a property owner has erected a pier without the consent of the state will not give a railroad company the right to take it for its own use without compensation. *Davenport & N. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51.

The extension of a pier will not be enjoined at the suit of an adjacent owner if the public authorities have taken no action which renders it illegal. *Jenks v. Miller*, 14 App. Div. 474.

If persons have acted unlawfully and injuriously in extending their wharf below low-water mark they may be called to account by the sovereign, but individuals who have no interest in the land covered by the wharf cannot require compensation to be made to them for the use of the land. *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384, 46 Am. Dec. 568.

The owner of lands not accessible by navigation from the sea has no cause of complaint because of being deprived by the erection of wharves of the ebb and flow of the tide to his premises, or the right thereby to drain over the lands of others. *Henry v. Newburyport*, 149 Mass. 582, 5 L. R. A. 179.

A wharf below high-water mark is a nuisance, but a private individual cannot without necessity

defendant's land and the vicinity thereof, and enables him to more readily reach the deeper waters of the lake by boat, and prevents the action of the waters and ice upon his land to his damage.

At the close of the trial the court found, as matters of fact, that Spaight (formerly Rutledge) street is one of the public streets of the city, and extends between blocks 149 and 150; that the southerly line of said street is, and ever has been, the line marking the crest of the bank along said block 150, upon which was situated a certain iron fence or railing at the time of the commencement of this action, and being at all points along said block many feet distant from the waters of the lake; that

said street between said blocks is a public street only by virtue of the fact that it has been used and worked and traveled for 20 years; that it is materially less than 66 feet wide (being of such width only as it has been worked and used); that the street so used and traveled between said blocks was never dedicated to the public by any of the plats of the city for the purpose of a public street; that it was not laid out, located, established, traveled, or used at the point or points fixed by the various plats of the city creating and fixing the streets, lots, and blocks of the city, and has never been used, worked, or traveled south of said iron fence or railing as it existed at the commencement of this action; that the loca-

run his vessel against and injure it without liability for damages. *Dimes v. Petley*, 19 L. J. Q. B. N. S. 452, 15 Q. B. 276, 14 Jur. 1132.

Though the grant of a right to erect a wharf if destructive of the paramount right of navigation and fishing may be void, the remedy is not by injunction at the suit of an individual. *Delaware & M. R. Co. v. Gill & J.* 479, 29 Am. Dec. 561.

The owner of a right of fishery has no claim against one who, acting without license from the state, erects a wharf in the stream so as to interfere with the fishery, since that right is held subject to the paramount right of the public. *Tinicum Fishing Co. v. Carter*, 61 Pa. 29, 100 Am. Dec. 557.

Right under grant or license.

A grant of a right to build a wharf as long as 1200 feet near the island in the tule in Suisun valley, in a certain county, on the land of the state, is not void for uncertainty, and the grantees have a right to select any property which is within the terms of the description for the erection of the wharf, and must proceed within a reasonable time with its erection. *Rush v. Jackson*, 24 Cal. 308.

A constitutional provision that no one shall be entitled to exclusive privileges but in consideration of public services will not prevent the legislature from granting to one person the exclusive right to erect wharves for the use of the public. The court says that the position taken, that the owners of lands lying on the sea have the right to build wharves for their own use into the sea adjoining the fronts of their lands, and cannot be deprived of that grant under legislative authority, cannot be maintained. *Martin v. O'Brien*, 34 Miss. 21.

Where a grant of a right to build a wharf of a certain length was made in 1852, and a structure only a part of that length was built and left for six years without addition, it was held that the power of the grantees had been exhausted, and that they could not afterwards extend it further without a new grant. *Rush v. Jackson*, 24 Cal. 308.

A grant to two persons of a right to erect a wharf in front of their lands, when the title appears to be in one alone, will not avail to defeat the right after the structure has been erected, if the one holding the title has conveyed to the other, and he to a third person who has held possession for more than thirty-five years. *Brooks v. Roberts*, 45 U. S. App. 395, 78 Fed. Rep. 411, 24 C. C. A. 158.

A state cannot grant to a railroad company its title to the lands under the navigable waters of an entire harbor so as to give it the right to regulate the construction and use of wharves. *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 38 L. ed. 1018.

And in the lower court it had been held that there was nothing to prevent the state from withdrawing the authority which had been given to the railroad company, if it saw fit to do so. *Illinois v. Illinois C. R. Co.* 38 Fed. Rep. 780.

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A grant of a right to make a wharf will not authorize the grantee to make fills which will cut off access from a highway which formerly terminated at the water's edge to the water. *People v. Lambier*, 5 Denio, 9, 47 Am. Dec. 273.

A statutory grant to a railroad company of the right to construct its track along the bank of a navigable body of water gives it no riparian rights which will entitle it to construct wharves into the water for the benefit of its business. *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 38 L. ed. 1018.

A landowner has no common-law right to erect a wharf below high-water mark, and a legislative grant of the soil below high-water mark will not by implication prevent the construction of improvements in the harbor which will cut a wharf erected there off from access to the navigable part of the river. *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 59.

In *Dugan v. Baltimore*, 5 Gill & J. 387, the court, in speaking of the title to land which had been made by filling out in front of a market house under authority of the act of the legislature, says the improvements authorized and encouraged were those made by improvers in front of their own lands, not of their neighbors. The legislature never designed such an invasion of the rights of public property; nor indeed had they the power to legalize it, if such had been their intention.

The grant by Ramirez to Pintado of the right to make wharves in the Bay of Pensacola was void because of want of jurisdiction to make it. *Richardson v. Sullivan*, 38 Fla. 90.

To entitle the owner of land to a license to build a wharf he must be the owner of land adjoining the water's edge at ordinary high water. *State v. Brown*, 27 N. J. L. 13.

But the licensing board has no power to inquire into the applicant's title to the land. *Brown v. Morris Canal & Bkg. Co.* 27 N. J. L. 648.

So far as the right to wharf out extends under a license to wharf, the property is vested in the licensee. *State, Roberts v. Jersey City*, 25 N. J. L. 530.

A state has the power to lease the space in front of a public street where it reaches navigable water, to a private person for the construction of a dock, which, when completed, may be treated as private property. *United States v. Bain*, 3 Hughes, 593.

In *Baltimore v. McKim*, 3 Bland, Ch. 453, it was held that permission given to an individual by the port wardens, to build a wharf on a certain public street, was a mere nullity.

The water in front of a plat of land dedicated by an individual for a public park at a time when the title to the water was in the government is not annexed to the park by a statute for benefit of commerce which requires the erection of wharves, and owners of land abutting on the park cannot enjoin the erection of wharves by a lessee of the government upon a space opposite the park. *Euge v. Apalachicola Oyster Canning & Fish Co.* 25 Fla. 636.

tion of Spaight street, according to the various plats of the city, is a number of feet north of the present north line of said street and as it now exists; that none of the defendants removed any earth, boulders, stones, or other materials from within the limits of Spaight street, or in any way injured or damaged the support of said street; that none of the defendants committed any nuisance of any kind or description at the point mentioned in the complaint; that, some years prior to the commencement of this action, certain persons, then owning lots in block 150, placed in the waters of the lake certain rocks and boulders, in front of and distant from the shore line; that the action of the waters and ice in succeeding

years carried such rocks and boulders in and close to, and in some instances upon, the shore of block 150; that the only acts of any of the defendants were to remove said rocks and boulders further out into the lake, and so place them in a uniform line as to afford protection to the shore, and to prevent the accumulation of material at that point calculated to create a nuisance; that such acts created no nuisance, and had no tendency so to do, but rather to prevent one, and in no way interfered with or weakened the support of said street, but rather tended to strengthen and protect the same; that Heath is the owner in fee of lot 3, block 150, according to the several plats of the city; that the north part of lot 3, lying

To low-water mark.

Riparian owners are permitted to build wharves and make other improvements between high and low water mark if they do not materially interfere with the right of navigation common to all citizens. *Cincinnati Co. v. Com.* 11 Ky. L. Rep. 629.

One of the earliest objects to which the settlers in Massachusetts gave their attention was commerce. For this purpose wharves erected below high-water mark were a necessity. But the colony was not able to build them at public expense. To induce persons to erect them the common law of England was altered by ordinance providing that the proprietor of land adjoining on the sea should hold to low-water mark where the tide did not abate more than 100 rods. *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155.

The title of a riparian owner of land bounded by the Ohio river extends at least to low-water mark, subject to the easement of navigation and the right of the state to control its use for the promotion of commerce. *Barre v. Fleming*, 29 W. Va. 314.

The owner may build his wharf to low-water mark without license. *Frankford v. Lenning*, 2 Phila. 403.

One owning the land to low-water mark may erect a wharf to the boundary of his property if he does not thereby create a nuisance to navigation. *Delaware & H. Canal Co. v. Lawrence*, 2 Hun, 163.

The owner of land bordering on the Ohio river has a right to establish a private wharf as far as low-water mark. *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 495.

The proprietor of land adjoining a navigable river has the exclusive right to the land between high and low-water mark for the purpose of erecting wharves thereon. *East Haven v. Hemingway*, 7 Conn. 202.

A wharf below high-water mark in tide waters is not, as matter of law, a nuisance. The question is one of fact. *People v. Davidson*, 30 Cal. 379.

Prescriptive right.

In *Durham v. Newcastle-upon-Tyne* (Angell, *Tide Waters*, p. 84, Appx.), the corporation prescribed for the right to erect and license wharves on the River Tyne, which was upheld by a dismissal of an appeal from a decree recognizing the claim.

The Federal cases.

Following the general understanding which has prevailed throughout the country, there are several expressions of opinion in decisions of the Supreme Court of the United States in favor of the right to wharf out.

A riparian proprietor may erect a pier for his exclusive use and benefit if it terminates at the point of navigability, and does not interfere with the statutory regulations, and he is not obliged to per-

mit other persons to fasten their vessels to it. The court says such structures are never held to be nuisances unless they obstruct the paramount right of navigation, and that is a question of fact. *Dutton v. Strong*, 1 Black, 23, 17 L. ed. 29.

Although riparian proprietors on navigable streams above the tide are limited to the bank of the stream, they have the same right to construct suitable landings and wharves as is accorded riparian proprietors on navigable water affected by the ebb and flow of the tide. *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74.

In *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984, municipal authorities acting under authority of the state attempted to remove a wharf which had been erected into the waters of a river, and in support of the right relied upon two grounds, one of which was that the one who had erected the wharf had no title to the soil. This raised the question between the individual and the state, and the court says that under the doctrine of the Federal courts he probably had no title to the soil, while the Wisconsin court, from which state the case came, recognized such title. After deciding this question, however, the court said: But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, which may be exercised subject to the general rules and laws for the protection of the public rights in the river. This proposition has been decided by this court. This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation.

In *Illinois v. Illinois C. R. Co.* the railroad company had acquired by purchase certain lots on the shore of Lake Michigan, from which it had erected piers into the water, and it had acquired from the state a grant of all the land under water in the harbor, with authority to improve the same. The state brought suit to enjoin the maintenance of the piers or the erection of new ones, claiming that the grant was void and that the wharves had been erected without right upon the domain of the state, and asked that the unlawful structures be directed to be removed and the corporation enjoined from constructing others. Mr. Justice Harlan in the circuit court first considered the rights under the ownership of riparian lots, and held (33 Fed. Rep. 755), that in the absence of any legislative or governmental direction as to the manner of the occu-

immediately south of the street, throughout its whole width, has, ever since said lot was platted, remained high and dry land, and is now high and dry land; that assuming Spaight street to be 66 feet wide, and located where the city claims it to be, yet Heath would still own dry land between the street and the lake along the whole width of his lot 3; that Powers is the owner and is possessed of lots 4 and 5, block 150, which extend from the iron railing or fence to the water's edge of the lake; that Mayers is the owner of lots 6 and 7 of block 150, which extend from the iron railing or fence to the water's edge of the lake; that continuously since said lots in block 150 were laid out and platted there has existed dry land on said lots at a point

66 feet south of the north line of Spaight street; that Kerns is and was the owner of lot 9 in block 150, and he and his ancestors in title have continuously owned the same since the platting thereof, and the same extends from the iron fence or railing south-erly to the lake; that there is and ever has been a portion of said lot, between the waters of said lake and a point 66 feet south of the north line of Spaight street as actually established, dry land; that the city has no title to any portion of the bed of the lake, and has no jurisdiction over its waters, except for the limited and specific purposes mentioned in the charter. And as conclusions of law the court finds, in effect, that the defendants, Heath, Power, Mayers, and Kerns, are and were re-

pation of the bed of the lake within the state, the railroad company as riparian owner of the water lots had the right, in virtue of such ownership and as part of its purchase of such lots, to connect the shore line by artificial constructions with outside waters which were navigable in fact; although the exercise of that right is at all times subject to such regulations—at least those not amounting to prohibition—as the state may establish. And it was held that the piers in front of the riparian lots could not be removed, but it was held that the grant was void. The railroad company appealed from the decree. The Supreme Court of the United States, in an opinion by Mr. Justice Field, upholds the decision as to the rights of riparian owners upon the authority of *Yates v. Milwaukee and Dutton v. Strong* (Illinois C. R. Co. v. Illinois, 146 U. S. 445, 36 L. ed. 1040), and although three of the justices dissent, this doctrine is not questioned in the dissenting opinion.

That case comes very close to being a direct decision of the question, for, although the state does not appear in terms to repudiate the doctrine of riparian rights, it does ask to have the piers removed, which the court refused to do so far as they were erected in front of riparian lots owned by the company.

In *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 381, in which Mr. Justice Gray attempts to review the decisions upon the question, he shows that passages in opinions of that court which were relied on as showing that a riparian owner had, independently of local law, a right of property in the soil below high-water mark, and the right to build out wharves to reach navigable water, must be interpreted in view of the fact that the states from which the cases came had recognized such right as part of the local law, and it was held that in case the state had absolutely repudiated such right the supreme court would follow its law.

The general language found in the prior decisions was doubtless used without considering the possibility that the doctrine of riparian rights might be repudiated in some state or states, and the implication would seem to be that the court regarded such right as a common-law right, or at least one not requiring express legislative permission to exercise. The law of the subject as gathered from the Illinois Central case, and those the doctrine of which it followed, as read in the light of *Shively v. Bowlby*, would seem to be that if a state does not expressly disallow all right of access both to navigable waters and to the water's edge such right exists and will vest upon the acquisition of the riparian lot, and after it vests it cannot be taken away without compensation. The effect of Mr. Justice Gray's opinion in *Shively v. Bowlby* would seem to be simply to leave the states free to establish their own rules unembarrassed by the expressions of opinion which have fallen from the 40 L. R. A.

members of the Supreme Court of the United States. But the expressions in those opinions have been adopted and followed in so many state courts that there is little reason to believe that the withdrawal of the support furnished by them now will have any material effect upon the development of the law.

It would seem that to some extent, at least, Justice Gray had changed his opinion in regard to the Federal cases, for in *Boston v. Richardson*, 105 Mass. 365, he cites *Dutton v. Strong* and *Yates v. Milwaukee* as holding that the riparian proprietor has the right to build out wharves for his own use and the use of the public, provided he does not obstruct navigation; and this without regard to the question whether he has or has not title in the soil under the water before he so builds upon it.

In *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 623, where the question was as to the title to a small inland lake, the court says the title of the shore and land under tide water is in the state, and it may dispose of the usufruct of such lands, as is often done by the erection of wharves and piers and other adventitious aids of commerce.

A private wharf may be maintained in a navigable river. *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584.

Cases denying the right to build wharves.

All the courts agree that the obstruction cannot be extended beyond the point of navigability or be allowed if it is in fact a nuisance.

A wharf is not *per se* a nuisance. *Laughlin v. Lamasco City*, 6 Ind. 223.

At common law the erection of wharves in tide water is not indictable as a nuisance unless it obstructs navigation. *Engs v. Peckham*, 11 R. I. 210.

But the erection of a wharf which materially obstructs access from riparian property to the water will be enjoined as a nuisance. *Shirley v. Bishop*, 67 Cal. 518.

A city cannot declare a private wharf a nuisance, and order its removal, when in point of fact it no hindrance or obstruction to navigation. *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

It is not every erection into tide waters which is a nuisance. In deciding whether a proposed wharf will be a nuisance, the character of the river and existing modes of navigation, as well as the necessity of wharves for commerce, should be borne in mind. *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701.

The mere fact that a wharf may interfere with navigation does not render it unlawful unless it interferes to such an extent as to make it a nuisance. *Delaware & H. Canal Co. v. Lawrence*, 2 Hun, 168.

The riparian owner, although owning the land to low-water mark, cannot construct his wharf so as to interfere with the navigation of the river.

spectively the owners of the several lots as stated; that each and all of said lots extended from the iron railing or fence to the lake; that neither the city nor any of the inhabitants thereof have any right of access to the waters of the lake over and across any of the said lots, but that the right to the same, as well as all other riparian rights incident to the ownership of land bordering upon the lake at that place, belongs to the respective defendants; that the city has no title to the bed of the lake, and is only given jurisdiction over its waters for the limited and specific purposes mentioned in its charter, which gave it no authority to enjoin or prevent any of the acts herein found to have been done by any of the defendants; that the injunction herein was improperly issued; that

the defendants are entitled to judgment dismissing the complaint herein, vacating the preliminary injunction, and for their damages, including reasonable attorneys' fees, and costs and disbursements in this action. And it was thereby referred to a referee to assess the damages of each of the defendants, and report the same to the court, and judgment was entered thereon accordingly. Upon such findings judgment was entered ordering and adjudging, in effect, that the injunction be, and the same was thereby, dissolved, and the complaint dismissed with costs, taxed at \$163.52 for Kerns and Blackner, and \$42.27 for Heath, and ordering and adjudging that the defendants do have and recover against the plaintiff, as and for damages sustained by them by reason of

Sherlock v. Bainbridge, 41 Ind. 35, 18 Am. Rep. 302.

Riparian proprietors have no right to erect wharves between high and low water mark if thereby the passage of vessels and boats will be materially straitened and injured. *Kean v. Stetson*, 5 Pick. 432.

It is no obstruction to build out a wharf if a sufficient passage or way is left for the public. *Com. v. Crowninshield*, 2 Dane, Abr. 606.

There is no right to erect a wharf in a narrow stream where the effect of it will be to obstruct and deflect the flow of the water to the detriment of the public. *Murphy v. Bullock*, 20 R. I. pt. 1, p. 36.

The right of an individual to build a wharf in front of his land in navigable waters is subject to the qualification that such wharf does not improperly impede the public navigation. *Frink v. Lawrence*, 20 Conn. 117, 50 Am. Dec. 574.

Cases absolutely denying right.

There are some courts which deny absolutely the right of the riparian owner unless he acquires the right by contract with the state.

In Washington, under a peculiar constitutional provision retaining the title to the tide ways in the state, it is held that—

As against the state a littoral owner can assert no valuable rights below the line of ordinary high tide. *Harbor Line Comrs. v. State, Yesler*, 2 Wash. 530.

A riparian proprietor has no right as against the state or its grantees to extend wharves in front of his land below high-water mark. *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632.

Parliament has always had the power of depriving a riparian owner of his access to the water without compensation, and the state has succeeded to the same right in this country. *Harbor Line Comrs. v. State, Yesler*, 2 Wash. 530.

In Oregon also, although the early *dicta* were the other way, it has been decided that the riparian owner has no right in the tide way.

In *Wilson v. Welch*, 12 Or. 353, it is doubted whether a sale by the state of land under navigable water could be made which would deprive the riparian owner of his rights.

It is said that the state, although having title to the bed of navigable waters, holds that title for the benefit of the public, and cannot take away the riparian rights of abutting owners without making compensation therefor.

So, it was said that under the Oregon law the owner of the shore has a right to build wharves out from his land and reclaim the submerged land from the water. *Parker v. Taylor*, 7 Or. 435.

The riparian owner has a right to build wharves out to the navigable water. *Parker v. West Coast Pkg. Co.* 17 Or. 510, 5 L. R. A. 61.

But in *Bowley v. Shively*, 22 Or. 410, it was finally settled that there is no right to wharf out. 40 L. R. A.

So upon repeal of the statute giving riparian owners the right to purchase the adjoining land under water, their right to do so ceased. *Olney v. Moore*, 18 Or. 238.

Although it is said that it is the policy of Oregon to permit owners of riparian lands on non-tidal rivers to build wharves in front of their property. *Lewis v. Portland*, 25 Or. 133, 22 L. R. A. 736.

The right to erect a wharf and to receive tolls for the use of it is a franchise, and cannot be exercised by a private citizen except under a grant from the sovereign power or by prescription. *Wiswall v. Hall*, 3 Paige, 313.

In Louisiana the banks of the Mississippi river are public property subject to be used by the public at large, and if an individual builds a wharf it will be upon the condition that the public will have the use of it. *Hart v. Baton Rouge*, 10 La. Ann. 171.

There is no right or property in the privilege of erecting a wharf below low-water mark. The exercise of the privilege is dependent upon a license from the state. *Naglee v. Ingersoll*, 7 Pa. 185.

A riparian owner has no right to erect a wharf below low-water mark. *Borough v. The Geneva*, 3 Lanc. L. Rev. 134.

At common law a riparian proprietor has no right to wharf out from his own land. *Dana v. Jackson Street Wharf Co.* 31 Cal. 113, 39 Am. Dec. 164.

There is no right to erect wharves as against the state. *Murphy v. Bullock*, 20 R. I. pt. 1, p. 36.

In New York the court held, in *Lansing v. Smith*, 8 Cow. 143, that there was no private right of action for an improvement in the river which interfered with access to wharves further up the stream.

And that decision was followed in *Gould v. Hudson River R. Co.* 6 N. Y. 522, where the right of access was cut off by a railroad built along the shore. But that case was overruled in *Rumsey v. New York & N. E. R. Co.* 138 N. Y. 79, 15 L. R. A. 613.

Statutory restrictions.

Under the New York act of 1845 a grantee of land under water on the river front of New York city could not construct a wharf below high-water mark without permission of the common council. *Duryea v. New York*, 26 Hun. 120.

Under the New Jersey act of 1891, no pier can be built into navigable water without authority of commissioners. *Stockton v. American Luloi Co.* (N. J. Ch.) 36 Atl. 572.

A riparian owner cannot since the act of March 30, 1877, build and maintain wharves in front of his land. *Folsom v. Freeborn*, 13 R. I. 200.

Wharf beneficial.

The rule which was at one time suggested in England, that if the wharf did more good than

the injunction, the sum of ——— dollars and ——— cents, as assessed by the referee therein appointed. From that judgment the plaintiff brings this appeal.

Messrs. J. A. Aylward and R. M. Bashford for appellant.

Messrs. Erdall & Swansen and W. R. Bagley, for respondent Heath:

The title to the bed of a meandered lake or pond is in the state. The riparian owner along such lakes or ponds takes to the edge of the water in its ordinary condition, and has certain rights which are incident to his ownership of the soil immediately adjoining the water; namely, the right of exclusive access to and from the waters of the lake on his land; also

the right, in case of a navigable lake, to construct in shoal water, in front of his land, proper wharves or piers in aid of navigation, and, at his peril of obstructing navigation, through the water far enough to reach actually navigable water.

Diedrich v. Northwestern Union R. Co. 42 Wis. 248, 24 Am. Rep. 399; *Boorman v. Sunnucks*, 42 Wis. 238; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *McLennan v. Prentice*, 85 Wis. 437; *Ne-Pee-Nauk Club v. Wilson*, 96 Wis. 290; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018; *Shively v. Bouby*, 152 U. S. 1, 38 L. ed. 331.

The intrusion only amounted to the creation of a purpresture, and not a public nuisance. A public nuisance is something which mate-

harm it was not a nuisance, has not been recognized in this country.

It is no defense to an indictment for nuisance in building a wharf on public property that the wharf was beneficial to the public. *Respublica v. Caldwell*, 1 Dall. 150, 1 L. ed. 77.

Regulation of right.

There is a right on the part of the public to regulate the erection of wharves so that they may best promote the public welfare.

The right of a riparian owner to wharf out is subject to such regulations as the state shall see fit to prescribe. *State v. Sargent*, 45 Conn. 358.

All sovereignties within which are navigable rivers have a right to exercise jurisdiction over their waters. *Delaware & H. Canal Co. v. Lawrence*, 2 Hun. 168.

The right to construct wharves is subject to the control of the state and municipal authorities. *Bond v. Wool*, 107 N. C. 139.

The state has a right to regulate the erection of wharves and piers for the benefit of commerce and navigation, even in cases where the riparian owners have a right to erect them. *People v. New York & S. I. Ferry Co.* 68 N. Y. 71.

In *Atty. Gen. v. Ewart Booming Co.* 34 Mich. 462, the court says that while the state may limit wharves to the line of navigability, this is seldom done except under certain peculiar circumstances.

By the Maryland act of 1783 the port wardens of Baltimore were authorized to grant permission to make wharves, but in order to vest a title to a wharf it must have been made according to permission granted. *Giraud v. Hughes*, 1 Gill & J. 249.

An injunction may be issued against the construction of a pier 25 feet into a navigable river to a point where the water is 25 or 28 feet deep, if it will seriously injure the business of a ferry company, under the act of Congress providing that it shall be unlawful to build a wharf outside established harbor lines, or in navigable water where there are no harbor lines, without permission of the Secretary of War. *Grand Trunk R. Co. v. Backus*, 46 Fed. Rep. 211.

When a riparian owner has built a wharf in accordance with the designation of the proper authorities as to what portion of the bulkhead line he shall be entitled to, his land being in a cove, he cannot be deprived of his wharf by a subsequent change of the method of appropriating the bulkhead line, by which he receives a shorter portion. But if he has not built he may be compelled to conform to the new designation. *Classen v. Chesapeake Guano Co.* 81 Md. 258.

A city cannot by building a wharf where a street terminates on the water's edge deprive a riparian owner owning the land under the water of the right to build a wharf, by reason of its authority 40 L. R. A.

to regulate wharves, and the statute providing that piers shall be a certain distance apart, so that it may maintain a suit to enjoin him from doing so. *Brooklyn v. New York Ferry Co.* 87 N. Y. 34. *Affirming 23 Hun. 277.*

The fact that a pier exceeds the width permitted by statute does not deprive it of the character of a lawful pier to the extent of the permitted width, nor justify the erection of another pier within the prohibited distance from it. *People v. New York & S. I. Ferry Co.* 68 N. Y. 71.

The building of a wharf without a license from the state, or someone to whom the authority to license has been delegated, beyond low-water mark, is a clear encroachment on the rights of the public. *Frankford v. Lennig*, 2 Phila. 408.

The owner of a lot on the water front of San Francisco has no right without a license to wharf out from his own land into the bay. *Dana v. Jackson Street Wharf Co.* 31 Cal. 118, 89 Am. Dec. 164.

Under the California act of 1870 an application for a franchise to construct a wharf must particularly describe its location. *Templeton v. Coburn*, 48 Cal. 563.

If a wharf is erected in tide water and upon soil belonging to the state, without a license from the state, it will belong to the state, and may be recovered by it in ejectment. *People v. Davidson*, 31 Cal. 379; *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634.

Harbor lines.

The establishment of harbor lines is a method of regulation which is commonly used. See note to *Grand Rapids v. Powers* (Mich.) 14 L. R. A. 496.

The legislature has power to establish lines beyond which no wharf shall be maintained. But such statute will not affect the right to maintain wharves erected before their passage. *Com. v. Alger*, 7 Cush. 53; *Atty. Gen. v. Boston & L. R. Co.* 118 Mass. 349.

Under the North Carolina statutes requiring the authorities of a town bordering on navigable water to fix the wharf line at deep water upon application of riparian owners, the mere fact that one location has been made and a wharf built in accordance with it does not deprive the riparian owner of the right to compel a second fixing of the line in case the former one does not reach deep water. *Wool v. Edenton*, 117 N. C. 1.

Where the navigable line has been established by dedication of lots and the establishment of a dock line by the authorities, a wharf cannot be extended beyond the line. *Yates v. Judd*, 13 Wis. 119.

The extension of a wharf beyond the established lines of the harbor is a purpresture. *The Idlewild*, 26 U. S. App. 469, 64 Fed. Rep. 603, 12 C. A. 32.

A statute establishing a wharf line beyond which no wharf can be built does not take the property

rially injures, inconveniences, or damages the public.

Douglas v. State, 41 Wis. 387; *State v. Carpenter*, 68 Wis. 172, 60 Am. Rep. 848; *Janesville v. Carpenter*, 77 Wis. 298, 8 L. R. A. 808; Gould, Waters, § 21; 1 Wood, Nuisances, § 4; *People, Britton, v. Park & O. R. Co.* 76 Cal. 156.

Under the circumstances, whether or not the acts of the respondent in this case amounted to a public nuisance was a question of fact.

Gould, Waters, § 21, p. 45.

The remedy for a purpresture is either by an information of intrusion at common law, or by information in equity, at suit of the attorney general. A common nuisance is abatable at suit of the Crown by virtue of its power of su-

perintendence and control over public rights, and the attorney general, on the part of the Crown, may proceed by information in equity for the protection of either the *jus privatum* of the King, or the *jus publicum* of his subjects, from the nuisance.

Gould, Waters, § 21, p. 46. See also *State v. Carpenter*, 68 Wis. 172, 60 Am. Rep. 848; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *People, Britton, v. Park & O. R. Co.* 76 Cal. 156; *Stewart v. Fitch*, 81 N. J. L. 17; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386.

The city of Madison, in its public capacity, has no control over public nuisances within its limits, except such as is conferred upon it by its charter or some general law.

of a riparian owner. *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435.

The city of Evansville has under her charter the power to establish wharf lines, but her power does not extend to prevent wharves above high-water mark. *Martin v. Evansville*, 32 Ind. 85.

The legislature has no power to establish wharf lines upon a stream which is navigable only for floating logs and rafts. *Grand Rapids v. Powers*, 89 Mich. 94, 14 L. R. A. 498.

In a state where the riparian owner owns to the middle of the stream the public authorities cannot, after he has erected a wharf, arbitrarily establish a wharf line hundreds of feet away from the point of navigability, and, without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves or docks to it for that purpose, nor declare the wharf that extends beyond it a nuisance and proceed to abate it. *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

Right of municipal corporation to build wharf.

The power to erect wharves and charge wharfage is not one of the implied powers of the municipal corporation, but requires for its exercise an express legislative grant. *The Geneva*, 16 Fed. Rep. 874.

The power to erect wharves is not strictly one relating to municipalities, but it is competent for the legislature to make them, in such measure as it deems expedient, repositories of it. *Mobile v. Moog*, 53 Ala. 561.

A city cannot engage in the business of erecting wharves and charge for the use of them without legislative authority. But when one of its streets is laid out along a river it may make suitable structures to enable the public to make use of the rights of commerce and transportation afforded by the river. *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62.

The power to erect wharves is a franchise which a municipal corporation can acquire only by legislative grant. *St. Martinsville v. The Mary Lewis*, 32 La. Ann. 1293.

The power of a municipal corporation to acquire land for wharf purposes must be derived directly from the legislature. *Roberts v. Louisville*, 92 Ky. 95, 13 L. R. A. 844.

The city of St. Louis was given power by charter to construct wharves. *Waddingham v. St. Louis*, 14 Mo. 190.

And the same is true of Alexandria. *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 775.

A city has power to build piers under a statute enabling it to enlarge slips, and, upon paying one third of the expense of building the necessary piers, shall be entitled to share in the slippage. *Thompson v. New York*, 11 N. Y. 115.

Under the Indiana statutes cities have power to 40 L. R. A.

construct wharves. *Jeffersonville v. The John Shallcross*, 35 Ind. 19.

A city has a right to build a wharf for public purposes where a street which has been duly dedicated to the public abuts upon a navigable river. *Backus v. Detroit*, 49 Mich. 110, 43 Am. Rep. 447.

Wharves may be constructed by the city either directly or by contract with others, giving them the revenue for a certain period as compensation for the expenditure. *Geigor v. Flor*, 8 Fla. 325.

In California a statute authorized San Francisco to construct wharves at the ends of all the streets which terminated on the bay. *People v. Broadway Wharf Co.* 31 Cal. 84.

The subsection of the California municipal government act, giving cities the right to erect wharves, does not give them the right to construct them at any point irrespective of the rights of others. *San Pedro v. Southern P. R. Co.* 101 Cal. 388.

The right of erecting wharves will pass to a town when the owner of land lays it out into lots and blocks which he sells according to a plat which leaves the space along the water open and marked for public use. *Rowan v. Portland*, 8 B. Mon. 256; *Newport v. Taylor*, 18 B. Mon. 699.

A city has a right to construct a wharf at the termination of a dedicated street which runs to the water. *McMurray v. Baltimore*, 54 Md. 103.

A city has a right to build a wharf for public purposes where any street which has been duly dedicated to the public abuts upon a navigable stream. *Backus v. Detroit*, 49 Mich. 110, 43 Am. Rep. 447. That case turned, however, upon the question of the extent of title in the public, and not upon the power of the city as such.

A city has a right to build and control a wharf in front of its streets. *Galveston v. Menard*, 23 Tex. 404.

But where the title to the fee of a street which runs to the water is in the abutting owners the municipal corporation is not a riparian proprietor upon the water so as to justify the port wardens in granting to it a license to erect a wharf from the end of the street into the water. *Rc Cramp*, 18 Phila. 16.

A city in which the streets have been dedicated for public use has no authority to grant to a private person a right to erect a wharf at the termination of one of the streets, and take toll there. The title to the street being in the public, any wharf erected there must be free. *Russell v. The Empire State*, *Newberry*, Adm. 542.

The Indiana act of 1852 gave towns no authority to construct wharves. *Snyder v. Rockport*, 6 Ind. 237.

A municipal corporation may lease a small portion of a water front for a private wharf. *Pacific Coast S. S. Co. v. Kimball*, 114 Cal. 414.

A city which has been given power to construct wharves and fill up flats cannot make a lease of

2 Wood, Nuisances, § 748.

The general language of the charter is not intended to apply to acts such as are complained of in this case, but is intended to apply to such acts as intrinsically and inevitably amount to a nuisance; in other words, to acts which amount to a nuisance *per se*, and which necessarily affect the health and safety of the inhabitants of the city, or the property of such inhabitants.

1 Dill. Mun. Corp. § 379, also § 374; *Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446; *Felt v. Felt*, 19 Wis. 194.

The fact that the legislature has delegated to the common council of this city the authority to prevent certain kinds of nuisances from being committed in this lake, by necessary implication excludes its authority to prevent others.

the right to a private corporation. *Corpus Christi v. Central Wharf & W. Co.* 8 Tex. Civ. App. 94.

Right of city to regulate wharf.

The corporation of Washington has the power under act of Congress to regulate the erection of wharves. *District of Columbia v. Johnson*, 3 Mackey, 120.

Under the Maryland acts of 1783 and 1796, the city of Baltimore may refuse its authority to the erection of a wharf, or may grant it with such conditions, limitations, or restrictions as it deems most beneficial to the navigation and use of the port of the city. *Baltimore v. White*, 2 Gill, 444.

Wharves erected within the corporate limits of a municipality must yield to the paramount right of the corporation under the law by which the corporation is created. *Grant v. Davenport*, 18 Iowa, 179.

If a city has been given the right to control the water front beyond a line drawn on the bay, a person who subsequently acquires land from the state will take in subordination to such right, and cannot erect a wharf against the will of the city. *Weber v. State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798.

If no title to tide lands has passed from the state to a municipal corporation, it cannot enjoin a railroad company from erecting a wharf over them under permission of the state authorities. *San Pedro v. Southern P. R. Co.* 101 Cal. 333.

Right of New York city.

The city of New York received a grant of a strip 400 feet wide around the whole water front of Manhattan island before any private titles had been perfected. It therefore has a right different from that of other municipalities.

The city of New York, when private rights were not interfered with, had a general authority to lay out wharves whenever and wherever it should deem them expedient. *Marshall v. Guion*, 11 N. Y. 461.

An addition to a pier in New York harbor cannot be made without permission from the proper authorities, and if authority has been given for certain additions, which has been exhausted, no further additions can be made without further authority. *Buck v. Post*, 39 Fed. Rep. 249.

After the passage of the act of 1857 to reinvest in the people the title to the Hudson river outside of the port lines, the city of New York could not authorize the erection of a pier outside of such lines, but such erection would be a purpresture and nuisance, to be restrained and abated at the suit of the people. *People v. Vanderbilt*, 28 N. Y. 287.

Where a permanent pier and an exclusive right to its use is a necessity of large steamship lines, 40 L. R. A.

Wisconsin Teleph. Co. v. Oshkosh, 63 Wis. 32.

Any ambiguity or doubt arising out of the words used by the charter must be resolved in favor of the public.

1 Beach, Pub. Corp. §§ 588, 577; 1 Dill. Mun. Corp. § 91, note 2; 15 Am. & Eng. Enc. Law, pp. 1089, 1042; *Gilman v. Milwaukee*, 61 Wis. 588; *Bell v. Platteville*, 71 Wis. 139; *Kilvington v. Superior*, 83 Wis. 222, 18 L. R. A. 46; *Racine v. Chicago & N. W. R. Co.* 93 Wis. 118.

In the absence of special powers given to, or special duties imposed upon, a city by act of the legislature, a city can no more than an individual bring an action in equity to enjoin the commission of a public nuisance, unless it is specially injured in its corporate capacity.

Janesville v. Carpenter, 77 Wis. 288, 8 L. R. A. 808; *Sheboygan v. Sheboygan & F. du L.*

without which business cannot be properly transacted, the duty rests upon the state or the municipality to provide such accommodations or to permit the companies to obtain them from private owners. *Re New York*, 135 N. Y. 253.

If the city is granted the right by the state to establish a new bulkhead line beyond the ends of the wharves of private owners, which have been made under contract with the city, and proceeds to do so, by which the access to the private owners' wharves is cut off, it will be compelled to make compensation to them for the damage so occasioned. *Williams v. New York*, 105 N. Y. 419.

A city which has granted to an individual its right to build a wharf and collect wharfage cannot, without express authority from the legislature, subsequently establish a new wharf line and erect a bulkhead there in such a way as to cut the other wharf off from access to the water. *Lansdon v. New York*, 98 N. Y. 129, *Reversing 6 Abb. N. C. 814*, where it was held that by the terms of the deed to the claimants the city did not undertake to keep the land beyond the wharf line free from obstruction; that all the right that the claimants had was the right to the wharfage from the wharves as they were originally erected.

And that case was followed in *Kingsland v. New York*, 45 Hun. 198.

But it has been held that a city which owns the soil under the water of a river along its front to the distance of 400 feet from the shore is not precluded by a grant to one person of a right to build wharves upon less than the 400 feet upon condition that he is required to do so, from subsequently granting the right to another to build upon the space beyond his grant, the former grant never having been acted upon. *Furman v. New York*, 10 N. Y. 567.

A riparian owner cannot be deprived of his right of access to the water, without compensation, by the erection of a bulkhead for the use of the public. *Van Dolsen v. New York*, 17 Fed. Rep. 817.

Abatement of wharf.

If the soil of the river is in the sovereign he may remove the obstruction at pleasure, whether it is an injury to navigation or not. *Weber v. State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798.

An addition to a pier in the public waters of a harbor where the statute forbids it will be a nuisance so that the court will not interfere with the proceedings of the board of pilot commissioners to abate it. *Moore v. Commissioners of Pilots*, 32 How. Pr. 184.

Effect of street along shore.

The creation of a public street between the abutting owner's property and the stream will cut

R. Co. 21 Wis. 672; Milwaukee v. Milwaukee & B. R. Co. 7 Wis. 85.

The facts in this case are not such as to justify the interference by a court of equity to grant an injunction.

State v. Carpenter, 68 Wis. 165, 60 Am. Rep. 848; High, Inj. § 742, and cases cited in note 4; *Woodruff v. Lockerby*, 8 Wis. 369; *Head v. James*, 13 Wis. 642, 10 Am. & Eng. Enc. Law, p. 830.

Wherever an injunction has been finally dissolved, it is proper to ascertain the damages by a reference for that purpose.

Rev. Stat. § 2778; *Parish v. Reeve*, 63 Wis. 315; *Kane v. Casgrain*, 69 Wis. 430; *Avery v. Ryan*, 74 Wis. 591.

Where the sole purpose of the action is to obtain an injunction, and a temporary injunction is issued, which is dissolved on final hear-

ing, the defendants are entitled to recover as damages reasonable attorneys' fees, even though a motion to dissolve the injunction was not made.

10 Am. & Eng. Enc. Law, pp. 999-1001; *Ford v. Loomis*, 62 Iowa, 586; *Andrews v. Glenville Woolen Co.* 50 N. Y. 282; 2 Sutherland, Damages, pp. 68, 69; *Miles v. Edwards*, 6 Mont. 180; *Swan v. Timmons*, 81 Ind. 243; *Newton v. Russell*, 24 Hun, 40; *Crook v. McManus*, 18 Mont. 152; *Brownlee v. Fenwick*, 103 Mo. 420; *Colby v. Meservey*, 85 Iowa, 555.

Messrs. Chynoweth & Wynne, R. M. La Follette, and *G. M. Roe*, also for respondents.

Cassoday, Ch. J., delivered the opinion of the court:

The complaint alleges, in effect, that

off his right to build wharves. *Potomac S. B. Co. v. Upper Potomac S. B. Co.* 100 U. S. 672, 27 L. ed. 1070.

But it has been held in Minnesota that the dedication to public use of a street along the bank of a stream will not deprive the owner of the fee of his riparian rights to erect wharves into the stream. *Brisbine v. St. Paul & S. C. R. Co.* 23 Minn. 114.

Where the title to the land below high-water mark is in the public it may widen a street running along the shore and erect wharves without the consent of the adjacent proprietor, and without making him any compensation. *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224.

Owners of land fronting on a public street which is laid out along the water front, and the title to which is in a third person, cannot wharf out from the other side of the street opposite their property. *Potomac S. B. Co. v. Upper S. B. Co. MacArth. & M.* 285.

Private contracts.

A lessee of a wharf cannot, as against his lessor, acquire a right during the existence of the lease to maintain a pier beyond the wharf, the effect of which will be to destroy the value of the wharf. *Bedlow v. New York Floating Dry Dock Co.* 112 N. Y. 263, 2 L. R. A. 629.

A riparian owner who has granted a license to a third person to fish in the water in front of his property is not thereby precluded from acting upon the license of the state to erect a wharf. *Tinicum Fishing Co. v. Carter*, 61 Pa. 29, 100 Am. Dec. 567.

If the owner of a wharf conveys the upland by metes and bounds, retaining possession of the wharf, which he subsequently sells to a third person, and by gradual filling up the water line is at least 30 feet beyond the bounds of the first grantee, he will have no wharf rights so that he can maintain a suit for the abolishment of the existing wharf. *Rivas v. Solary*, 18 Fla. 122.

A deed giving title as far as a line which is placed at such a distance as to include a certain amount of land will not, although it extends to the flats, give the grantee a right to wharf out to the exclusion of the right of the prior owner. *Simons v. French*, 25 Conn. 352.

The riparian owner may contract to permit a third person to exercise his right to the use of the water within the harbor lines for wharves. *Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89.

The right to wharf out may be alienated separate from the upland. *Hanford v. St. Paul & D. R. Co.* 43 Minn. 104, Overruling *Lake Superior Land Co. v. Emerson*, 35 Minn. 406.

Upon sale of land bounded by tide water the right of wharfage may be reserved. *Parker v. Rogers*, 8 Or. 133.

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The granting by a riparian owner to a third person of the right to build a wharf in front of his property will be binding upon a subsequent grantee of the riparian proprietor. *McCann v. Oregon R. & Nav. Co.* 13 Or. 455.

The right to erect wharves, severed from the ownership of the upland, is not a right which can be protected by an action of ejectment. *Parker v. West Coast Pkg. Co.* 17 Or. 510, 5 L. R. A. 61.

Direction of wharf.

The wharfing rights of adjoining proprietors is in the direction of their side lines which run at right angles with the shore, although by running the wharves in another direction the channel might be reached in a much shorter distance. *New Haven S. B. Co. v. Sargent*, 50 Conn. 199, 47 Am. Rep. 632.

Rights of state and general government.

It is within the power of the state government to authorize the construction of wharves on navigable streams within its territory, even below low-water mark, and such right does not interfere with the power of the general government over commerce. *Savannah v. State*, Green, 4 Ga. 26.

Effect of constructing wharf in front of private property.

A wharf constructed by a third person in front of property of a riparian owner will belong to the latter. *Baltimore v. St. Agnes Hospital*, 48 Md. 419.

If a city without right builds a bulkhead in front of a pier belonging to a riparian owner it will be treated as an accretion, and the title will vest in him. *Steers v. Brooklyn*, 101 N. Y. 51.

But in *Bedlow v. New York Floating Dry Dock Co.* 44 Hun, 378, it is said that in case the authorities of New York city were to disregard the rights of the riparian owners and erect the piers themselves, or authorize them to be erected by a third person, the riparian owner would not, under the statutes, become the owner of the piers so built.

The provisions of a statute permitting a municipal corporation to enlarge a slip by extending a pier must be strictly complied with in order to cut off the right of the owner of the pier as it was formerly located. *Marshall v. Vultee*, 1 E. D. Smith, 294.

Right in wharf which has been erected.

When the lotowner has accepted the statutory authority and has erected the wharf, he has a right to the wharf, which, so long as he uses it, cannot be taken from him. *Horner v. Pleasants*, 66 Md. 475; *Baltimore & O. R. Co. v. Chase*, 43 Md. 23.

Spaight street, between Patterson and Livingston streets, was regularly laid out, platted, and recorded, and is 66 feet wide, and was and is traveled, and runs along the south side of block 149. The several answers allege that the street was established and dedicated under and by virtue of the Doty plat, duly executed and recorded May 7, 1837; that November 27, 1868, the common council of the city widened the street by extending the northerly boundary thereof opposite lots 4, 5, 6, 7, and 8 in block 150, into block 149, as therein stated; that December 4, 1868, the common council vacated the portion of the street therein described, along a part of the south side of block 149; and that the several lots in block 150 were platted by that same Doty plat. Thus, it was expressly claimed by all the parties to this action that the section of Spaight street in question was originally established by a recorded plat or plats, and that the same ran along the south line of block 149, or between blocks 149 and 150, as designated on such plat or plats. The court found that it was a public street, "and extends between blocks 149 and 150," but that it was such only by virtue of being used, worked, and traveled for many years. The court then found that the true location of that street, according to the various plats, was a number of feet north of the present north line of the street. Since the present north line of the street is some 8 feet in the narrowest place, and some 32 feet in the widest place, north of the original south line of block 149, it is obvious that the court thus found that "the true location" of that section of the street was not between blocks 149 and 150, as previously found and as claimed by all parties, but "a number of feet north of the present north line" of the street (that is to say, across some of the lots in block 149, or entirely north of that block). Counsel was asked on the argument how many feet north of the present north line of the street the trial court, by such finding, had in mind as the true location of the street, according to the various plats; and his answer was, "About 200 feet." Such finding seems to be based upon the testimony of one of the surveyors to the effect that he had recently

measured the distance on Patterson street from the shore line of Third lake to the shore line of Fourth lake, and found it to be 4,044 feet; that such distance, as indicated by the Pritchette plat of 1839, as near as he could ascertain it, was 3,762 feet (that is to say, 282 feet less than the true distance); and that, not with reference to where it is laid out, but according to that plat, the true location of Spaight street was, approximately, something over 200 feet north from where it is at present. Of course, if the true location of the street, according to the plat, would be 200 feet north of where it now is, then the true location of block 149, according to the plat, would be still further north of such true location, and that would necessarily place block 150 where block 149 is now. That would necessarily, according to the plat, disarrange, not only the balance of Spaight street, but other streets in the vicinity, and besides would be likely to unsettle numerous titles. The city engineer testified to the effect that there were no original monuments, either natural or made, in the city, except one in the Capitol Park, and that he thought no one had ever been able to find that; that there was no plat which covered the entire city which would agree with the land as laid out over the entire city; that he used a map made by McCabe, city surveyor, June 16, 1868, of the street and block 149 in question, attached to the petition for widening the street; that that map agreed with the Pritchette plat, recorded in the register's office in 1839; that there was a discrepancy between the two Doty plats and the Pritchette plat as to the location of the street in question, varying from nothing to 20-odd feet; that such discrepancy was owing to the fact that the Pritchette plat put the west end of the section of the street in question further south, and the east end of such section further north, than either of the Doty plats; that he assumed that the Pritchette plat was evidence that the original land had been staked out in accordance therewith; that in making the map in evidence, of the premises in question, he resorted to old fences, old buildings, and the streets as laid out and used for many years, as indicating the lines evidently established by former surveys

If a person without authority from the legislature erects a wharf below low-water mark, he acquires no exclusive right to the space immediately adjoining the wharf for the purpose of accommodating vessels, but the space may be occupied by the public. *Gray v. Bartlett*, 20 Pick. 186, 32 Am. Dec. 208.

Log pier.

A pier erected by a riparian owner in the navigable water of the Mississippi river as part of a boom for his logs is unlawful, and he will be liable for loss occasioned by a collision of a boat with it. Such structure differs from a wharf made to facilitate commerce. *Atlee v. Union Packet Co.* 21 Wall. 389, 22 L. ed. 619.

Individual property owners of the bank of navigable rivers have no right to construct piers for booming logs in it without authority from the legislature. *Leigh v. Holt*, 5 Biss. 338.

In 1873 Congress authorized the owners of saw-mills to construct piers in aid of the business on the banks of the Mississippi river, in front of their property, under the direction of the Secretary of

War. *Renwick v. Davenport & N. W. R. Co.* 49 Iowa, 664.

Ejectment for pier.

In *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, a recovery was denied of wharves in front of the plaintiff's riparian property, which had been erected by a railroad company under permission of the state.

In *Austin v. Rutland R. Co.* 45 Vt. 215, it is said that all that can be claimed for riparian owners seeking to recover in ejectment land that had been improved by a third person in front of their lot is the right to pass to and from the water of the lake within the width of the lot as it bordered on and was washed by the water. There was no right to appropriate land beyond the low-water mark. There is no right to wharf out except by provision of a statute. As the absolute owner of the lot he had the exclusive right to use it in passing to and from the lake. If one in making erections in the lake in front of his land violated his right he could seek redress in some proper way but not by action based on his right as the owner of them.

H. P. F.

in the city; that the Pritchette plat gives no dimensions, but that after he discovered that the McCabe plat practically agreed with it, and that that did give dimensions, he took those dimensions as being the true dimensions as originally staked out in block 149; that he assumed that the streets and blocks, as laid out, had approximately been accurately laid out by former surveyors; that the surveys he made in that part of the city correspond with those made by Capt. Nader and Prof. Conover; that, as his starting point in locating block 149, he took the stake located by Capt. Nader, after verifying the same to see that it was correct; that that gave him the south line of Jenifer and the west line of Patterson streets, and the corner of block 149; that, assuming that those two streets were accurately laid out, the block 149 would correspond with the Pritchette plat, with the exception of the widening of Spaight street mentioned; that the plat indicates that all regular lots are 66 feet wide, and all streets 66 feet wide, but as a matter of fact some of the lots run over more or less; that, if such actual distances were to control, houses would soon be in the streets, and streets in the lots, and so, in making the survey, he tried to ascertain from the streets as laid out, and the fences and buildings as they were located, where the street actually was on the ground, as laid out on the plat. Such evidence as to the practical location of the section of Spaight street in question, as actually laid out under the plats, does not seem to be overcome by anything in the record,—certainly not by the mere fact that the actual distance between the respective shores of the two lakes on the line of Patterson street is 282 feet greater than it would appear to be by the Pritchette plat.

The question recurs, whether, under the evidence and the admissions in the pleadings, the trial court was justified in holding that such section of Spaight street was never dedicated to the public as a street by any of such plats, and that it was never laid out, located, or established as such at the point or points fixed by such plats, but was a public street only by virtue of having been used, worked, and traveled as a street for many years. It is 60 years since the Doty plat was recorded, and 58 years since the Pritchette plat was recorded, and 29 years since the McCabe map was made. Those two plats, as to the premises in question, differ from each other, as indicated; yet such difference is too slight to prevent a practical location of the street under the Pritchette plat. It appears that Spaight, Livingston, Patterson, and Jenifer streets have each and all been actually located, opened, and traveled for a period of 40 years or more, that block 149 is between those streets, and that during that time lots in that block and other blocks in the vicinity have been occupied by persons residing thereon. In the absence of any original monuments which can be ascertained as indicated, such locations and occupancy, and the lines and corners of such streets and blocks, thereby established, as indicated by old fences, old buildings, and the streets as so laid out and used for many years, and stakes and monuments established by former surveyors, were competent evidence as tending to prove, and in our opinion do clearly prove, that the section of

Spaight street in question was, more than forty years ago, actually located and laid out under and pursuant to the Pritchette plat, and hence the same was a practical construction of that portion of that plat. Numerous authorities might be cited in support of that proposition. *Marsh v. Mitchell*, 25 Wis. 706; *Nys v. Biemeret*, 44 Wis. 104; *Racine v. J. I. Chase Plow Co.* 56 Wis. 539; *State v. Schwin*, 65 Wis. 207; *Miner v. Brader*, 65 Wis. 537; *Hrouska v. Janke*, 66 Wis. 252; *Koenigs v. Jung*, 73 Wis. 178; *Racine v. Emerson*, 85 Wis. 80; *Riley v. Griffin*, 16 Ga. 144, 60 Am. Dec. 726. Thus, in one of the cases cited it was held that "in ascertaining the true location of the street's, lots, and blocks in a city, according to the plat and survey thereof, regard is to be had (1) to the natural monuments referred to therein, and (2) to the artificial monuments placed by the surveyor to mark lines or boundaries, before resorting to the courses and distances marked on the plat or survey. If no monuments are mentioned or in existence, evidence of long-continued occupation, though beyond the given distances, is admissible. If the description is ambiguous or doubtful, parol evidence of the practical construction given by the parties by acts of occupation, or recognition of monuments or boundaries, is admissible." Courts have gone still further, and held, in effect, that a competent surveyor may, as a witness, in a proper case, and under proper circumstances, give his opinion as to whether certain piles of stone and certain mark or marks on trees were made by a surveyor and indicated a boundary line. *Davis v. Mason*, 4 Pick. 156; *Knox v. Clark*, 123 Mass. 216; *Brantly v. Swift*, 24 Ala. 390; *Clegg v. Fields*, 52 N. C. (7 Jones, L.) 37, 75 Am. Dec. 450. Certainly a mere discrepancy in distance is not to overcome such practical location of the street under and in pursuance of the plat. We must hold, upon the evidence in the record as well as the pleadings, that the section of Spaight street in question was so laid out and opened under and in pursuance of the Pritchette plat, and that the recording of that plat was a dedication of such street to the public, and that such dedication covered and included the whole width of that street as indicated on that plat.

2. The mere fact that the eastern portion of that section of the street was widened by extending the same north into block 149, as mentioned, and that the western portion thereof was narrowed by vacating a piece on the north side of the street, as mentioned, in no way changed the south line of the street as located under that plat.

3. Nor does the fact that that section of the street was never worked or fitted for travel clear to the south line thereof, nor at all south of the iron railing or fence mentioned in the pleadings and findings, prevent the city from working and fitting the same for travel clear to the south line thereof, as located under the Pritchette plat, whenever it may choose to do so. It is well settled that no mere nonuser of that side of the street for the time mentioned can operate as a surrender or abandonment of the same for the purposes of a public street. *Reilly v. Racine*, 51 Wis. 526; *State v. Leaver*, 62 Wis. 387; *Childs v. Nelson*, 69 Wis. 125;

Maire v. Kruse, 85 Wis. 302, 26 L. R. A. 449; *Nicolai v. Davis*, 91 Wis. 370. In this last case it was held that "the mere fact that the plaintiff had for many years encroached upon the road by putting a portion of his fences in the road, and otherwise, did not bar the town from the legal right of having the road at any time opened to its full width as originally surveyed and laid out." It follows from what has been said that the space between the iron railing or fence and the south line of the street, as so located under the plat, was at the time of the commencement of this action, and is now, a part of Spaight street, and may be worked and fitted for public use as a part of the street whenever the city may choose to do so.

4. The several defendants as abutting lot owners, except Kerns, justified what they had done, respectively, in respect to removing stone, earth, and other materials from within the limits of the street as so laid out, by claiming that they severally owned the land clear up to the iron railing or fence, and that the street did not extend south of that railing or fence, and the findings of the court are in harmony with such claim. From what has been said, it is obvious that such ruling was erroneous. The question recurs whether the city has such an interest in that branch of the relief demanded as to maintain this action. The right of the city in the space between the iron railing or fence and such south line of the street, as so located, being as stated, it follows, under the repeated decisions of this court, that the city has such an interest therein that it may maintain this action so far as to restrain the respective defendants, as abutting lotowners, from so removing stone, earth, and other materials from within the limits of such street, or from impairing the embankment of the street as it now exists, or making it more expensive and difficult to fit the whole width of the street for travel. To that extent the injunction should have been made perpetual. In support of this proposition it is only necessary to cite the following cases: *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475; *Neshkoro v. Nest*, 85 Wis. 126; *Eau Claire v. Matke*, 86 Wis. 291.

5. Counsel contend, in effect, that block 150 on the plat is itself a monument, and that, according to that plat, there appears to have been a strip of land between the section of Spaight street in question and the lake shore, for the whole distance, which is divided up into lots numbered from 1 to 9 inclusive, and hence that the plat should be so construed and modified as in some way to satisfy such calls of land for such lots. But the fact remains that the whole of block 150 is south of Spaight street on the plat, and hence is necessarily south of it as actually located under and in pursuance of the plat. In other words, the location of the streets as mentioned necessarily located that block. Certainly the several owners of land between that street as so located, and the lake shore, have all the rights of abutting owners upon the street, and also all the rights of riparian owners on the shore of the lake. But if there is any defendant who owns no land between the street as so located, and the shore of the lake, then we are unable to perceive

upon what theory he could properly be regarded as an abutting owner or riparian owner. A mere mistake as to the quantity or shape of the land in the block, or as to whether the shore of the lake, at some particular point, was within the limits of the street, cannot be allowed to frustrate the plat, as such mistake comes within the well recognized maxim, *Falsa demonstratio non nocet*. *Sherwood v. Sherwood*, 45 Wis. 864, 30 Am. Rep. 757; *Paine v. Benton*, 32 Wis. 496; *Du Pont v. Davis*, 30 Wis. 175; *Kennedy v. Knight*, 21 Wis. 347, 94 Am. Dec. 548. The dimensions of the several lots in the block, as they appear upon the plat, must, like other courses and distances, yield to the actual condition of things as they existed, and be determined by the practical construction and location of the plat upon the grounds.

6. There is another branch of this case. The complaint alleges, in effect, that the city has jurisdiction over the entire surface of the lake; that the defendants have placed stones, earth, and other materials in the waters of the lake, not only within the limits of the street, but outside of, and beyond the limits of, the street, even to the distance of 60 or 70 feet from the south line of that street,—and prays an injunction to restrain the defendants from so filling in the lake. The several answers allege, and the court found, in effect, that such jurisdiction of the city over the lake was for limited and special purposes only, but not for any of the purposes set forth in the complaint. So far as the right of the city to work and prepare the street for travel, for the whole width thereof, even where the shore of the lake may be within the limits of the street, enough has already been said. But the question recurs as to whether the city may properly, in this action, restrain the defendants from so filling in the lake outside and beyond the limits of the street. The provisions of the charter, cited in the brief of counsel, give the city power to enact ordinances for the benefit of trade, commerce, and health, and to provide for the abatement and removal of nuisances thereunder, and "generally to take such other measures for the public health as shall be deemed proper." Such police regulations may well be conceded, but they do not authorize the city to restrain the filling in of the lake in question, outside of the limits of the street. Under the repeated decisions of this court, there can be no question but what the title to the bed of the lake was and is in the state. But such of the defendants as own lots between the shore of the lake and the south line of the street have the rights of riparian owners on the shore of the lake. Such rights include the right of each to construct in front of his land, in shoal water, proper wharves, piers, and booms in aid of navigation, without obstructing it, far enough to reach water actually navigable for such boats as are in use or appropriate to the lake. *Cohn v. Wausau Boom Co.* 47 Wis. 332; *J. S. Keator Lumber Co. v. St Croix Boom Corp.* 72 Wis. 82; *Northern Pine Land Co. v. Bigelow*, 84 Wis. 163, 164, 21 L. R. A. 776; *Priene v. Wisconsin State Land & Improv. Co.* 93 Wis. 547, 83 L. R. A. 645, and cases there cited. Such right, however, is a private right, and is subordinate to the public right to navi-

gate the lake, and may be regulated or prohibited by law. *Ibid.* Obviously, the city has no proprietary or corporate interest in the lake, nor the shore of the lake, outside of the limits of the street. Nor does it appear that the acts complained of are such as to affect the health of anyone. We are clearly of the opinion that the city has no such interest or right in the lake or the waters thereof, outside of the limits of the street, as to enjoin the defendants from the acts complained of. *Milwaukee v. Milwaukee & B. R. Co* 7 Wis. 85; *Sheboygan v. Sheboygan & F. du L. R. Co.* 21 Wis. 668; *Racine v. Crotzenberg*, 61 Wis. 481, 50 Am. Rep. 149; *Janessville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808. In such a case the right of the city to remove such a purpresture or public nuisance is no greater than that of an individual, and this court has expressly held that an individual could not remove the same. *Larson v. Furlong*, 50 Wis. 681. In England such purpresture or public nuisance was removable or abatable only by suit of the Crown, having superintendence and control over public rights, at the instance of the attorney general. Gould, Waters, §§ 21, 167. In this country such right of action is in the state. *Id.* §§ 98, 168. Thus, in *People v. Vanderbilt*, 28 N. Y. 896, 84 Am. Dec. 851, it was held that "the remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is by injunction at the suit of the attorney general." See also *People v. Davidson*, 80 Cal. 879. We must hold that the court properly refused to enjoin the defendants from filling in the lake outside of the limits of the street, and that as to that branch of the case the complaint was properly dismissed.

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to enter judgment in accordance with this opinion. In view of the fact that the findings of the trial court are sustained in part and set aside in part, costs and disbursements are allowed in favor of the plaintiff and against the defendants, except Kerns, for the expense of printing the case, and for the fees of the clerk of this court; but no other costs or expenses are allowed to either party.

Josephine M. KASTEN, *Respt.*,
v.

INTERSTATE CASUALTY COMPANY
OF NEW YORK, *Appt.*

(.....Wis.....)

***Under a policy insuring a person against bodily injury sustained by external, violent, and accidental means, with a provision for payment to a beneficiary or beneficiaries in case of death from such injuries within ninety days therefrom, independently of**

*Headnote by MARSHALL, J.

NOTE.—As to whether accident or disease was the cause of death, see *note* to *Fidelity & C. Co. v. Johnson* (Miss.) 80 L. R. A. 206; also *Modern Woodmen Aocl. Asso. v. Shryock* (Neb.) 39 L. R. A. 826; *Western Commercial Travelers' Asso. v. Smith* (C. C. App. 8th C.) *post*, 653.
40 L. R. A.

all other causes, and with a condition that the liability of the assurer shall not extend to injuries, fatal or otherwise, resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled;—held, that death caused by blood poisoning from the effects of the absorption into the system of septic poison evolved by the propagation of germs in cotton inserted by a dentist in wounds caused by the removal of teeth from the mouth of the deceased, to stop hemorrhage, is within the condition, and creates no liability under the policy.

(March 22, 1896.)

A PPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Reversed.*

Statement by Marshall, J.:

Action to recover on a \$2,000 policy of accident and life insurance, which insured Fred A. Kasten against bodily injury sustained through external, violent, and accidental means, and provided that in case of death from such injuries within ninety days therefrom, independently of all other causes, the company should pay the sum of \$2,000 to his wife, Josephine M. Kasten, if surviving, otherwise to his legal representatives, subject, however, to several conditions, among which was the following: "This insurance does not cover . . . injuries, fatal or otherwise, resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." The cause of death was alleged to be the accidental injection of septic matter into a wound caused by the extraction of two teeth, at the time they were extracted. At the commencement of the trial there was a demurrer *ore tenus* to the complaint, made, overruled, and the ruling duly excepted to. The evidence tended to show that the deceased, while suffering from some serious derangement of his system, which manifested itself, among other ways, by severe toothache, had two of his teeth extracted by a dentist; that there was a diseased condition of the membrane surrounding some of the teeth, and a general foul condition of the mouth; that the teeth were extracted in the usual way, but it caused a rupture of the upper maxillary artery, or a branch of it, from which a violent hemorrhage ensued, and to stop that the dentist plugged the cavities with cotton; that thereafter blood poisoning ensued from the absorption into the system of some chemical poison supposed to have been caused by the propagation of disease germs in the cotton, the seat of the affection being where the teeth were extracted. The blood poisoning progressed to a fatal determination. At the close of the evidence both sides moved for the direction of a verdict. Defendant's motion was denied and plaintiff's granted. Judgment was entered accordingly and defendant appealed.

Messrs. Winkler, Flanders, Smith, Bottum, & Vilas, for appellant:

In construing a policy of insurance, some particular operation, effect, and meaning

should be assigned to each sentence, phrase, and word used, and when this may fairly and properly be done, no part of the language used can be rejected as superfluous or unmeaning.

Merrill v. Travelers Ins. Co. 91 Wis. 329.

The injury in this case certainly resulted from poison or something accidentally or otherwise absorbed.

Bacon v. United States Mut. Acci. Assn. 123 N. Y. 304, 4 L. R. A. 617.

Where a policy of insurance in an accident insurance company provides that its benefits shall not extend to death or injury caused "by the taking of poison," an involuntary taking of poison by mistake, causing death, is within said provision of the policy.

Pollock v. United States Mut. Acci. Assn. 102 Pa. 230, 48 Am. Rep. 204; *Cole v. Accident Ins. Co.* 61 L. T. N. S. 227.

A disease aggravated and made fatal by an accident cannot be a ground for recovery.

Freeman v. Mercantile Mut. Acci. Assn. 156 Mass. 851, 17 L. R. A. 753; *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362; *Anderson v. Scottish Acci. Ins. Co.* 27 Scot. L. R. 20; *McKechnie v. Scottish Acci. Ins. Co.* 17 Sess. Cas. (Scotland) 6; 1 Am. & Eng. Enc. Law, 2d ed. p. 817.

Messrs. La Boule & Hunt, for respondent:

The unintentional and accidental introduction of the septic matter and its confinement in the cotton was an accident within the meaning of the policy.

The insertion into a wound of cotton containing matter which will cause blood poisoning is as much an accident as would be the giving by a physician to his patient of a deadly poison supposing it to be some harmless drug.

In all cases, a policy must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity which in making the insurance it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted.

May, Ins. 3d ed. § 175.

The words "excepting death by poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," mean "poison or anything, accidentally or otherwise, consciously and by an act of volition, drawn into the system by inspiration," and do not apply to a case of accidental asphyxiation while the insured is asleep.

Fidelity & C. Co. v. Waterman, 161 Ill. 632, 32 L. R. A. 654.

It is a question for the jury whether an injury from the sting of a venomous insect is an injury from poison, the court making a distinction between venom and poison.

Preferred Mut. Acci. Assn. v. Beidelman, 1 Monaghan (Pa.) 481; *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L. R. A. 661.

Where there is an unusual or unforeseen occurrence during the performance of a voluntary act, which unforeseen occurrence results in injury, even though the injury is a disease, a recovery should be had under policies insuring against injuries received through external, violent, and accidental means.

United States Mut. Acci. Assn. v. Barry, 131 U. S. 100, 33 L. ed. 60; *Bailey v. Interstate Casualty Co.* 8 App. Div. 127; *North Ameri-*

can Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; *Freeman v. Mercantile Mut. Acci. Assn.* 156 Mass. 351, 17 L. R. A. 753; *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362; *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & El. 478; 1 Am. & Eng. Enc. Law, 2d ed. p. 292.

Marshall, J., delivered the opinion of the court:

The evidence goes no further than the complaint. It may be said to establish the fact of death as alleged, that is, that it was produced by the accidental planting of septic matter in the mouth of the deceased at or about the time his teeth were extracted. While the inference from the allegations of the complaint is that the introduction of the foreign substance, which subsequently caused death, into the person of the deceased, was accidental, it was nevertheless by an act to which he consented. So the rulings on the demurrer to the complaint and the motions for the direction of a verdict, all present the same question, which is, Admitting everything alleged, is plaintiff entitled to recover? Such being the case, the rulings will be considered together.

The theory upon which the complaint was sustained and the verdict directed in respondent's favor, and upon which her counsel seek to sustain such rulings, defeats them if the plain wording of the contract is to be given effect according to the obvious intention of the parties thereto. It is contended that the septic matter was accidentally introduced into the wound caused by the extraction of the teeth, by its being in the cotton with which the wound was plugged to stop the hemorrhage; that it was absorbed from the cotton into the surrounding parts; that death was the result; and that because the poisonous substance was thus accidentally planted, the calls of the policy for an injury caused by external, violent, and accidental means were all satisfied. Whether that be so or not, and if so, whether it can be said from the evidence, as a matter of law, that death ensued from the injury independently of all other causes, so as to satisfy the terms of the policy in that regard, are not by any means free from difficulty, but they are questions unnecessary to decide, because the injury having been admittedly caused by something accidentally taken, administered, or absorbed, and death caused in whole or in part from such circumstances, by the plain language of the policy the verdict should have been directed in favor of the defendant instead of the plaintiff.

While the word "poison," as used in the policy, may be construed to mean liquids commonly known as poisons, it is followed by the words "or anything," which clearly indicates that the intent was to include under the entire term everything of a poisonous nature. While it is true that, where the meaning of words in an insurance contract is in doubt, courts are to lean to that reasonable construction most favorable to the assured, they can go no further without making contracts for the parties which they did not intend to make. If words are plain, courts must give effect to them accordingly, or

contractual obligations will be subject to variations and violations to suit the exigencies of particular cases. Here, in order to sustain a recovery, the court is asked, after having successfully passed difficulties in the way of holding that the death of the assured was caused solely by external, violent, and accidental means, in the face of evidence that the septic poison was voluntarily, though accidentally, planted in the system of the deceased, to pass the barrier by which the defendant excepted from the contract death caused in whole or in part by the administration or absorption, accidentally or otherwise, of poison or any other substance. No precedent to which we have been referred by counsel, or which we have been able to discover, warrants a construction of the contract of insurance that will enable the court to do that. Numerous cases may be found to the effect that the clause excepting death caused by inhaling gas, accidentally or otherwise, only covers cases of voluntary conscious inhalation. Such are *Fidelity & C. Co. v. Waterman*, 161 Ill. 682, 32 L. R. A. 654; *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642; *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 448; *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 596, 31 L. R. A. 686; and *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L. R. A. 661 but they do not apply to this case. Here there was not that absence of volition and consciousness that were the turning circumstances of those cases. The rule itself is by no means free from criticism, nor has it passed without criticism from respectable courts. *Richardson v. Travelers' Ins. Co.* 46 Fed. Rep. 843. Certainly, no good reason can be given for extending it to cases of accidental taking or absorption of poisonous substances into the system through the voluntary use, for a remedial pur-

pose, of some other substance. In the instances cited the word "inhaled" and the word "take," in view of other language used in the contract, were easily construed to contemplate voluntary conscious action, not in the sense that the victim should know the precise nature of what he was taking or inhaling, or its effect on his system, but that the thing taken should be by his act or permission. Here the cotton was placed in the mouth of the deceased by his permission. True, the fact that it contained the germs which propagated and evolved the poison which was absorbed into the blood with fatal effects was unknown and accidental: but that was within the express terms of the exception under consideration. In *Early v. Standard Life & Acci. Ins. Co.* 71 N. W. 500, a very recent case, the supreme court of Michigan reached the same conclusion at which we have arrived, and to the same effect is *Westmoreland v. Preferred Acci. Ins. Co.* 75 Fed. Rep. 244, where chloroform was administered, from the effects of which, and some other cause, death ensued; and it was held that, as the chloroform would not alone have caused death, the accidental concurrence of some other unknown cause did not make a cause of action. Here the cotton alone would not have produced death. It was properly used, but on account of its containing the poisonous germs not known to exist in it, they were voluntarily, though accidentally, introduced into the system of the deceased, and the poison evolved by their propagation was thereby carried into the circulation, corrupting the blood and causing death. That is one of the very things most carefully guarded against by the words of the insurance contract.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

WESTERN COMMERCIAL TRAVELERS' ASSOCIATION, *Plff. in Err.*,

v.

Sarah I. SMITH.

(56 U. S. App. 396, 85 Fed. Rep. 401.)

1. **No notice of an accident or injury causing death need be given** by the beneficiary of the death loss until the death occurs, where the policy provides for immediate notice "in the event of any accident or injury for which claim shall be made, . . . or in case of death resulting therefrom," as this provides for two notices for different claims, one of injury not resulting in death, and the other of death.
2. **An abrasion of the skin of a toe, unexpectedly caused, without design, by unforeseen, unusual, and unexpected friction in the act of wearing a new shoe, is an accidental injury, within the meaning of an insurance policy.**

NOTE.—On the question whether death is due to accident or disease, see preceding case of *Kasten v. Interstate Casualty Co.* (Wis.) *ante*, 651, and references in footnote thereto.

40 L. R. A.

3. **Blood poisoning caused by an accident, and which is a mere link in the chain of causation** between the accident and the death which it produces, is not an intervening and independent cause of death which will prevent liability on insurance against accident.

(February 14, 1898.)

ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment in favor of plaintiff in an action brought to enforce payment of an accident insurance certificate. *Affirmed.*

The facts are stated in the opinion.

Before *Sanborn* and *Taylor*, Circuit Judges, and *Philips*, District Judge.

Messrs. Judson & Taussig and *Louis R. Tatum*, for plaintiff in error:

The conclusiveness attached to the special finding as to the verdict of a jury extends only to the finding of facts. It does not attach to the conclusions of law and the court's deductions from the special findings of fact, though

the findings of fact and conclusions and deductions therefrom may be filed together as in the case at bar.

Norris v. Jackson, 9 Wall. 125, 19 L. ed. 608; *Jennison v. Leonard*, 21 Wall. 302, 22 L. ed. 539; *Walnut v. Wade*, 103 U. S. 688, 26 L. ed. 526; *Quinn v. Dimond*, 44 U. S. App. 469, 72 Fed. Rep. 993, 19 C. C. A. 337; *United States v. Harris*, 46 U. S. App. 653, 77 Fed. Rep. 821, 23 C. C. A. 488; *Wesson v. Saline County*, 34 U. S. App. 680, 73 Fed. Rep. 917, 20 C. C. A. 227; *Sneed v. Sabinal Min. & Mill. Co.* 34 U. S. App. 688, 73 Fed. Rep. 925, 20 C. C. A. 230; 2 Thomp. Trials, §§ 2658, 2651.

Where the facts are not in dispute, the reasonableness of a notice in respect of time is a question of law for the court.

Earnshaw v. United States, 146 U. S. 60, 36 L. ed. 887; *Brown v. Kimmel*, 67 Mo. 430; *Powell v. Pacific R. Co.* 65 Mo. 658; *Burger v. Burger*, 84 Mo. App. 153.

The finding of facts is that neither Freeman O. Smith during his lifetime, nor plaintiff, gave to the defendant any notice of the accident to the deceased prior to his death.

The finding goes on to say that due notice of the death and of plaintiff's claim was given within a reasonable time after death, and the court finds in effect that this notice was a sufficient compliance with the notice of accident required by the contract.

But these findings were not of facts, but of the court's legal conclusions from the facts specially found. Where the facts are undisputed it becomes a question of law for the court to determine whether a notice in point of time was sufficient.

Earnshaw v. United States, 146 U. S. 60, 36 L. ed. 887.

But in the case at bar, it is not a mere question of reasonableness of time of a notice, but it is conceded that no notice whatever was served.

These findings of the court are none the less questions of law, though included by the court in, and called, a special finding of facts.

Walnut v. Wade, 103 U. S. 688, 26 L. ed. 526.

Notice was a condition precedent of liability.

McFarland v. United States Mut. Acci. Assn. 124 Mo. 204; *McCullough v. Phoenix Ins. Co.* 118 Mo. 606; *Williams v. Preferred Mut. Acci. Assn.* 91 Ga. 698; *Standard Life Acci. Ins. Co. v. Strong*, 13 Ind. App. 315; *Merrill v. Travelers' Ins. Co.* 91 Wis. 329; *Railway Pass. Assur. Co. v. Burwell*, 44 Ind. 460; *Gamble v. Accident Assur. Co.* Ir. Rep. 4 C. L. 204; *Cusley v. National Employers' Acci. & General Assur. Assn.* 1 Cal. & E. 597; *Cooke, Life Ins. p. 211*; *Kentzler v. American Mut. Acci. Assn.* 88 Wis. 589; *North America Ins. Co. v. Brim*, 111 Ind. 281; *Whitehurst v. North Carolina Mut. Ins. Co.* 52 N. C. (7 Jones, L.) 433, 78 Am. Dec. 246; *Trask v. State F. & M. Ins. Co.* 29 Pa. 198, 72 Am. Dec. 622; *Kimball v. Howard F. Ins. Co.* 8 Gray. 33.

The finding of the court that the death was caused by external, violent, and accidental means is simply the court's deduction or conclusion that the death caused by the specific facts found was the result of such external, violent, and accidental means. As the burden

rested upon the plaintiff in the court below to establish death by accident, it is to be assumed that the special finding contains all the findings necessary to recovery. The silence of a special finding as to a fact is equivalent to a finding against the party who has the burden of establishing proof as to such fact.

United States v. Harris, 46 U. S. App. 653, 77 Fed. Rep. 821, 23 C. C. A. 488; *Sneed v. Sabinal Min. & Mill. Co.* 34 U. S. App. 688, 73 Fed. Rep. 925, 20 C. C. A. 230.

The term "accident" in its application to insurance policies has been defined as an injury which happens by reason of some violence, casualty, or *vis major*, to the insured without his design or consent or voluntary co-operation.

See 1 Am. & Eng. Enc. Law, 1st ed. p. 87.

The accident must be the approximate, and not the remote, cause of the injury or death. That which merely brings into activity a dormant disease is not an accident.

Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478.

Disease produced by the action of a known cause cannot be considered as accidental.

Doxter v. Fidelity & C. Co. 46 Fed. Rep. 446, 13 L. R. A. 114; *Bacon v. United States Mut. Acci. Assn.* 123 N. Y. 304, 9 L. R. A. 617; *Travelers' Ins. Co. v. Selden*, 42 U. S. App. 253, 78 Fed. Rep. 285, 24 C. C. A. 92; *McCarthy v. Travelers' Ins. Co.* 8 Biss. 363; *Clidens v. Scottish Acci. Ins. Co.* 29 Scot. L. Rep. 308; *United States Mut. Acci. Assn. v. Barry*, 131 U. S. 100, 33 L. ed. 60.

Messrs. S. L. Swarts, E. M. Merriman, and George H. Sanders for defendant in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

The Western Commercial Travelers' Association, the plaintiff in error, has sued out a writ of error to reverse a judgment against it upon a certificate of insurance against accident which it issued to Freeman O. Smith, one of its members, for the benefit of Sarah I. Smith, the defendant in error. A jury was waived, the court tried the case and made a special finding of the facts, and the error assigned is that the facts found do not support the judgment (1) because they show that immediate notice of the accident or injury was not given to the association, as required by the policy, and (2) because they fail to show that the death of the member was produced "by bodily injuries effected by external, violent, and accidental means."

These are the facts relative to the two questions thus raised, which appear from the pleadings and the findings: The certificate upon which the suit is based secured to the member, Freeman O. Smith, indemnity in various amounts for total disability, for the loss of an arm or a leg, or one arm and one leg, and for the loss of both arms or both legs, by accident; and it also secured to his beneficiary, the defendant in error, indemnity for his death produced "by bodily injuries effected by external, violent, and accidental means" alone. It contained this provision: "In the event of any accident or injury for which any claim shall be made under this certificate, or in case of

death resulting therefrom, immediate notices shall be given in writing, addressed to the secretary, at St. Louis, Missouri, stating the full name and address of the member, number of certificate, occupation, and name and address of the attending physician, with full particulars of the accident or injury, and failure to give such notice shall invalidate all claim under the certificate; and unless direct and affirmative proof of the death or duration of total disability shall be furnished the association within ninety (90) days from the happening of such accident, as per forms of proof furnished, and questions prepared on same by the board of directors of the association, then all claims under this certificate shall be waived and forfeited to the association."

In the latter part of August, 1895, while this certificate was in force, Freeman O. Smith, who was a strong and healthy man, commenced wearing a pair of new shoes. About September 6, 1895, the friction of one of the shoes against one of his feet, unexpectedly and without design on his part, produced an abrasion of the skin of one of his toes. He gave the abrasion reasonable attention, but it nevertheless caused blood poisoning about September 26, 1895, which resulted in his death on October 3, 1895. Neither the deceased nor the defendant in error gave any notice of this accident or injury to the association before his death, but within a reasonable time thereafter due notice thereof and of her claim under the certificate was given to the association by the defendant in error.

The agreement of the parties was that the failure to give the notice required by this certificate should invalidate all claim under it, and there can be no question but that the service of this notice was a condition precedent to the enforcement of any such claim. *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 289, 49 Am. Dec. 74; *McCullough v. Phoenix Ins. Co.* 113 Mo. 606; *McFarland v. United States Mut. Acci. Assn.* 124 Mo. 204. The real question here is, therefore, What was the notice exacted of the beneficiary by the contract, and when was it to be given? The agreement was that, "in the event of any accident or injury for which any claim shall be made under this certificate, or in case of death resulting therefrom, immediate notice shall be given." In the interpretation of this provision, the fact must be borne in mind that all claims under this contract for accidents and injuries which do not result in death accrue to the member himself. The beneficiary of the death loss has no interest in them. It is only in a case in which death results from an accident or injury that any claim in favor of the defendant in error arises. In the nature of things, she cannot know whether she will have a claim until the member whose life is insured for her benefit is dead. Must she give notice of the accident or injury on account of which her claim may arise before she knows whether or not it will ever come into existence? A provision which exacts such a notice should be plain, clear, and unambiguous. Forfeitures are not favored in the law, and a strained and unnatural construction must not be given to this contract in order to impose one here. A stipulation could have easily been drawn which would have plainly

imposed upon this beneficiary the duty of giving such a notice. If this contract had simply omitted the words, "or in case of death resulting therefrom," and had provided that, "in the event of any accident or injury for which any claim shall be made under this certificate, notice of such accident or injury shall be given immediately after it happens," there would have been no doubt that the beneficiary was required to notify the association of the accident as soon as it occurred. If it had required only that, "in case of death resulting from any accident or injury for which any claim shall be made under this certificate, immediate notice shall be given," it would have been equally certain that she was not required to give any notice until the death had supervened. As it stands, it seems to us to be intended to provide two different classes of notices for the two classes of claims,—one an immediate notice of the accident or injury which does not result in death, the other an immediate notice of the death which results from such an accident or injury, to be given by the beneficiary as soon as it occurs. If this is not the correct construction of the provision, the words, "or in case of death resulting therefrom," are without significance or effect, because the stipulation, without those words, would require the beneficiary of a death loss to give notice of the accident or injury immediately after it occurred.

There is no better canon for the interpretation of contracts than the rule that the court may put itself in the place of the parties to the agreement at the time it was made, and may then consider how its terms affected its subject-matter, and ascertain what those who made it intended thereby. *Accumulator Co. v. Dubuque Street R. Co.* 27 U. S. App. 364, 372, 64 Fed. Rep. 70, 74, 12 C. C. A. 37, 41, 42; *Westervelt v. Mohrenstecher*, 40 U. S. App. 221, 227, 228, 76 Fed. Rep. 118, 121, 22 C. C. A. 93, 95, and 84 L. R. A. 477; *Rockefeller v. Merritt*, 40 U. S. App. 666, 675, 76 Fed. Rep. 909, 915, 22 C. C. A. 608, 613, 614, 35 L. R. A. 633; *Prentice v. Duluth Storage & F. Co.* 19 U. S. App. 100, 110, 58 Fed. Rep. 437, 443, 7 C. C. A. 298, 298. When this is done, it can hardly be successfully maintained that the parties to this certificate intended to require the beneficiary of a loss by death under it to give notice of the accident or injury before the death occurred and before her claim arose. When the provision, "in the event of any accident or injury for which any claim shall be made under this certificate, or in case of death resulting therefrom, immediate notice shall be given," is read in the light of the events to which it refers, and of the relation of the parties to the contract to each other, its natural and obvious meaning is that, in the event of any accident or injury which shall not result in death, immediate notice of such accident or injury shall be given, or, in the case of death resulting from any such accident or injury, immediate notice of such death shall be given, because in the one case it is the injury, and in the other it is the death, which conditions the existence of the claim. The conclusion is that this certificate required no notice of the accident or injury to be given to the association by the beneficiary of the death loss before the

death occurred, and the due notice which the court finds she gave immediately after death was a sufficient compliance with this stipulation of the agreement.

It is earnestly contended, however, that the death was not caused by bodily injuries effected by external, violent, and accidental means (1) because the disease of blood poisoning was the cause, and the abrasion of the skin of the toe was only the occasion, the locality in which the disease first appeared; and (2) because the abrasion of the skin was not an accident, but was made in the ordinary course of things. The contract does not differ, in respect to the subject presented by this proposition, from those which have been repeatedly considered by this court, and we state its legal effect briefly, because the reasons and authorities in support of our views here have been frequently set forth in the opinions of this court which are cited below.

If the death was caused by a disease, without any bodily injury inflicted by external, violent, and accidental means, as in the case of the malignant pustule (*Bacon v. United States Mut. Acci. Assn.*, 123 N. Y. 304, 9 L. R. A. 617), and as in the case of sunstroke (*Sinclair v. Maritime Pass. Assur. Co.* 3 El. & El. 478; *Dozier v. Fidelity & C. Co.* 46 Fed. Rep. 446, 13 L. R. A. 114), the association was free from liability by the express terms of the certificate. If the deceased suffered an accident, but at the time he sustained it he was already suffering from a disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected by the disease or infirmity, but he died because the accident aggravated the disease, or the disease aggravated the effects of the accident, as in the case of the insured who was subject to such a bodily infirmity that a short run, followed by stooping, which would not have injured a healthy man, produced apoplexy (*Travelers' Ins. Co. v. Selden*, 42 U. S. App. 253, 78 Fed. Rep. 285, 24 C. C. A. 92), the association was exempt from liability, because the death was caused partly by disease and partly by accident. If the death was caused by bodily injuries effected by external, violent, and accidental means alone, the association was liable to pay the promised indemnity. If the death was caused by a disease which was not the result of any bodily infirmity or disease in existence at the time of the accident, but which was itself caused by the external, violent, and accidental means which produced the bodily injury, the association was equally liable to pay the indemnity. In such a case, the disease is an effect of the accident, the incidental means produced and used by the original moving cause to bring about its fatal effect, a mere link in the chain of causation between the accident and the death, and the death is attributable, not to the disease, but to the *causa causans*, to the accident alone. *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547, 560, 561, 65 Fed. Rep. 178, 186, 12 C. C. A. 544, 552, 27 L. R. A. 629; *Union P. R. Co. v. Callaghan*, 12 U. S. App. 541, 550, 56 Fed. Rep. 988, 994; 6 C. C. A. 205, 210; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. ed. 256, 259; *National Masonic Acci. Assn. v. Shryock*, 36 U. S. App. 653, 663, 73 Fed. Rep. 774, 776, 20 C. C. A. 8, 5.

Now, the finding of the facts made by the 40 L. R. A.

trial court is conclusive in this case, and the only question here presented is whether those facts warrant the judgment below. That court has found that the deceased was an exceptionally strong and healthy man when the abrasion in question was produced. It has found that the wearing of the new shoe produced the abrasion on September 6, 1895, that this abrasion was the cause of blood poisoning on September 26, 1895, and that the blood poisoning produced the death on October 3, 1895. The question whether the death was produced by the abrasion or by the disease is therefore extracted from this case. There is no ground for the contention that the disease of blood poisoning was an intervening and independent cause of the death, because the finding of the court below is that that disease was a mere link in the chain of causation between the abrasion which produced it and the death which it produced.

The only question remaining, therefore, is whether or not the abrasion of the skin of the toe was produced by accidental means. If it was, the death was so produced; and if it was not, there was no accident, and consequently no cause of action. The contract was that the association would pay the promised indemnity for any death caused "by bodily injuries effected by external, violent, and accidental means." There is no claim that the friction of the shoe which caused the abrasion was not external and violent. The contention is that it was not accidental. The significance of this word "accidental" is best perceived by a consideration of the relation of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from their use,—the result which may be reasonably anticipated from their use, and which ought to be expected. The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, under the maxim to which we have adverted is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means. *Chicago, & P. M. & O. R. Co. v. Elliott*, 12 U. S. App. 381, 386, 387, 389, 5 C. C. A. 347, 350, 351, 353, 55 Fed. Rep. 949, 952, 953, 955, 20 L. R. A. 592.

Was the abrasion of the skin of the toe of

the deceased the natural and probable consequence of wearing new shoes? It must be conceded that new shoes are not ordinarily worn with the design of causing abrasions of the skin of the feet, and the trial court has found that the abrasion upon the toe of the deceased was produced unexpectedly and without any design on his part to cause it. An abrasion of the skin, certainly, is not the probable consequence of the use of new shoes; for it cannot be said to follow such use more frequently than it fails to follow it. Nor can such an abrasion be said to be the natural consequence of wearing such shoes,—the consequence which ordinarily follows, or which might be reasonably anticipated. How, then, can it fail to be the chance result of accidental means,—means not designed or calculated to produce it? If the deceased, without design, had slipped, and caused an abrasion of his skin, as he was walking down the street, or had punctured the skin of his foot by stepping on a nail in his room, or had pierced it with a nail in his shoe as he was drawing it upon his foot, there could have been no doubt that these injuries were produced by accidental means; and it is difficult to understand why an abrasion of the skin, produced unexpectedly and without design by friction caused by wearing a new shoe, does not fall within the same category.

In *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362, it is held that death from the rupture of a blood vessel caused by swinging Indian clubs for exercise may be a death from bodily injury caused by accidental means. In *Martin v. Travelers' Ins. Co.* 1 Fost. & F. 505, a total disability caused by straining the back while lifting a heavy burden was declared to be a disability produced by accident. In *North American L. & Acci. Ins. Co. v. Burroughs*, 69 Pa. 48, 51, 8 Am. Rep. 212, the court said that an accident is "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance; casualty; contingency."—and held that a strain of the abdominal muscles produced by pitching hay, which caused an inflammation that resulted in death, was an accident. Death by drowning, by involuntarily inhaling illuminating gas, or by fright, is

death by accidental means. *Trew v. Railway Pass. Assur. Co.* 6 Hurlst. & N. 839; *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410; *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 8 L. R. A. 443; *McGlinchey v. Fidelity & C. Co.* 80 Me. 251. In *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547, 65 Fed. Rep. 178, 12 C. C. A. 544, 27 L. R. A. 629, this court affirmed a judgment based upon a verdict that a death caused by lockjaw, which was produced by a shot wound unexpectedly inflicted upon himself by the deceased, without design, was a death caused by bodily injury produced by accidental means alone. In *United States Mut. Acci. Asso. v. Barry*, 181 U. S. 100, 33 L. ed. 60, three persons jumped from the same platform at the same time and place. Two of them alighted in safety, while the third suffered a stricture of the duodenum which produced a disease which caused his death. The supreme court affirmed a judgment founded upon a verdict that his death was the result of bodily injuries effected through external, violent, and accidental means, and approved an instruction to the jury that "the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;' that, if a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means."

We are unable to distinguish the case at bar from those to which we have referred, and the case last cited is of controlling authority in this court. The abrasion of the skin of the toe of the deceased was unexpectedly caused, without design on his part, by unforeseen, unusual, and unexpected friction in the act of wearing the shoe, which preceded the injury. It was not the natural or probable consequence of that act, and it was, therefore produced by accidental means.

The judgment below must be affirmed, with costs; and it is so ordered.

MASSACHUSETTS SUPREME JUDICIAL COURT.

William A. TURNER

v.

REVERE WATER COMPANY, Appt.

(.....Mass.....)

A regulation of a water company by which it refuses to turn on water for a building until unpaid rates of previous owners or tenants are paid is unreasonable and invalid, unless authorized by statute.

(May 21, 1898.)

NOTE.—As to regulations concerning the supply of water to a consumer, see *Ladd v. Boston (Mass.)* 40 L. R. A. 371, and references in footnote thereto.
40 L. R. A.

APPEAL by defendant from a decree of the Superior Court for Suffolk County in favor of plaintiff in a suit brought to compel defendant to furnish plaintiff with water upon premises from which the water had been turned off for failure of former occupants to pay the water tax. *Affirmed.*

The facts are stated in the opinion.

Mr. Benjamin N. Johnson, for appellant:

There is no general statutory requirement or prohibition which imposes the duty upon the defendant to furnish water to any person or classes of persons.

There is no provision in the defendant's

charter which requires it to supply water within the territory in question upon any specific terms or conditions.

Acts 1882, chap. 142, § 4.

The defendant still had the right to conduct its business under fit and reasonable rules and regulations, and was only bound to furnish water when requested in a reasonable way, and in accordance with such rules and regulations.

Wood v. Auburn, 87 Me. 287, 29 L. R. A. 376; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, 10 L. R. A. 122.

Water companies may make reasonable rules for the government of their customers in the use of the water supply, and enforce the same by stopping their supply as a penalty for the violation thereof. In such cases the company is not limited to an action for damages.

29 Am. & Eng. Enc. Law, p. 18, and cases cited; *Shepard v. Citizens' Water Co.* 90 Cal. 635; *Shiras v. Ewing*, 48 Kan. 170.

Regarding the situation of the parties, it is more reasonable to require that one proposing to purchase, lease, or otherwise hire a building, house, or other tenement should make inquiry as to the practicability of obtaining a supply of water therefor, and as to the terms and conditions on which such supply may be secured, than that the municipality or corporation furnishing the supply should be compelled to keep itself informed of the shifting ownerships and tenancies of all the habitations and other buildings within its territory.

Girard L. Ins. Co. v. Philadelphia, 88 Pa. 398; *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, 10 L. R. A. 122; *Wood v. Auburn*, 87 Me. 287, 29 L. R. A. 376; *Com., Roman Catholic High School Trustees, v. Philadelphia*, 132 Pa. 288; *Atlanta v. Burton*, 90 Ga. 486; *Brumm's Appeal* (Pa.) 12 Atl. 855.

Mr. C. R. Morse, for appellee:

The act under which the defendant company was organized does not give any right or lien to said company against any estate for water furnished and not paid for, so as to deprive a subsequent owner, tenant, or occupant of said premises of the use of said water, who may be willing to comply with said rules and regulations, without first paying for the water used and unpaid for by the former occupant.

Merrimack River Sav. Bank v. Lowell, 152 Mass. 556, 10 L. R. A. 122; 2 Dill. Mun. Corp. § 821 and notes; *Rockland Water Co. v. Adams*, 84 Me. 472.

Water rates are not to be collected in the exercise of the taxing power, unless made so by some special authority of law, but the obligation to pay for the use of water rests upon either a special or implied contract on the part of the consumer to make compensation for water which he has applied for and received, on the terms and conditions made public.

Young v. Boston, 104 Mass. 95; *Atlanta v. Burton*, 90 Ga. 486; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 398; *Com., Roman Catholic High School Trustees, v. Philadelphia*, 132 Pa. 288; *Shepard v. Citizens' Water Co.* 90 Cal. 635.

40 L. R. A.

Lathrop, J., delivered the opinion of the court:

On February 1, 1897, the plaintiff hired a dwelling house in Winthrop from Clarissa C. Doane, its owner. Two days later he applied to the defendant to have water turned on, and tendered the price charged from January 1, 1897, to January 1, 1898. The defendant refused to turn on the water until the amount due the defendant for water supplied to Mrs. Doane from January 1, 1896, to October 10, 1896, had been paid. In October, 1893, one Emmet J. Doane, the then owner of the house, made an application for water for the house, and paid the bills sent to him on July 1, 1894, and on July 1, 1895. On July 13, 1895, Emmet J. Doane conveyed the house to his mother, Clarissa C. Doane, who since that date has been the owner. The defendant received no notice of this conveyance until June 8, 1896. On July 1, 1896, the defendant sent a bill to Clarissa C. for water during the year 1896. The bill was not paid, and on July 17, 1896, the defendant sent notice to Clarissa that the water would be cut off unless the bill sent on July 1st should be paid immediately. On October 10, 1896, the water was shut off. The defendant refuses to turn on the water until the plaintiff pays the bills incurred by his landlord, because it has the following rule or regulation: "The rates for use of water shall be payable on the 1st day of July in each year. All charges for specific supplies, or for fractional parts of the year, shall be payable in advance, before the water is let on. In all cases of nonpayment of rates fifteen days after same are due, the water may be shut off without further notice, and not be again turned on until rates are paid and \$1.50 additional for shutting off and letting on." The superior court entered a decree restraining the defendant from refusing or neglecting to furnish the plaintiff a suitable supply of water so long as he continues to pay the regular water rates, and complies with all other reasonable and usual regulations of the defendant in the future, except those relating to the payment of the water rates remaining unpaid of previous owners or tenants. The case is before us on appeal, and the principal question presented is whether, if the rule applies to a case like this, it is reasonable. The defendant was incorporated, under Stat. 1882, chap. 142, "for the purpose of furnishing the inhabitants of Revere with water for domestic and other purposes." By § 4 it was given the power to "establish and fix from time to time rates for the use of such water, and collect the same." By Stat. 1884, chap. 259, it was authorized to contract with the town of Winthrop to supply that town with water "for the extinguishment of fires and for other purposes as authorized by said act." It was also authorized to "distribute water through said town, and establish and collect rates therefor in like manner as by said act it is authorized to do in the town of Revere." The amendment of its charter by Stat. 1887, chap. 387, is immaterial to the case.

It is contended that the rule is a reasonable one, because similar rules have been established by ordinances in various cities of this commonwealth, and in a statute of Georgia granting a charter to the city of Atlanta, and

that it has been decided to be reasonable in Pennsylvania. It is also argued that it is easy for a person hiring or buying a house to ascertain whether the debt of some former owner has been paid. Of course, it cannot be disputed that if the legislature gives a lien upon the land to a water or gas company for unpaid dues, or uses words equivalent to giving a lien, it has the right to do so, and there is nothing more to be said. In *Atlanta v. Burton*, 90 Ga. 486, the charter provided that the board of water commissioners shall have the power to "require the payment in advance for the use or rent of water furnished by them in or upon any building, place, or premises, and, in case prompt payments shall not be made, they may shut off the water from such building, place, or premises, and shall not be compelled again to supply said building, place, or premises with water until said arrears, with interest thereon, shall be fully paid." It was held that the commissioners might furnish water on credit; that the charter did not contemplate a personal credit, because water was not furnished to persons, but to buildings. "The charter did not contemplate nor intend that water should be furnished upon individual or personal credit, but that the supply should be made a charge upon the property to which the water was conveyed." In *Girard L. Ice Co. v. Philadelphia*, 88 Pa. 393, the words of the ordinance were that, after the water was turned off, it "shall not again be supplied or furnished to the said premises except upon payment of all arrears of water rent and the sum of \$2 for expenses incurred." The opinion of the court states that the validity of the ordinance was conceded. The only question was whether, as the defendant had not sooner cut off the water on rates not being paid, the plaintiff was obliged to pay three years' rates due from a former owner, instead of the rates for one year, of which it had made a tender. The case of *Com. v. Roman Catholic High School Trustees v. Philadelphia*, 182 Pa. 288 (a gas case), simply considered the question as settled by the former case, and the opinion does not discuss it. In *Brumm's Appeal* (Pa.) 12 Atl. 855 (a water case), the charter expressly provided that the real estate to which the water was furnished should be bound by the water rates. The argument derived from foreign legislation, and ordinances of cities in other states, seems to us to be of little consequence in determining the question before us, as to the effect of the regulation in this case. It may be noted, however, that in New York it is expressly provided that a gas company cannot refuse to turn on gas because a former occupant of the premises has not paid for the gas consumed by him. N. Y. Stat. 1859, chap. 311, §§ 6, 9; 2 N. Y. Rev. Stat. 1896, pp. 1856, 1857. In England it has been held, under Stat. 10 & 11 Vict. chap. 17, that, if a tenant does not pay water rates, the water company may sever the connection between the house and the main pipes, and that, if a new tenant occupies the house, he has the right to have the water turned on, on reconnecting the pipes, but until he does so the water company is not liable to a penalty under the act for not supplying him with water. The remarks of Bramwell, L. J., on the point of not compell-

ing the new tenant to pay an old debt, will be cited later. *Waterworks Co. v. Wilkinson*, L. R. 4 C. P. Div. 410. Under 50 & 51 Vict. chap. 21, § 4, arrears of water rates, where the rent does not exceed £20, may be recovered in a personal action against a purchaser of land, but the water cannot be cut off. *East London Waterworks Co. v. Kellerman* [1892] 2 Q. B. 73.

So far as legislation is concerned in Massachusetts, the case of a gas company is covered. Pub. Stat. chap. 61, § 16, gives the company the right to "stop the gas from entering the premises" of a person neglecting to pay the amount due, and to enter the premises between certain hours, and remove the meter, etc. Nothing is said about making subsequent users liable for old debts. Stat. 1894, chap. 299, makes it unlawful for a gas company to refuse to supply gas for any building or premises "for the reason that a gas bill remains unpaid by any previous occupant of said building or premises; provided the person or persons applying for gas shall not be in arrears to such corporation for gas previously furnished to or for said building or premises, or to or for any other building or premises." So far as gas is concerned, the question is settled. As to water, there was no general legislation until after this action was brought. Stat. 1898, chap. 168, makes the same provision as to water that Stat. 1894, chap. 299, made as to gas. The statute is not retroactive, and the question before us must be decided on general principles. There is much in our special legislation to show that we should not hold that one man is obliged to pay the debt of another, or that a water rate is a charge upon the land. The charter of the defendant is one of the simpler forms. The one which is generally found, and which applies to most of the cities and towns of this commonwealth, after giving the right to regulate the price or rents for the use of water, contains this provision: "The occupant of any tenement shall be liable for the payment of the price or rent for the use of the water in such tenement; and the owner thereof shall be also liable. If, on being notified of such use, he does not object thereto." Stat. 1846, chap. 167, § 14 (Boston); Stat. 1863, chap. 168, § 18 (New Bedford); Stat. 1864, chap. 268, § 14 (Salem); Stat. 1865, chap. 153, § 9 (Cambridge); Stat. 1867, chap. 60, § 7 (Medford); Id. chap. 843, § 13 (Roxbury); Stat. 1869, chap. 462, § 12 (Lynn); Stat. 1871, chap. 307, § 8 (Woburn); Id. chap. 133, § 17 (Fall River); Stat. 1872, chap. 343, § 14 (Brookline); Id. chap. 188, § 9 (Concord and Lincoln); Id. chap. 62, § 9 (Holyoke); Id. chap. 79, § 11 (Lawrence); Id. chap. 844, § 14 (Newton); Id. chap. 845, § 10 (Springfield); Id. chap. 336, § 14 (West Roxbury); Id. chap. 837, § 11 (Waltham); Stat. 1878, chap. 274, § 7 (Lexington); Id. chap. 76, § 9 (Natick); Id. chap. 322, § 9 (Westfield); Stat. 1874, chap. 191, § 9 (Danvers); Id. chap. 256, § 9 (Marlboro); Id. chap. 125, § 10 (Newton); Stat. 1875, chap. 199, § 14 (Watertown); Stat. 1881, chap. 206, § 8 (Framingham); Stat. 1884, chap. 256, § 13 (Cambridge); Stat. 1887, chap. 416, § 11 (Malden). The following charters have the "occupant and owner" clause, but add that the water rates are "to be collected in an action of

contract in the name of the city." Stat. 1891, chap. 848, § 9 (Haverhill); Id. chap. 401, § 13 (Quincy); Stat. 1894, chap. 187, § 12 (Stoneham); Stat. 1897, chap. 478, § 10 (Stoneham). The following charter provides that the notice of objection to the owner must be in writing: Stat. 1875, chap. 217, § 9 (Taunton). The following charters provide that the notice of objection from the owner must be in writing: Stat. 1876, chap. 98, § 9 (Clinton); Stat. 1881, chap. 174, § 9 (Weymouth). The following charter provides that both the notice to the owner and the objection from the owner must be in writing: Stat. 1875, chap. 158, § 6 (Rockport Water Company). The following charter provides: "The owner of any tenement shall be liable for the payment of the rent for the use of the water in such tenement, to be collected in an action of contract in the name of the city." Stat. 1892, chap. 384, § 12 (Chicopee). This must mean an action of contract, for it is simply a liability for rent; and in some charters the words are added, "to be collected in an action of contract in the name of the town." Our legislature has never authorized the making of an unpaid water rate a lien or charge upon the land. It has authorized holding the owner liable, after notice, in some instances, for the debt of a tenant; but in no instance has a tenant been held liable for the debt of an owner. If the authority to create a lien or charge is to be derived from the right to make rules, there would have been no necessity to insert the words above cited.

In the absence of legislation, can a regulation such as the one in question, if it imposes a lien on land, be considered a reasonable one? We are of opinion that this question must be answered in the negative. In *Lumbard v. Stearns*, 4 Cush. 60, it was declared by Chief Justice Shaw that a private water company, by accepting its charter, would abuse its franchise if it failed to furnish water, and that it was its duty to supply all who should apply for water on reasonable terms. See also *Young v. Boston*, 104 Mass. 95. The ordinance of the city of Lowell, which was before the court in *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, 10 L. R. A. 122, was much more explicit than the one before us. It provided that, in case the water was cut off for nonpayment of rates, it should not be let on, "either for the present or any subsequent occupant," except upon payment of the amount due. The point decided was that, after the city had received the money for a year's use of the water, it could not cut it off during the year because a former occupant had not paid his bill. There is no intimation in the opinion that a water rate constitutes a charge upon land, and the case goes upon the ground of contract. Indeed, it is said by Mr. Justice Knowlton, speaking of payments of rates: "It seems to be more consistent with the nature of the transactions to consider them as payments of the price of a commodity, sold under a general authority to provide for the public, and to sell upon request, in a reasonable way, to the persons who constitute the public." It may be desirable that a water company or a gas company should have an easy way of collecting its debts, but we see no reason why it should be enabled by the court to collect a debt

from one who is not a party to the contract, when it sells its commodity on credit. The legislature may give such a company a lien, as it has given one to mechanics. We have no doubt that payment may be demanded in advance, as is done in Boston; though whether the owner of the house could not have the water shut off during the year, and recover for what he had not used, may be considered an open question. See *Rockland Water Co. v. Adams*, 84 Me. 472. In this case the owner of a house had paid bills which contained the words, "One year's rent will be required in all cases." During a subsequent year he used the water for four months only, and was sued for a year's supply. It was held that the regulation was unreasonable and void, and that the plaintiff could not recover unless the defendant expressly assented to the regulation, and that payment of former bills was not such assent. See also *Wood v. Auburn*, 87 Me. 287, 29 L. R. A. 376, where there are some strong remarks in favor of the consumer. We have also no doubt that a water company may demand a deposit, as is required by the Boston Gaslight Company, where it does not know the consumer. This was held to be reasonable in the case of a gas company in *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266. See also *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479, 15 Wis. 318, 82 Am. Dec. 679. The right to shut off water or gas if a bill is not paid is undoubted, so far as the consumer is concerned. *People v. Kennedy, v. Manhattan Gaslight Co.* 45 Barb. 136; *McDaniel v. Springfield Waterworks Co.* 48 Mo. App. 273; *Sheward v. Citizens' Water Co.* 90 Cal. 635; *Shiras v. Ewing*, 48 Kan. 170. If gas is supplied to the owner of different houses, under separate contracts, failure to pay the gas bill on one house does not authorize the cutting off of the gas from the other. *Gaslight Co. v. Collday*, 25 Md. 1. See also *Lloyd v. Washington Gaslight Co.* 1 Mackey, 331. In *American Waterworks Co. v. State, Walker*, 46 Neb. 194, 30 L. R. A. 447, where a consumer of water (who was in default), after the water was turned off, tendered his arrears due, but refused to pay \$1, as required by regulation of the company, for turning the water on, the court, by mandamus, compelled the company to turn the water on, holding the regulation to be unreasonable. See also *Smith v. Birmingham Waterworks Co.* 104 Ala. 315. It is difficult to see how a lien or charge upon land can be created, except by the written consent of the owner or by an act of the legislature, when it is provided by Pub. Stat. chap. 120, § 8, "and no estate or interest in land shall be assigned, granted, or surrendered, unless by such writing [i. e., an instrument in writing signed by the grantor], or by operation of law." Water is at the present time a necessity, and without it a house cannot be occupied in our cities. The water must be obtained from a water company, and to compel a man to pay another's debt in order to obtain it seems to us a result that ought not to be reached. Water is even a greater necessity than gas, for there are other means of lighting in use; yet in the case of gas there is a decision directly in point. In *New Orleans Gaslight & Bkg. Co. v. Paulding*,

12 Rob. (La.) 376, the plaintiff refused to supply the defendant with gas unless he paid an unpaid bill contracted by a former owner of the building. He promised to do so, in order to obtain the gas. The plaintiff turned on the gas, and afterwards sued him on his promise to pay the amount due from the former owner. The court held that the promise was void, and that the plaintiff had no right to require such a payment. In *Sheffield Waterworks Co. v. Wilkinson*, L. R. 4 C. P. Div. 410, 421, 422, it is said by Bramwell, L. J.: "My judgment does not proceed upon this, that the appellants have a right to insist upon the communication with their main remaining severed until their claim for rates due from the preceding occupier is satisfied. I do not think they have such right. That was, no doubt, the notion upon which they acted; but in my opinion it is not sustainable. The learned magistrate who has stated this case has argued it extremely well, and I agree with him in thinking that it was not the intention of the legislature that the undertakers should be at liberty to withhold the supply of water from the respondent's premises until the arrears due from someone else are paid. I also agree with him in thinking that ample provision is made for their security, by enabling them to demand the rates in advance, without having what may be called something in the nature

of a lien upon the property itself for bygone rates." It is suggested that a lessee or purchaser can easily protect himself by finding out whether the water has been paid for. The answer to this is obvious. The records of a water company are not public records, to which anyone has access. If inquiry be made, there is no law to compel the company to give a certificate in writing. The answer would be a verbal one. If there should be a controversy as to what it was, it would be a matter to be proved. An answer in the negative would only operate by way of estoppel, and this would have to be proved. Suppose it turned out that there was an old bill which the clerk who gave the answer supposed had been paid, when in fact it had not been, and the company should show that the clerk had no authority to answer the question. Is the man who proposes to buy a house to be kept from completing the purchase until all these matters are determined by a court of law? See *Wood v. Auburn*, 87 Me. 287, 292, 29 L. R. A. 376. It seems to us that if an unpaid gas or water bill is made a charge upon the land, without authority of a statute, there are numerous difficulties to be encountered, and that the better rule is that any such regulation as that before us, if construed as the defendant seeks to construe it in this case, is unreasonable and void.

Decree affirmed.

MINNESOTA SUPREME COURT.

Samuel D. PETERSON, *Respnt.*,
v.

WESTERN UNION TELEGRAPH COMPANY, *Applt.*

(.....Minn.....)

- *1. **A written message, alleged to be libelous**, was delivered to defendant's operator at New Ulm, and by him transmitted by sound over the wires to the operator at St. Paul, to be by him reduced to writing and delivered to the plaintiff. *Held*, that this constituted a publication of the libel.
2. **Mere negligence, unless so gross as to amount to positive bad faith**, is not a ground for awarding punitive damages. Hence an instruction to the effect that the jury might award exemplary damages, if they found that the defendant was negligent in employing the operator who transmitted the message, or in failing to adopt proper rules to prevent the transmission of libelous messages, is erroneous.

(April 22, 1898.)

A PPEAL by defendant from a judgment of the District Court for Brown County refusing a new trial after verdict in favor of plaintiff in an action brought to recover dam-

*Headnotes by MITCHELL, J.

NOTE.—For prior decision in this case, see *Peterson v. Western U. Teleg. Co.* (Minn.) 38 L. R. A. 302.

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ages for alleged publication of a libel. *Reversed.*

The facts are stated in the opinion.

Messrs. Ferguson & Kneeland, for appellant:

The words of the message must speak for themselves, unaffected by anything extraneous. If they are not libelous *per se*, they are not libelous at all.

Hankinson v. Bilby, 16 Mees. & W. 445; *Shull v. Raymond*, 28 Minn. 66.

The broad distinction between slander and libel, or the two distinct wrongs which those terms are used to designate and distinguish, is that one is the communication of defamatory matter by transitory means,—like the human voice; the other by means more or less permanent,—as written language, pictures, caricatures, effigies, etc.

Newell, *Defamation*, p. 38; Townshend, *Slander & Libel*, 3d ed. §§ 18, 98, citing Holt, *Libel*, p. 254; Folkhard's *Starkie, Slander & Libel*, p. 92, *67, note; Odgers, *Libel & Slander*, § 22.

The transmission of this message was not a publication in writing either under authority or in reason.

Spoken words are actionable in themselves if they (1) charge the plaintiff with the commission of some indictable offense; (2) impute to the plaintiff a contagious disorder tending to exclude him from society; (3) or speak of the plaintiff in the way of his profession or trade, or disparage him in an office of public

trust. But in all other cases of spoken words the fact that the plaintiff's reputation has been injured thereby must be proved at the trial by evidence of the consequences, etc.

Odgers, Libel & Slander, § 2; see also *Townshend, Slander & Libel*, §§ 153a et seq.; 13 Am. & Eng. Enc. Law, p. 349.

A corporation cannot be liable for slander.

Townshend, Slander & Libel, 3d ed. § 265; *Odgers, Libel & Slander*, § 368; *Newell, Defamation*, p. 361; *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284; 4 Am. & Eng. Enc. Law, p. 257; 13 Am. & Eng. Enc. Law, p. 449.

Such a publication, if it is a publication, is privileged in the absence of express malice.

Gray v. Western U. Teleg. Co. 87 Ga. 350, 14 L. R. A. 95; *Western U. Teleg. Co. v. Ferguson*, 57 Ind. 495; *Minn. Gen. Stat.* 1894, §§ 2635, et seq.; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 888; *Wenman v. Ash*, 13 C. B. 844, cited in *Townshend, Slander & Libel*, § 209; *Marks v. Baker*, 28 Minn. 162; *Traynor v. Seilaff*, 62 Minn. 420; *Rector v. Smith*, 11 Iowa, 302; *Taylor v. Hawkins*, 16 Q. B. 308; *Toogood v. Spryng*, 1 Crompt. M. & R. 181; *Moore v. Butler*, 48 N. H. 161; *Aldrich v. Press Printing Co.* 9 Minn. 183, 86 Am. Dec. 84; *Bishop, Non-Cont. L.* § 302.

A verdict for purely vindictive damages, if excessive, should be set aside.

Sedgw. Damages, 520-528; *Pratt v. Pioneer Press Co.* 32 Minn. 217; *Bridge v. Oshkosh*, 71 Wis. 363; *McCarthy v. Niskern*, 22 Minn. 90; *Dennis v. Johnson*, 42 Minn. 301.

The question of actual malice and punitive damages should not have been submitted to the jury at all.

Wiggin v. Coffin, 3 Story, 1; *Hoffman v. Northern P. R. Co.* 45 Minn. 53.

Malice of agent is not imputable to principal.

Existon v. Cramer, 57 Wis. 570; *Wardrobe v. California Stage Co.* 7 Cal. 118, 68 Am. Dec. 231; *Hill v. New Orleans, P. & G. W. R. Co.* 11 La. Ann. 292; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Sedgw. Damages*, 523, and note.

Mr. S. L. Pierce, for respondent:

When it is the purpose of the speaker of the words to have the person spoken to reduce the spoken words to writing, and this is done, the writing is published to the writer.

Townshend, Slander & Libel, § 86; *Pullman v. Hill* [1891] 1 Q. B. 524; *Snyder v. Andrews*, 6 Barb. 43; *McCoombe v. Tuttle*, 5 Blackf. 431.

Where one, knowing a writing to be a libel, reads it to others, that is an unlawful publication of it.

Lamb's Case, 9 Coke, 59b, 108; *Kiene v. Ruff*, 1 Iowa, 483; *Bacon v. Michigan C. R. Co.* 55 Mich. 224, 54 Am. Rep. 372; *State v. McIntire*, 115 N. C. 769; *Munson v. Lathrop*, 96 Wis. 386; *The Case De Libellis Famosis*, 5 Coke, 125a; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455.

In common-law actions the parties are entitled to trial of issues of fact by jury.

Judges may differ widely with the jurors, but that is no justification for disturbing the decision of a jury on matters left by the law to their determination, unless the damages given are excessive, and this fact appears to have 40 L. R. A.

been given "under the influence of passion and prejudice."

Fabrigas v. Mostyn, 2 W. Bl. 929; *Meeks v. St. Paul*, 64 Minn. 220.

Aside from the question of punitive damages, was there not here something in the way of actual injury to the plaintiff of a serious and, indeed, irreparable character?

Williamson v. Freer, 43 L. J. C. P. N. S. 161.

Mitchell, J., delivered the opinion of the court:

This case was here on a former appeal (63 Minn. 18, 33 L. R. A. 302), the opinion in which may be referred to for a full statement of the facts. It was there held that the forwarding of the alleged libelous message by the defendant over its wires to its operator at St. Paul constituted a publication; that the message was on its face fairly susceptible of a libelous meaning; also that the evidence was sufficient to justify the jury in finding that defendant's operator published or transmitted the message maliciously, and not in good faith. If there is any difference between the evidence on this last point on the first trial and that adduced on the last trial, the latter is the stronger against the defendant.

The message was delivered in writing to the operator at New Ulm, and by him transmitted over the wires to the operator at St. Paul, to be by him reduced to writing and delivered to the plaintiff, which was done. The fact affirmatively appears on the second trial that the message was transmitted over the wires by sound, and the point is now made that the mode of communication was oral, and not written, and therefore there was no publication of a libel; the distinction between slander and libel being that the former is oral defamation by spoken words, while the latter consists of a publication by writing, printing, pictures, or other durable mode. The alleged materiality of the point lies in the facts that, as defendant claims, the words complained of are not actionable in themselves unless published in writing, and that a corporation cannot be liable for slander. This point was not raised or considered on the former appeal. We are of the opinion that it is without merit. Whether the means employed by the operator at New Ulm in dictating or communicating the contents of the message to the operator in St. Paul consisted of sounds representing letters, or dots or dashes representing the same thing, can make no difference. In either case, the purpose and result would be the same, viz., the transmission and copying in written form the contents of the written message in the hands of the operator in New Ulm. The result was to put the message in the hands of the St. Paul operator in written, durable form, which he could read and understand as effectually as if the original had been placed in his possession. Words communicated for such an accomplished purpose "have an existence *per se* off the tongue." When the means of reproducing the contents of a writing are by repeating its contents orally to another, to enable him to put it into writing, and the person to whom it is repeated reduces it to writing, the writing thus produced does not depend for its identification

on the oral utterances of the person who reads or repeats, but on the writing itself, which is thus communicated to the person who reduces it to writing; and it can make no difference whether the contents of the writing are communicated by sound over telegraph wires by one operator to another, or by a person in audible words to an amanuensis at his side. See *Pullman v. Hill* [1891] 1 Q. B. 524; *M'Combs v. Tuttle*, 5 Blackf. 481; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455. As long ago as *Lamb's Case*, 9 Coke, 59a, it was held that where one, "knowing a writing to be a libel, reads it to others, that is an unlawful publication of it;" and in *The Case De Libellis Famosis*, 5 Coke, 124b, it was held that a libel may be published (1) *verbis aut cantilenis*, as where it is maliciously repeated or sung in the presence of others." It is not necessary to go as far as this in order to hold that the facts in the present case constituted the publication of a libel.

2. There was no evidence that the New Ulm operator was not competent and generally faithful in the discharge of his duties, or that he was ever guilty of any breach of duty, unless in the transmission of this message, and there is no evidence that the defendant had any reason, prior to its transmission, to anticipate that he would transmit an improper message. Neither is there any evidence that the defendant ratified or approved of his wrongful act (if it was such) in transmitting this message, unless it is the bare fact that it subsequently retained him in its service. Upon this state of the evidence the court, after instructing the jury that if they found that the defendant or its agent was actuated by malice in fact, and that it ought to be punished, further instructed them in that connection as follows: "Perhaps the only fault that can be charged against the defendant in the premises is that it had and retained an operator who would receive and transmit such improper messages, or that it did not have a rule prohibiting the sending of unsigned messages libelous on their face; and, if the jury should be of that opinion, they should make the amount of exemplary damages, if any, reasonably proportionate to the degree of defendant's fault." (It should be stated in this connection that the defendant had a rule forbidding its operators from sending messages containing profane or obscene language, but none in regard to unsigned or libelous messages). When the court had completed his charge, defendant's counsel took the following exceptions: "I except to that portion of the general charge which submits the question of punitive damages to the jury; and I especially except to that portion of the charge reading as follows: [The part above quoted]." Then ensued the following colloquy between counsel, and between the counsel and the court: "Mr. Pierce: If there is an exception to that part of the charge, I would consent to strike that portion of the charge out. Let's get that, —that it might be possibly construed to be a recognition of the fact of fault, I suppose that is the point counsel makes. I just as soon, if they object to do it, to have that clause stricken out. Mr. Ferguson: I have referred to that. If that is stricken out, why, then, the case

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should be dismissed, because there isn't any other fault of the company. Mr. Pierce: I think, perhaps, that clause might be stricken out. Mr. Ferguson: I except to it. If you want to strike it out, I move to dismiss. By the Court: I guess I won't strike it out. Mr. Ferguson: That is the gist of your action; that is why I except to it. Mr. Pierce: Now, I will ask counsel, then, the particular feature of that—What is it that you object to? Object to the question of submitting the question of punitive damages at all, under the evidence of this case? Mr. Ferguson: I except to this, which is the only specific point called out. I don't think that the question of punitive damages should be submitted to the jury. Mr. Pierce: I might say that it might be modified, with the suggestion that, if these facts might be found, it is rather a matter for the jury to determine. By the Court: I don't feel disposed to change that at present." We are of the opinion that the part of the charge especially excepted to contains material error. It may be that it is erroneous in assuming or implying that the defendant was at fault or negligent in each and all of the matters mentioned. But that is not its chief vice. The fatal error in this part of the charge lies in the fact that, in effect and substance, it amounts to an instruction that the mere negligence of the defendant in the respects mentioned would justify the jury in awarding punitive or exemplary damages. The defendant's liability, if any, rests upon the doctrine of *respondet superior*. If the act of the servant in transmitting the message was wrongful, the defendant is liable, whether it was negligent or not; and, on the other hand, if his act was lawful, the defendant is not liable, however negligent it may have been. Hence the question of defendant's negligence in the employment of its operator, or in the failure to adopt proper rules, was really foreign to the issues in the case.

Moreover, mere negligence, unless so gross as to amount to positive bad faith, is no ground for awarding punitive damages. The liability of the defendant for such damages, if the act of the agent was actuated by malice or bad faith, is an entirely different matter. It is urged very strenuously by plaintiff's counsel that defendant is not in position to raise this objection, for the reason that, by what subsequently occurred in court, he put his exception to the charge exclusively upon the ground that the question of exemplary damages should not have been submitted to the jury at all, and that he did not specifically call the court's attention to the particular vice in this part of the charge. We cannot so construe the colloquy between the court and defendant's counsel.

Counsel took two entirely distinct exceptions: First, to the submission of the question of exemplary damages to the jury at all; and, second, to the part of the charge which stated the grounds upon which the jury might award such damages; and we cannot see anything in what followed that amounted to a waiver of either of the exceptions or a merger of the second in the first. The second exception was sufficiently explicit. Counsel called the court's attention specifically to the particular part of the charge excepted to, embodying it *verbatim*

in his exception. We do not think he was required, under the circumstances, to go further, and explain to the court the reasons why the charge was erroneous. The error in it was not one of mere verbal inaccuracy or incompleteness of statement. As it appears that this case has been tried three times, it is unfortunate

that error should have occurred on the trial, but the error is so manifest and so substantial that we cannot avoid granting a new trial. This renders it unnecessary to consider any of the other points discussed by counsel.

Order reversed.

NEW YORK COURT OF APPEALS.

Re Assignment of Alfredrick S. HATCH et al.

Re Claim of Collis P. HUNTINGTON.

(155 N. Y. 401.)

1. A claim accruing after an assignment for creditors on a contract previously made by the assignor is assets in the hands of the assignee only to the extent of the balance due after deducting a claim against the assignor which was a valid existing set-off at the time of the assignment.
2. Only one of mutual debts or claims need be due at the time of an assignment for creditors by one of the parties, in order to give the right of set-off in equity.
3. A claim which was due when the debtor made an assignment for creditors can be set off against a claim in favor of the assignee against the creditor for a share of the proceeds of collections made after the assignment on judgments which the assignor, before the assignment, had transferred to the creditor under a contract for a division of the proceeds.

(April 19, 1886.)

APPPEAL by Collis P. Huntington from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County entered upon order of a referee allowing his claim upon the assets of the insolvent estates of the Hatches. *Reversed.*

The facts are stated in the opinion.

Mr. Maxwell Evarts, for appellant:

Mr. Huntington had a right under the statute to set off his claim for money loaned to Hatch prior to the assignment, against the claim of Hatch's assignee for his proportion of the money collected by Huntington in the Baltimore and Canadian suits under the agreement of June 24, 1886.

Code Civ. Proc. §§ 501, 502; *Norton v. McCarthy*, 10 Misc. 222.

Mr. Huntington is entitled to set off *pro tanto* the $\frac{1}{11}$ of the net collections made by him under the agreement of June 24, 1886, against the amounts due him from Hatch and his firm at the date of the assignment.

Hughitt v. Hayes, 138 N. Y. 163; *Scott v. Armatrong*, 146 U. S. 499, 36 L. ed. 1059; *Yardley v. Clothier*, 49 Fed. Rep. 337, 8 U. S. App.

207, 51 Fed. Rep. 506, 17 L. R. A. 462; *Adams v. Spokane Drug Co.* 57 Fed. Rep. 888, 23 L. R. A. 334; *Van Wagoner v. Paterson Gaslight Co.* 23 N. J. L. 284; *Smith v. Felton*, 43 N. Y. 419; *Smith v. Fox*, 48 N. Y. 674; *Rothschild v. Mack*, 115 N. Y. 1; *Skiles v. Houston*, 110 Pa. 254; *Martin v. Kunzmüller*, 87 N. Y. 896; *French v. Fenn*, 3 Dougl. 257; *Cooke*, Bankrupt Laws, 569; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731.

Where the claim against the insolvent matured before the assignment, and the claim in favor of the insolvent became due after the assignment (the present case), the right of set-off has always been allowed.

Smith v. Felton, 43 N. Y. 419; *Smith v. Fox*, 48 N. Y. 674; *Hughitt v. Hayes*, 138 N. Y. 163.

It has invariably been held by this court that it is immaterial, so far as the right of set off is concerned, that the claim in favor of the insolvent became due after the date of the assignment.

Rothschild v. Mack, 115 N. Y. 1; *Richards v. La Tourette*, 119 N. Y. 54; *Fera v. Wickham*, 135 N. Y. 223, 17 L. R. A. 456.

A pledgee cannot set off against his debt to a pledgee the value of the collateral as existing at any earlier time than the time when the account is taken to the court.

Granite Bank v. Richardson, 7 Met. 407; *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551.

Messrs. Hatch & Wickes and George C. Lay, for respondent:

Demands to be set off must be legal and within the jurisdiction of the court. They must be mutual between all the parties to the action; and the set-off must be a subsisting cause of action.

Waterman, Set-Off, 2d ed. § 25.

At the date of the assignment there was no subsisting demand, actual or contingent, against Huntington.

Chance v. Isaacs, 5 Paige, 592; *Hatch v. New York*, 82 N. Y. 442; *Pond v. Harwood*, 139 N. Y. 111.

In cases of cross demands, both due at the date of the assignment, the equity of the person owing the insolvent is deemed superior to the equities of creditors entitled to a share in the estate, and a set-off is allowed.

Richards v. La Tourette, 119 N. Y. 54; *O'Connor v. Brandt*, 12 App. Div. 596.

On the other hand, where the estate has a

NOTE.—As to the effect of the immaturity of a claim at the time of insolvency upon the right of set-off, see note to *Fera v. Wickham* (N. Y.) 17 L. R. A. 456.

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As to the right to set off an insolvent's obligation upon a claim in the hands of his receiver or assignee or trustee for creditors, see note to *Merrill v. Cape Ann Granite Co.* (Mass.) 23 L. R. A. 313.

claim against A. due at the date of the assignment, and A. the debtor, is also a creditor upon a claim against the estate, falling due after the assignment, the set-off is not allowed, on the theory that at the date of the assignment the rights of the other creditors have become fixed for the recovery of all the assets of the estate and the collection of claims then due.

Martin v. Kunzmüller, 87 N. Y. 896; *Hamilton v. Piza*, 6 App. Div. 598; *Fera v. Wickham*, 185 N. Y. 223, 17 L. R. A. 456.

Where an insolvent has an existing matured claim against a third person at the date of the assignment, and where at that date there is a contingent liability of said third person upon a note of the assignor, which ripens into a claim against the estate after the assignment, the set-off is not allowed.

Chance v. Isaacs, 5 Paige, 592.

The rights and equities of the other creditors, which became fixed by the assignment, are superior to the right of the secured creditor to a set-off.

Chance v. Isaacs, 5 Paige, 592; *Fera v. Wickham*, 185 N. Y. 223, 17 L. R. A. 456; *Hatch v. New York*, 82 N. Y. 486.

The claim of the estate against Huntington was unliquidated, and its amount could only be determined after an accounting.

Hackett v. Connett, 2 Edw. Ch. 73; *Cummings v. Morris*, 25 N. Y. 625; *Elliott v. Smith*, 77 Hun, 116.

The right of set-off depends upon the situation of affairs at the moment of insolvency, and the allowance of a set-off creates a preference to the prejudice of other creditors.

Wingate v. Orchard, 44 U. S. App. 522, 75 Fed. Rep. 241, 21 C. C. A. 315; *Yardley v. Philler*, 167 U. S. 344, 42 L. ed. 192.

O'Brien, J., delivered the opinion of the court:

The only question necessary for us to consider in this case is that of the right to offset one claim against another. The facts that bear upon this question are these: On the 14th of November, 1887, the firm of A. S. Hatch & Co., as a firm, and each of the individual members as such, made a general assignment for the benefit of creditors. At that time, Huntington had a claim against A. S. Hatch, individually, of \$17,899.22, and against the firm of \$20,167.49; and he still holds these claims against the individual and firm estate in the hands of the assignee. On the 24th of June, 1886, more than a year before the assignment, Huntington had entered into a written contract with A. S. Hatch, individually, whereby the latter transferred to the former certain judgments which were to be collected, and; when collected, divided between the parties in the manner indicated in the agreement. Nothing, however, had been collected on these judgments, and nothing was due on this contract at the date of the assignment above mentioned. Several years after the assignment was made, a considerable sum of money was paid to Huntington in compromise and satisfaction of the judgments by the defendants therein; and for a certain share of the sum so paid, after deducting certain expenses, Huntington is bound to account to Hatch, or, in this case, to his assignee. This was a proceed-

ing, under the statute relating to general assignments, for the purpose of ascertaining and adjusting the claim of the assignee against Huntington by reason of the money in his hands received on the judgments, and of Huntington against the assignee, in consequence of his debt against Hatch individually, above stated. The amount of the claim of each party was determined upon a reference under the statute, and subsequently confirmed by the court. The referee and the court permitted Huntington to set off, against the claim of the assignee for the moneys collected on the judgments, the debt held against Hatch individually at the date of the assignment; but the appellate division reversed the order in so far as it permitted the offset, and this presents the only question of law which we need consider.

In the view that we have taken of the case, it is not necessary to decide whether the right of set-off exists under the statute on that subject. Code, §§ 501, 502. The question can be disposed of under the rule in equity, which exists, as it always did, quite independent of the statute. It is this rule that the learned court below dealt with, as will appear from the opinion. But we think that the learned judge who spoke for the court misapprehended the true scope and application of the decisions on the question in assuming, as he evidently did, that it is necessary that the mutual debts or claims should both be due at the time of the assignment of the insolvent estate. The insolvency of one of the parties in this case draws the question with respect to the right of set-off into the domain of equity. The party who asserts the right is Huntington alone. His debt was due when the assignment was made, though the claim of the assignee against him did not accrue until some years afterwards. The question is whether Huntington is not entitled to apply the former in extinguishment of the latter. The general language used in some of the decisions would seem to sustain the decision below; but it will be seen on closer examination that it is not necessary, in order to warrant the set-off, that both debts should be due at the time of the insolvency. The learned court below supposed that the case of *Fera v. Wickham*, 185 N. Y. 223, 17 L. R. A. 456, deprived Huntington of the right of set-off. In that case neither claim was due at the time of the assignment, but both accrued afterwards, and the right was for that reason denied. It was held that, where this right did not exist at the time of the insolvency or assignment, it could not arise afterwards. In *Smith v. Felton*, 43 N. Y. 419, an assignee of an insolvent sued upon a note made by the defendant to the insolvent not due at the time of the assignment. The defendant had a debt against the insolvent exceeding the amount of the note, which was due at the time of the assignment. It was held that the defendant was entitled to set off his claim against the note. In *Smith v. Fox*, 48 N. Y. 674, the debt due to the assignee did not accrue till after the assignment, but that held by the defendant was due, and the latter was allowed to set off the debt so due. In *Richards v. La Tourette*, 119 N. Y. 54, the debt due from the assignee accrued prior to the assignment, while the debt due to him matured after-

wards, as is the case here, and it was held that the right of set-off existed in such a case. In *Rothschild v. Mack*, 115 N. Y. 8, the court said: "It has been frequently held that, as to the right of set-off in equity, the fact that the debt owing to the insolvent is not due when he makes an assignment is entirely immaterial." The same rule was laid down in the same words in the case of *Richards v. La Tourette*, 119 N. Y. 58, and a careful reading of the opinion in *Fera v. Wickham*, 135 N. Y. 223, 17 L. R. A. 456, will show that the learned judge had the same principle in mind.

The principle upon which the rule proceeds is that, in case of mutual debts, it is only the balance which is the real and just sum owing by or to the insolvent. Hence, when the assignee in this case became vested with the assets of his insolvent assignor, he took the contract above mentioned, which had not then matured into a claim or right of action, but which did mature in his hands some years thereafter. He acquired no greater right than his assignor had prior to the assignment, had the claim then matured, and since Huntington had, prior to the assignment, a valid existing set-off against what the assignee took, that right was not lost or impaired by the assignment. The rights of the parties being adjusted in equity as of the date of the insolvency, all the assignee took as assets was the balance subsequently accruing on the contract, after deducting Huntington's debt due against the assignor before the rights of creditors intervened. Had Huntington's debt accrued after the insolvency, as that of the assignee did, then equity would not permit the set-off, and the case would come within the rule laid down in *Fera v. Wickham*, 135 N. Y. 223, 17 L. R. A. 456; but, as already shown, such was not the case. When the debt of the party claiming the set-off does not exist when the insolvent estate passes into the hands of a trustee for creditors, but accrues subsequently during the administration of the estate, then the equities of the other creditors will intervene to prevent the depletion of the assets in the hands of the trustee by extinguishing a good debt due to the estate by a bad one due to the creditor from the estate. In all cases of mutual debts, it is the insolvency of one of the debtors and the rights of the other creditors in the assigned estate that equity takes notice of, and modifies the legal right of set-off accordingly, in order to promote equality and justice. But that condition of things exists only from the time when the assignment takes effect; and, while it is the general rule in the administration of insolvent estates that equality among creditors is equity, yet the court will not ignore the principle that it is only the balance in case of mutual debts or obligations which is the real sum owing by or to the insolvent; and the assets in the hands of the trustee for distribution to creditors are measured by this rule. Equity always regards as done what ought to have been done, and hence in this case it applies the past-due debt of Huntington, existing at the time of the assignment, upon his unmatured obligation in the hands of Hatch, which passed to the trustee. *Hughitt v. Hayes*, 136 N. Y. 163. This is the rule that prevails with respect to the right of

set-off in the Supreme Court of the United States. In *Scott v. Armstrong*, 146 U. S. 499, 38 L. ed. 1059, the receiver of an insolvent national bank sought to recover upon a note which fell due after his appointment. The maker of the note claimed a right to set off against his obligation a sum of money deposited to his credit with the bank prior to the insolvency. The precise question certified to the court for its decision was this: "Where a national bank becomes insolvent, and its assets pass into the hands of a receiver appointed by the controller of the currency, can a debtor of the bank set off against his indebtedness the amount of a claim he holds against the bank, supposing the debt due from the bank to have been payable at the time of its suspension, but that due to it to have been payable at a time subsequent thereto?" The court answered the question in the affirmative, and, in delivering the opinion, the learned chief justice said: "Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference; and it is clear that it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent."

The state of case where the claim sought to be offset is acquired after the act of insolvency is far otherwise, for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the object of these provisions. The transaction must necessarily be held to have been entered into with the intention to produce its natural result, the preventing of the application of the insolvent's assets in the manner prescribed." From this review of the authorities, I think it is quite apparent that the decision of the court at special term allowing the set off in this case was correct. *The order of the Appellate Division should therefore be reversed*, and that of the special term affirmed, with costs.

All concur.

Rehearing denied May 13, 1898.

Louis BLANCK, *Appt.*,

v.

Frank X. SADLIER, Receiver, etc., of *Cassidy et al.*, *Respt.*

(153 N. Y. 551.)

An undisclosed gold clause in a mortgage subject to which real estate is bought at auction is not a defect in title which will enable the purchaser to withdraw from his contract, nor will a contract be implied on the part of the vendor that no such clause existed, a breach of which will entitle the purchaser to rescind the contract and recover his deposit, where the government has pledged its faith to keep all its funds at par, and the terms of the mortgage are such that there is no probability that the policy of the government will be changed before the mortgage becomes due.

(*Bartlett and Haight, JJ., dissent.*)

NOTE.—As to contracts for payment in coin, see note to *Skinner v. Santa Rosa* (Cal.) 29 L. R. A. 512; also *Dennis v. Moses* (Wash.) ante, 302.

(October 5, 1897.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County in favor of defendant in an action brought to recover money which had been deposited as part performance of a contract to purchase real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Spink & Martin**, for appellant:

The provisions of the terms of sale must be construed most strongly against the defendant who prepared them.

Pom. Spec. Perf. §§ 866-868; *Gibson v. D'Este*, 2 Younge & C. Ch. Cas. 542; *Greaves v. Wilson*, 4 Jur. N. S. 271; *Dykes v. Blake*, 4 Bing. N. C. 463; *Jones v. Edney*, 3 Campb. 285.

The purchaser cannot be compelled to do anything more than, or to take something different from, that which is provided by the clear meaning of the terms of sale. He is not bound to take upon himself any risk or trouble not contracted for.

Webster v. Kings County Trust Co. 145 N. Y. 275; *Schmidt v. Reed*, 132 N. Y. 108; *Oppenheimer v. Humphreys*, 31 N. Y. S. R. 622; *Zorn v. McParland*, 11 Misc. 555; *Smyth v. Sturges*, 108 N. Y. 495.

By the terms of the contract the property was to be conveyed subject to a "lawful money" mortgage. This is clear, under legal principles of interpretation. It is also the practical construction put upon it by the defendant.

Metropolitan Bank v. Van Dyck, 27 N. Y. 400; *Juilliard v. Greenman*, 110 U. S. 421, 28 L. ed. 204; *Legal Tender Cases*, 12 Wall. 457, 28 L. ed. 217; U. S. Rev. Stat. §§ 3589-3590; Laws of 45th Cong. chap. 20, passed Feb. 28, 1878; Laws of 51st Cong. chap. 708, passed July 14, 1890.

There is nothing in the case from which an agreement to pay in gold can be presumed.

Maryland v. Baltimore & O. R. Co. 22 Wall. 105, 22 L. ed. 713.

The statement of the defendant on June 26, when told that the mortgage was payable in gold coin, shows that his understanding of the contract was the same as that claimed by the plaintiff.

Such practical interpretation by the parties must control.

Snyder v. Seaman, 2 App. Div. 258, and cases cited.

If plaintiff had agreed to pay part in cash and give mortgage for \$16,000, he could not have been compelled to execute a "gold" mortgage.

Peabody v. Dewey, 153 Ill. 657, 27 L. R. A. 322.

The mortgage in fact on the property is enforceable in gold.

Bronson v. Rodes, 7 Wall. 229, 19 L. ed. 141; *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460.

The plaintiff is suing for money had and received, to recover back money paid by him on a consideration which has failed.

Green v. Green, 9 Cow. 50.

The defendant does not ask equitable relief,
40 L. R. A.

but assumes the position of exacting a forfeiture.

Oppenheimer v. Humphreys, 31 N. Y. S. R. 622; *Zorn v. McParland*, 11 Misc. 555.

It is now too late for the defendant to seek specific performance.

Page v. McDonnell, 55 N. Y. 308.

The courts will take judicial notice of all matters of public history affecting the whole people, whether they be events relating to war or peace.

Swinerton v. Columbian Ins. Co. 37 N. Y. 188, 93 Am. Dec. 560.

The uncertainty as to a "gold" standard is a matter which not only ought to be generally known, but is generally known throughout the state, and above all within New York city, its great commercial and financial center.

People v. Snyder, 41 N. Y. 898; *Oliver v. State*, 86 Ala. 88, 4 L. R. A. 83, note.

Mr. **Henry Yonge**, with Messrs. **Johnson & Lamb**, for respondent:

The defendant here is an officer of the court. To set aside a sale made by such an officer, it is necessary to establish fraud or grave mistake. Mere technicalities the court will not notice.

Riggs v. Pursell, 66 N. Y. 198; *High, Receivers*, 3d ed. § 191; *Hackley v. Draper*, 60 N. Y. 88.

The mortgage upon the property was as described in the bill of sale.

Trebilcock v. Wilson, 12 Wall. 687, 20 L. ed. 460.

The complaint does not allege, and there is no evidence of, any damage by reason of the mortgage being what is termed a gold mortgage. The absence of proof of this character is fatal to the plaintiff's contention.

Riggs v. Pursell, 66 N. Y. 198, 74 N. Y. 375; *Wetmore v. Bruce*, 118 N. Y. 323; *Gould v. Allen*, 1 Wend. 182; *Thompson v. Gould*, 16 Abb. Pr. N. S. 424.

A man paying the mortgage in gold value would have paid just the amount in actual value of the encumbrance as originally made, and the mortgagor would receive just that amount.

That he has been deprived of a situation where he might have realized a speculative profit is the foundation of his claim. Such profits the court will not regard unless they are distinctly proved.

Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Messmore v. New York Shot & Lead Co.* 40 N. Y. 422; *Starbird v. Barrons*, 38 N. Y. 280; *Rochester Lantern Co. v. Stiles & P. Press Co.* 135 N. Y. 209.

Where prospective loss is claimed there must be evidence that such loss will result.

Sedgw. Damages, 8th ed. § 172.

There is not a scintilla of proof in this case that the plaintiff made any mistake, or that he did not know that this mortgage was a gold mortgage. Therefore he can have no relief.

1 Story, Eq. Jur. § 152, p. 166; *Lyman v. United States Ins. Co.* 2 Johns. Ch. 630; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559; *Southard v. Curley*, 134 N. Y. 148, 16 L. R. A. 561; *Devoreux v. Sun Fire Office*, 51 Hun, 151.

The court should apply the maxim *De minimis non curat lex*.

Corwith v. Griffing, 31 Barb. 9; *Searles v. Cronk*, 38 How. Pr. 820; *Crook v. Rindskopf*, 105 N. Y. 476.

The principles of equity are available by the defendant, although the action is at law.

Sheehan v. Hamilton, 2 Keyes, 306; *Brown v. Miles*, 61 Hun, 453; *Phillips v. Gorham*, 17 N. Y. 270; *Dobson v. Pearce*, 12 N. Y. 156, 63 Am. Dec. 152; *Crary v. Goodman*, 12 N. Y. 266, 64 Am. Dec. 506; *New York O. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 85; *Cummings v. Morris*, 25 N. Y. 625; *McHenry v. Hazard*, 45 N. Y. 580; *Savage v. Allen*, 54 N. Y. 458; *Cavalli v. Allen*, 57 N. Y. 508; *Hopough v. Struble*, 60 N. Y. 430.

The plaintiff had constructive notice of the terms of the mortgage, and may not now plead ignorance of its provisions.

Riggs v. Pursell, 66 N. Y. 198; *Gilbert v. Peteler*, 38 N. Y. 165; *Williamson v. Brown*, 15 N. Y. 864; *Coven v. Paddock*, 48 N. Y. S. R. 342; *Williamson v. Brown*, 15 N. Y. 364.

Andrews, Ch. J., delivered the opinion of the court:

The plaintiff, on June 6, 1895, became the purchaser at public auction of premises known as No. 138 West 188d street in the city of New York, for the sum of \$19,700. The sale was made by the receiver of the firm of Cassidy & Adler, under the order of the court. There was at the time of the sale a mortgage on the premises for \$16,000, dated January 8, 1894, and payable January 30, 1899, "in gold coin of the United States of America, of the present standard of weight and fineness." The sale was made as stated in the conditions of sale, "subject to a mortgage of \$16,000, to be at 5 per cent, three years to run;" and there was no further or other statement or representation made at the time as to the terms or character of the mortgage. The conditions of sale further provided that all liens and encumbrances upon the premises would be allowed out of the purchase money. The plaintiff, at the time of the purchase, paid 10 per cent of the purchase price and the auctioneer's and salesroom fees, as required by the terms of sale. Subsequently, upon the examination of the title by his counsel, the provision in the mortgage requiring payment to be made in gold coin was discovered. The plaintiff, at the time appointed for the closing of the title, stated the fact so ascertained, and refused to accept the conveyance tendered by the defendant, unless he would procure a change in the mortgage by the elimination therefrom of the provision requiring its payment in gold. The defendant refused to comply with such requirement, and stood upon the validity of the title tendered and the insufficiency of the objection made to the mortgage. Thereupon the plaintiff, having first obtained the consent of the court, brought this action against the receiver to recover back the 10 per cent of the purchase money and the auctioneer's and salesroom fees paid on the sale, and also the expenses incurred in the examination of title. It seems that neither the plaintiff nor the receiver, at the time of the sale, knew that the mortgage contained the provision in question. There was no proof that the provision for the

payment of the mortgage in gold affected the salable value of the premises.

The sole question presented by this record is whether the plaintiff, by reason of the presence in the mortgage of this provision, was justified in refusing to accept the title, and became entitled to maintain this action. The general rule is well settled that a vendor, under an executory contract for the sale of land, unless exempted by the terms or nature of the contract, is bound to convey a good title free from any essential defect; and the purchaser cannot be compelled to accept a conveyance of property differing from the contract in any material particular. The obligation of the vendor to convey a good title exists, independently of any express undertaking in the contract. Where not expressed, it is implied from the nature of the transaction. And, although the title tendered may in fact be good, yet if it is subject to reasonable doubt, depending upon the ascertainment of some material fact extrinsic to the record title, to be found by a jury when the question arises, the purchaser, in general, will not be required to complete the purchase, for he is entitled to a title not only good in fact, but marketable. *Burwell v. Jackson*, 9 N. Y. 585; *Fleming v. Burnham*, 100 N. Y. 1; *Moore v. Williams*, 115 N. Y. 586, 5 L. R. A. 654; *Leake*, Contr. p. 831. Where the vendor refuses to perform his contract, or is unable to do so by reason of some defect in the title affecting the substance of the thing contracted for, or where the contract was induced by fraud or misrepresentation, the vendee may treat the contract as rescinded, and recover back any deposit made on account of the purchase money and the necessary expenses to which he has been put preliminarily to the completion of the contract on his part. *Lawrence v. Taylor*, 5 Hill, 114; *Graves v. White*, 87 N. Y. 468; *Leake*, Contr. 107, 1070.

The action brought by the vendee in the present case proceeds on the theory that, by the contract of sale, the mortgage subject to which he purchased was to be a mortgage payable in any lawful currency, and that the provision therein which required its payment in gold coin was not the encumbrance described in the conditions of sale, and that he was not bound to accept the conveyance tendered by the defendant unless he procured the mortgage to be reformed in this respect. Whether this action is regarded as an action based on a rescission of the contract by the plaintiff for the default of the defendant in performing the contract, or as an action for damages for its breach, it is plain that in either aspect it is a fundamental condition to its maintenance that the plaintiff should establish that there was an undertaking by the defendant, based upon contract, or upon a representation equivalent to a contract, that the mortgage subject to which the plaintiff purchased was payable generally, and could be discharged by payment in any legal currency. We think there was no such contract or representation. It is not claimed that there was any representation as to the terms of the mortgage, outside of the conditions of sale. The amount of the mortgage was stated, the rate of interest, and the time it was to run. It made no reference to

the medium of payment. Obviously, therefore, if there was any contract that it was payable generally in any lawful money, and not in gold coin only, it was an implied, as distinguished from an express, contract. If such implication existed in this case it was an unexpressed term which the law reads into the contract to effectuate the actual, though unexpressed, agreement of the parties. Implied contracts are familiar to the law. The court, as has been said, will imply such a contract whenever there is something not expressed which it is clear to all men of ordinary intelligence and knowledge of business must either have been latent in, or palpably present to, the minds of both parties when the contract was made. *Brett, J., Thorn v. London, L. R. 10 Exch. 123.* The case of the implication of a contract to give a good title in contracts for the sale of land is an illustration of the application of this principle. So, on principles of natural justice or to overreach covin or fraud, courts often force upon a wrongdoer the implication of a contract, although none existed in fact.

In this case the land was the subject of sale, and not the mortgage. The purchaser was notified of the existence of the mortgage and its amount. He made no inquiry as to whether it contained any special terms. He purchased subject to this encumbrance, entering into no personal obligation for its payment. The provision in this mortgage, that it should be paid in gold coin, although not present in most mortgages, was not unusual or infrequent. Such a provision is found in many corporate mortgages, and in mortgages taken by savings and other institutions. It was an important provision at a time when treasury notes or legal tenders were not convertible into coin. *Law of United States, February 25, 1862; Bronson v. Rhodes, 7 Wall. 229, 19 L. ed. 141.* Now, under the laws of the United States the paper currency of the government and silver coins are exchangeable at the treasury for gold coin at their nominal amount; and, as shown in the opinion of Judge Ingraham, the faith of the government of the United States is pledged by solemn and repeated declarations by Congress and the various departments of government to maintain the parity of all the currency issued by the government. The only hazard which the plaintiff would assume in taking the premises subject to the mortgage in question, beyond what would exist if the mortgage was payable without specification of the medium of payment, is the contingency that the United States government would violate its plighted faith, and, within the three years which the mortgage has to run, refuse to redeem its obligations in gold. We think this possibility is quite too remote to justify the assumption that the contract was made in reference to the mortgage being payable generally in lawful currency, and not in a particular kind of lawful money. Special clauses in mortgages are not infrequent. They sometimes contain what is known as the "insurance clause," or a clause making the whole mortgage due after a specified default, and other special terms are sometimes inserted. It would not, we conceive, be a valid ground of objection on the part of a purchaser of land subject to a specific mort-

gage, wherein the contract did not set out such special clauses, that they were not disclosed at the time the contract was made, if there was no deceit or misrepresentation. The contract here is sought to be avoided, not by reason of any fraud or misrepresentation, nor by reason of any variation in the subject of the sale from the description in the contract, but by reason of an incident connected with an encumbrance on the property, as to which the contract was silent, which, so far as appears, did not affect the value of the property or influence the purchaser in making his bid, and which we cannot assume, in view of the fact that the government is pledged to maintain the parity and the equal exchangeable value of treasury notes and silver and gold coin, will impose upon the plaintiff, in case the contract is completed, any additional burden. The law will not imply a contract, under such circumstances, that the mortgage was payable generally in any lawful currency, since whether it was or not cannot be supposed to have been a material circumstance entering into the substance of the transaction, or an efficient element in inducing the contract.

The judgment should therefore be affirmed.

O'Brien, Martin, and Vann, JJ., concur with **Andrews, Ch. J.**, for affirmance. **Haight, J.**, concurs with **Bartlett, J.**, for reversal.

Gray, J., absent.

Bartlett, J., dissenting:

I am for reversal. Presiding Justice Van Brunt, in his dissenting memorandum below, said: "When I contract to pay for property I may pay in any legal tender; when I take subject to an obligation, I may assume that I can discharge it in any kind of legal tender." In my judgment, this quotation contains the law of the case clearly and briefly stated. This was a sale at the Real Estate Exchange in the city of New York, under terms of sale which provided: "The property is sold by a good title in fee simple, . . . subject to a mortgage of \$16,000, to be at 5 per cent, three years to run." These sales are attended by a large number of bidders, and the purchaser is given ample time to search the title after the property is sold. In this case, by the terms the sale was made June 6, 1895, and the deed was to be delivered and balance of purchase money paid July 2, 1895. The bidders rely upon the terms of sale, and no search of the title is ever made until the property is purchased. If it was the intention to sell this property subject to a mortgage not payable in legal tender, it should have been so stated in the terms of sale. Any other rule will compel bidders to search titles for the terms of encumbrances before they can safely bid at the exchange. The mere statement of this proposition, which will compel hundreds of bidders at the exchange to examine titles they may never purchase, shows how unwise and inconvenient is the rule that is sought to be established in this case. In the legal tender case of *Juilliard v. Greenman*, 110 U. S. 421, 28 L. ed. 204, the Supreme Court of the United States laid down the rule (p. 449, 110 U. S., and p. 215, 28 L. ed.) that a contract to pay a cer-

tain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. The plaintiff in the case at bar, on consulting the terms of sale, found that the property was "subject to a mortgage of \$16,000, to be at 5 per cent, three years to run." He had the right to assume, in the absence of a statement to the contrary, that the mortgage was payable in whatever should be legal tender at the time of payment, whether it might be gold, silver, greenbacks, or treasury notes. If this general right was curtailed by the stipulations of the contract, the terms of sale should have so stated, in order to have put bidders upon their guard. This plaintiff is not seeking to recover damages. He rests upon the presumption that all contracts are payable in legal tender, unless the contrary is made to appear; and, as the terms of sale were silent as to this important point, he disaffirms the contract of sale, and asks to have restored to him what he paid at the time of the sale. I think he is entitled to recover.

John F. BAXTER, *Respt.*,

v.

Charles E. McDONNELL, *Appt.*

(155 N. Y. 83.)

1. A complaint alleging an implied liability of a bishop of the Roman Catholic church to a priest under the rules and regulations of the church, without alleging any express agreement to that effect, or anything to show the nature of the church or its civil rights, power, or capacity, or whether it is a corporation, a voluntary association, or a mere name adopted by the pleader for some purpose undisclosed,—does not state a cause of action.
2. Judicial notice of the nature and powers of the Holy Roman Catholic Church, so far as its civil rights and duties are concerned, will not be taken without any averment or proof upon the subject.
3. A bishop of the Roman Catholic Church cannot be held liable on the contracts of his predecessor, in the absence of an express agreement.
4. The same evidence is required to constitute a "church trust," and to bind a bishop as trustee thereof, as would be required in the case of a layman alleged to be a trustee under like circumstances.
5. A receipt of trust property by a bishop of the Roman Catholic Church as trustee does not make him liable on the contracts of his predecessor.
6. A receipt of trust property as trustee constitutes no consideration for an individual promise to pay an obligation of a predecessor as trustee.
7. A bishop is not the employer of a priest of the Roman Catholic Church, although he has power to assign priests to duty, and is not

personally liable under the laws of the church, in the absence of any express promise, to pay the priest for his services to the church.

8. An answer is not demurrable when the complaint is defective.

Per Haight, J.

9. The validity of a defense demurred to may be considered notwithstanding defects in the complaint, when the question is certified for review to the court of appeals, under Code Civ. Proc. § 190, subd. 2, and the defendant has waived the defects in the complaint by omitting to call attention to them or to have any questions with reference thereto certified.
10. The decision of an ecclesiastical tribunal concerning the rights, duties, and obligations of a priest or minister of the church who has submitted the controversy to it for decision is a bar to a subsequent action by him in a civil court.

(March 1, 1898.)

A PPEAL by defendant by permission, and to determine certified questions, from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Kings County in favor of plaintiff in an action brought to enforce payment of salary alleged to be due to plaintiff as a priest. *Reversed.*

The facts are stated in the opinions.

Messrs. Henry C. M. Ingraham and Joseph E. Owens, for appellant:

If the allegations demurred to set forth a defense to either of the two causes of action alleged by the plaintiff, the demurrer should be overruled.

Hale v. Omaha Nat. Bank, 49 N. Y. 637; *Henderson v. Commercial Advertiser Assn.* 46 Hun, 504, Affirmed, 111 N. Y. 685; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594; *Boyle v. Brooklyn*, 71 N. Y. 1; 6 Enc. of Pl. & Pr. p. 801.

The fact that plaintiff is suing for a pastor's salary while acting as chaplain, claiming that such salary is more than the salary paid him, does not introduce any conflicting claim to church property or funds, or to the use of them, or introduce a question of civil rights.

1 Bacon, Ben. Soc. § 77.

The admissions which flow from the plaintiff's demurrer are conclusive against the plaintiff, even though, as matter of fact, the defendant is in error as to the allegations constituting his third separate and affirmative defense.

Milliken v. Western U. Teleg. Co. 110 N. Y. 403, 1 L. R. A. 281; *Arrow S. S. Co. v. Bennett*, 78 Hun, 81.

The demurrer, as matter of law, admits all the allegations of the pleading demurred to, and such pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intentment; and facts so impliedly averred are traversable in the same manner as though directly stated.

Sage v. Culver, 147 N. Y. 241, and cases cited; *Zebble v. Farmers' Loan & T. Co.* 139 N. Y. 461; *Cornwell v. Clement*, 87 Hun, 50; *Marie v. Garrison*, 83 N. Y. 14.

Parties may in many ways bind themselves by their admissions and stipulations.

NOTE.—The question of liability for the salary of a pastor is the subject of a note to *First Presby. Church v. Myers* (Okla.) 38 L. R. A. 687.
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Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; *Baird v. New York*, 74 N. Y. 382; *Re New York, L. & W. R. Co.* 98 N. Y. 447; *Foley v. Royal Arcanum*, 151 N. Y. 196; *Brady v. Nally*, 151 N. Y. 258; *Rood v. Railway Pass. & Freight Conductors Mut. Ben. Assn.* 81 Fed. Rep. 62; *Hembeau v. Great Camp K. of M.* 101 Mich. 161; *Watson v. Jones*, 18 Wall. 679, 20 L. ed. 666.

The church court having passed upon the question of church law as to the individual liability of the defendant to pay the salary of a priest, adversely to the plaintiff, the allegation of fraud found in the plaintiff's first cause of action is immaterial, and such judgment, being upon a question of church law, is conclusive upon a civil court.

Connitt v. Reformed Prot. Dutch Church, 54 N. Y. 551; *St. James Church v. Huntington*, 82 Hun, 125; *Walker v. Wainwright*, 16 Barb. 486; *Union Church v. Sanders*, 1 Houst. (Del.) 160, 63 Am. Dec. 187; *Chase v. Cheney*, 58 Ill. 527; *McGuire v. St. Patrick's Cathedral*, 54 Hun, 207; *Tusgg v. Sheehan*, 101 Pa. 363, 47 Am. Rep. 727; *Rose v. Vertin*, 46 Mich. 457, 41 Am. Rep. 174; *Stack v. O'Hara*, 98 Pa. 213; *Moseman v. Heitshousen*, 50 Neb. 420.

If it should be held that the defendant was responsible for the plaintiff's salary from the time of his installation to the end of the plaintiff's pastorate, the complaint shows that plaintiff has received \$1,500 on account of his claim for salary, which is much more than the amount of his salary for these ten months, and, inasmuch as the plaintiff does not say from whom he received the \$1,500, it must be held that he received it from the party against whom he makes his claim for salary.

Clark v. Dillon, 97 N. Y. 370.

Trustees have no power to bind the trust estate by any executory contract.

Stanton v. King, 8 Hun, 4, Affirmed, 69 N. Y. 609; *Austin v. Munro*, 47 N. Y. 360; *Ferrin v. Myrick*, 41 N. Y. 815; *Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 787; *New v. Nicoll*, 12 Hun, 481, 73 N. Y. 127; *Blevitt v. Olin*, 13 N. Y. S. R. 76; *Clark v. Dillon*, 97 N. Y. 370.

When the vital question is whether the complaint is sufficient, the prayer must show the nature of the action.

Stuart v. Boughton, 85 Hun, 281; *Edson v. Girvan*, 29 Hun, 423; *Fisher v. Charter Oak L. Ins. Co.* 67 How. Pr. 191; *Alexander v. Kettle*, 63 How. Pr. 262; *Kelly v. Downing*, 42 N. Y. 71.

Mr. L. J. Morrison, for respondent:

Defendant's predecessor in the bishopric was personally liable to plaintiff as employer under an express contract.

Where services are performed at the request of another, the law implies a promise to pay, on the part of the person requesting performance.

Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 801; *Wood, Mast. & S.* § 67; 1 Parsons, Contr. 446.

As the employment of plaintiff was pursuant to the constitution, rules, regulations, and ordinances of the church, they necessarily bound both plaintiff and the bishop in so far as they established contractual relations, as under similar conditions the courts have held 40 L. R. A.

that the by-laws of the association made under authority of the constitution have this effect.

Kent v. Quicksilver Min. Co. 78 N. Y. 159; *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691; *Cummings v. Webster*, 43 Me. 198.

The title to the church property is vested in the bishop individually, upon the trust and confidence that he will apply it for the purpose intended, and the acceptance of the property by the appellant with the knowledge of its character constitutes an agreement on his part that he will use it for the purposes intended.

1 Perry, Tr. § 95; *Baldwin v. Humphrey*, 44 N. Y. 609; *Ryan v. Dox*, 84 N. Y. 807, 90 Am. Dec. 696; *Despard v. Walbridge*, 15 N. Y. 874; *Wood v. Rebe*, 96 N. Y. 414, 48 Am. Rep. 640.

The appellant occupies the same position logically and equitably as that of a devisee or legatee charged with certain payments, who becomes personally bound by accepting the devise or legacy.

Gridley v. Gridley, 24 N. Y. 180; *Taylor v. Dodd*, 58 N. Y. 335; *Brown v. Knapp*, 79 N. Y. 186; *Etter v. Greenawalt*, 98 Pa. 422; *Dodge v. Manning*, 1 N. Y. 298.

In determining the adequacy of a consideration the extent or benefit derivable therefrom is not considered; a value, however small or nominal, if given or stipulated in good faith, is sufficient to support an action.

Hubbard v. Coolidge, 1 Met. 84; *Hind v. Holdship*, 2 Watts, 104, 26 Am. Dec. 107; *Randle v. Harris*, 6 Yerg. 508; *Kidder v. Chamberlin*, 41 Vt. 62; *Lawrence v. McCalmont*, 2 How. 426, 11 L. ed. 326; *Follett v. Rose*, 8 McLean, 332; *Stewart v. State*, *Riggin*, 2 Harr. & G. 114; *Brachan v. Griffin*, 3 Call (Va.) 484.

The transfer of the property to the appellant was a good consideration for his promise to pay the debts of the deceased contracted with respect to the property transferred.

Austin v. Munro, 47 N. Y. 360; *Davis v. Staper*, 58 N. Y. 473.

All of this property has been transferred and handed over to the appellant upon his agreement to discharge the liabilities of the testator incurred in respect thereto. As the property transferred to appellant was the fund out of which a court of equity in marshaling the assets and liabilities of the deceased bishop's estate would have decreed the payment to respondent, the liability assumed by appellant accords with the equities (*Gifford v. Corrigan*, 117 N. Y. 258, 6 L. R. A. 610), and the transfer of the property in advance of the settlement of the estate is a good consideration for the promise of the appellant.

Oakley v. Boorman, 21 Wend. 588; *Harlan v. Harlan*, 20 Pa. 308; *Clark v. Gaylord*, 24 Conn. 484; *Powell v. Brown*, 3 Johns. 100; *Lawrence v. Fox*, 20 N. Y. 268; *Chitty, Contr.* 8d Am. ed. p. 29; *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20; *Van Loan v. Farmers' Mut. F. Ins. Assn.* 90 N. Y. 280; *First Nat. Bank v. Chalmers*, 144 N. Y. 432.

If this church property is to be treated as a part of the decedent's general estate for the purposes of administration, the executor, by voluntarily handing over the personal property bequeathed before duly ascertaining and paying debts, assumed a personal risk.

The general rule is, where an executor volunteers to pay the whole or any portion of a legacy, and it subsequently turns out that the assets are not sufficient to justify a payment to that extent, the loss must fall on him, and he cannot compel the legatee to refund.

Redfield's Sur. Practice, p. 632; *Re Underhill*, 117 N. Y. 471.

Therefore the agreement of the appellant to pay the debts contracted by his predecessor in respect to the property bequeathed was based upon a valuable consideration within the rule as laid down by this and other courts.

Sands v. Crooke, 48 N. Y. 564; *Cary v. White*, 52 N. Y. 138; *Weaver v. Barden*, 49 N. Y. 286; *Chrysler v. Renois*, 43 N. Y. 209; *Cardell v. Hicks*, 87 Barb. 458; *Pond v. Starkweather*, 99 N. Y. 411; *Beckwith v. Brackett*, 97 N. Y. 52; *Morehouse v. Second Nat. Bank*, 98 N. Y. 503; *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20; *Dunham v. Griswold*, 100 N. Y. 224; *Traders' Bank v. Bradner*, 43 Barb. 379; *Brown v. Leavitt*, 31 N. Y. 113; *Leonard v. Duffin*, 94 Pa. 218; *Austyn v. M'Lure*, 4 Dall. 227, 1 L. ed. 811; *Snow v. Hiz*, 54 Vt. 478; *Gove v. Newton*, 58 N. H. 359; *Hall v. Wear*, 92 U. S. 728, 23 L. ed. 500; *Harmon v. Adams*, 120 U. S. 368, 30 L. ed. 683; *Rogers v. Union Stone Co.* 134 Mass. 31; *Washburne v. Pintsch*, 17 Fed. Rep. 582; *Ware v. Morgan*, 67 Ala. 461; *Howe v. Taggart*, 183 Mass. 284; *Memphis v. Brown*, 20 Wall. 289, 22 L. ed. 264; *Sinclair v. Redington*, 58 N. H. 364; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473; *Dawson v. Beall*, 68 Ga. 328; *Ring v. Kelly*, 10 Mo. App. 411; *Wharton v. Anderson*, 28 Minn. 301; *Little v. Allen*, 56 Tex. 133; *Flannagan v. Kilcome*, 58 N. H. 443.

Treating the church property as a part of the general estate of the deceased bishop applicable to the payment of his debts, the executor of the estate assumed a risk or liability in parting with it before the debts had been paid, which is a sufficient consideration to support the promise of the appellant to pay certain debts existing against the estate.

Hannigan v. Allen, 127 N. Y. 639; *Arnold v. Nichols*, 64 N. Y. 117; *Dingeldein v. Third Ave. R. Co.* 37 N. Y. 575; *Kingsbury v. Earle*, 27 Hun. 141; *Snell v. Ives*, 85 Ill. 279.

It is immaterial whether the promisee is the estate of the late bishop or the church, if the appellant as promisor was in receipt of any consideration for the promise made by him (*Coster v. Albany*, 43 N. Y. 399). It is the agreement made for the benefit of respondent as a third party which gives the right of recovery.

Lawrence v. Fox, 20 N. Y. 268.

An individual who enters a partnership, or succeeds to the business of a sole trader, may make himself liable for debts which accrued prior to his becoming a partner or succeeding to the business of a sole trader.

Hall v. Herter Bros. 83 Hun. 19; *Hannigan v. Allen*, 127 N. Y. 639; *Dingeldein v. Third Ave. R. Co.* 37 N. Y. 575.

The question for this court to determine is whether, assuming all the facts alleged to be true, enough has been well stated to constitute any cause of action.

Sage v. Culver, 147 N. Y. 241.

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The duties performed by respondent were performed for the benefit of the church, and hence appellant's agreement, on accepting the church property, to pay debts and liabilities incurred by his predecessor "in behalf of the church," was by its terms an agreement to pay the debts existing in favor of respondent, incurred partly by his predecessor and partly by appellant in continuing to accept respondent's services after the death of the former bishop.

Coster v. Albany, 43 N. Y. 399.

If either cause of action set forth in the complaint contains facts sufficient to entitle respondent to recover, then the respondent is in a position to have his issue of law determined upon his demurrer to the separate defense pleaded by appellant.

Wheeler v. Connecticut Mut. L. Ins. Co. 82 N. Y. 543; *Boyle v. Brooklyn*, 71 N. Y. 1.

No judgment of any court not existing under governmental sanction can, *proprio vigore*, be binding where its decision purports to be an adjudication of property rights simply.

Const. art. 6, § 19; *People, Townsend, v. Porter*, 90 N. Y. 68; *Dunston v. Higgins*, 138 N. Y. 76, 20 L. R. A. 668; 3 Bl. Com. 23; *Hobart v. Hobart*, 45 Iowa. 501; *Glass v. The Betsey*, 3 Dall. 8, 1 L. ed. 486.

Nor can consent of parties confer jurisdiction.

Coffin v. Tracy, 3 Cal. 129; *Dudley v. Mayhew*, 3 N. Y. 9.

The contention that there is in any way a question of church law involved is not borne out by the record.

The burden, of course, is upon respondent to prove the existence of those rules as pleaded, and also to establish the fact that his agreement was made with reference thereto.

State v. Overton, 24 N. J. L. 440, 61 Am. Dec. 671; *Com. v. Worcester*, 3 Pick. 463.

The authority of an organization, church or otherwise, to take action which affects the rights of its members, must be pursuant to some by-law or rule reasonable in character, not opposed to the law of the land, and passed or assented to by its members by virtue of its charter or constitution.

Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665.

Whether or not the church was duly organized is a question to be determined by the court on the facts.

Graham v. Machado, 6 Duer. 517; *Myers v. Machado*, 6 Abb. Pr. 198.

It is not enough to allege in general terms that the court had jurisdiction, but the facts on which jurisdiction depends must be pleaded.

Turner v. Roby, 3 N. Y. 198; *McLaughlin v. Nichols*, 13 Abb. Pr. 244.

Where property rights are involved the ecclesiastical courts have no power whatever to pass upon them so as to bind the civil courts. 2 Black, Judgm. § 523; *Watson v. Garvin*, 54 Mo. 353.

The appellant is in no position to urge the decision of the church tribunal as an arbitration and award.

The adjudication is not pleaded as an arbitration and award, nor are the facts essential to such a defense alleged in the answer.

Brazill v. Isham, 13 N. Y. 9; *Estee*, Pl.

Pomeroy's 8d ed. § 8239, p. 492; *Denny v. Smith*, 18 N. Y. 567; *Lorenzo v. Deery*, 26 Hun, 447; *Gihon v. Levy*, 2 Duer, 176.

Vann, J., delivered the opinion of the court:

While the question certified to us for decision involves, directly, the sufficiency of the third defense set forth in the answer, it involves, indirectly, as we have held, the sufficiency of the complaint also. *Barter v. McDonnell*, 154 N. Y. 482. When reduced to their simplest form, the substantial allegations of the first cause of action purporting to be alleged are that, by the rules and regulations of the Holy Roman Catholic Church in the diocese of Brooklyn, the bishop holds all its property in his own name, as trustee for its benefit, and is liable individually upon all contracts for services rendered or materials furnished to the church; that each priest assigned to duty is authorized to hold the bishop individually liable for his salary, and that it is the duty of the bishop to provide by will for the devolution of all the trust property to the church or to his successor; that in September, 1885, the plaintiff was appointed pastor of a parish in said diocese by Bishop Loughlin, who died in December, 1891, after devising and bequeathing all the trust property held by him for the church to his successor in the bishopric; that in May, 1892, the defendant was installed as bishop, and soon after received the trust property subject to the trust upon which his predecessor had held it, and upon accepting the same on his installation as bishop agreed, by virtue of the law of the church, to pay all debts incurred and to perform all contracts entered into by the late bishop in behalf of the church, in the same manner and to the same extent as if the debts had been incurred and the contracts entered into by himself. There were further allegations to the effect that, upon this basis of liability, the defendant was indebted to the plaintiff in a certain amount. The second cause of action is based on the assignment of the plaintiff to duty as chaplain of a hospital, made by the defendant on the 4th of December, 1892, and it is claimed that by virtue thereof he became entitled, under the constitution and ordinances of the church, to a salary of \$1,000 per annum, and that the defendant is indebted to him for the balance unpaid on that basis.

Thus, in both counts of the complaint the liability of the defendant is founded upon a promise implied, as it is claimed, from the law of the church. In the first count two promises are said to arise therefrom, one on the part of Bishop Loughlin to become personally liable for the salary of the priests, and the other on the part of Bishop McDonnell to discharge the obligations assumed by his predecessor in office. The theory of the complaint is that, while the bishop holds the property of the church in trust for its benefit, he is personally liable for all services rendered to it in his diocese. No express agreement to that effect is alleged, but simply one to be implied from the rules and regulations of the church. No consideration is suggested, unless one springs from the relation of trust existing between the bishop and the church, and that relation is de-

pendent upon the law of the church. Yet there is nothing to show the nature of the church except as it may be implied from its name and the names given to certain of its officers. There are no allegations as to its civil rights, power, or capacity. We cannot tell from the complaint, which is our sole guide, whether it is a corporation, a voluntary association, or a mere name adopted by the pleader for some purpose undisclosed. What it is, what it can do, and what can be done to it; whether it can become the beneficiary of a trust and enforce its rights as such, or sue and be sued,—are not made known to us. No valid trust is alleged, unless the church is shown to be a body capable of making a contract and suing to enforce it. A trust created by the rules of a church which is not shown capable of making contracts, accepting benefits, or compelling performance, is not recognized by the law. The pleader seems to have assumed that the court would take judicial notice of the nature and powers of the Holy Roman Catholic Church, so far as its civil rights and duties are concerned, without any averment or proof upon the subject. Judicial notice is to be taken with caution, and every reasonable doubt as to the propriety of its exercise in a given case should be resolved against it. *Brown v. Piper*, 91 U. S. 87, 23 L. ed. 200; 12 Am. & Eng. Enc. Law, p. 151. According to the general practice of the courts in all jurisdictions, proof has been required upon the subject of church rights and powers, and whatever is to be proved must be alleged. Even if we should attempt to take judicial notice of the legal powers and duties of the church, it is doubtful whether the result would aid the plaintiff. Thus, Judge Strong, in his work on *Relations of Civil Law to Church Polity*, says: "A very large portion of the religious societies in the country are unincorporated, and in a few of the states charters cannot be obtained for them. They are, therefore, not legal entities, recognized as having a legal existence. They can neither sue nor be sued in civil courts. They cannot hold property directly, yet they may control property held by others for their use. Donations and grants may be legally made to trustees for the use and benefit of an unincorporated religious society, or for the support of the gospel ministry in connection with any particular church." P. 71. "There is still another mode in which property is largely held in this country for religious or church uses. In the Moravian congregations the property devoted to pious uses is held neither by a corporation nor by trustees, nor yet by the congregation itself. In some of the congregations, and I presume in all, the title to the churches, schoolhouses, and cemeteries is held by the bishop, who transmits it by will to his successor in office. And such is the tenure of most Roman Catholic churches in the country. The title to the real estate resides in the bishop of the diocese. In a certain sense he is a trustee thereof for religious uses, but there is no declaration of trust, and he controls the enjoyment and transmits the title by devise. The purpose of this arrangement is to exclude the laity from that power of interference which they would have were the title vested in a corporation. But, inasmuch as the holders

of such titles are not corporations, either sole or aggregate, as are the English bishops, deans, and even parsons, lands held by them do not pass to their successors in office unless through the instrumentality of a deed or will." P. 109.

We have been referred to no statute authorizing the incorporation of the church at large. By chapter 45 of the Laws of 1863, provision was made for the incorporation of Roman Catholic churches, and for the government thereof, but it is confined to a congregation, society, or assemblage of persons accustomed to stately meet for divine worship. This is now embodied in the religious corporations law, which also provides for the incorporation of ecclesiastical bodies with governing authority over churches. Laws 1895, chap. 723, §§ 14, 50, 51; Laws 1878, chap. 110; Laws 1886, chap. 210; Laws 1882, chap. 23.

Under the act of 1813, both real and personal property may be held in trust for the use of an unincorporated religious society without any restriction as to time, except that it shall terminate upon the lawful incorporation of the religious society, when, by virtue of the act, the title vests in the corporation. Laws 1813, chap. 60, § 4. This also refers to congregations, and not to the church at large. Indeed, in *Petty v. Tooker*, 21 N. Y. 267, 270, it was held that the existence of the church proper as an organized body is not recognized by the municipal law. In *Van Buren v. Reformed Church*, 62 Barb. 495, 497, it was said: "In order to give an organization for public worship legal rights, and to impose on it legal obligations as a corporate body, there must be a special law declaring its existence, or there must be an incorporation under the provisions of the general law relating to religious societies." And in *Hardin v. Second Baptist Church*, 51 Mich. 137, 47 Am. Rep. 555, Judge Cooley said: "The church is not incorporated, and has nothing whatever to do with the temporalities. It does not control the property or the trustees; it can receive nobody into the society and can expel nobody from it. On the other hand, the corporation has nothing to do with the church except as it provides for the church wants. It cannot alter the church faith or covenant, it cannot receive members, it cannot expel members, it cannot prevent the church from receiving or expelling whomsoever that body shall see fit to receive or expel." In *Silsby v. Barton*, 16 Gray, 329, it was said that "churches are not corporate bodies, and commonly have no occasion for the exercise of corporate powers." Kynett and Cotton, in their work on Churches and Other Religious Societies, say that "these two bodies, namely, the religious corporation and the church, although one may exist within the pale of the other, are in no respect correlative. The objects and interests of the one are moral and spiritual; the other deals exclusively with things temporal and material. Each as a body is entirely independent and free from any direct control or interference by the other. . . . The church by the nature of its organization may be entirely independent of other ecclesiastical associations, or may be a subordinate part of some general organization or denomination in which

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there are superior ecclesiastical tribunals, with general and ultimate power of control, more or less complete, in some superior judicature, over the whole membership of the general organization." These citations show the danger of an attempt to take judicial notice of what the civil rights of the Holy Roman Catholic Church are, and emphasize the necessity of allegations in the complaint as the basis of evidence upon the subject.

We have no statute to guide us upon the assumption that, by implication, it is part of the complaint. If, instead of the Holy Roman Catholic Church, the pleader had made use of an abstract term or a name that might be applied to various organizations, incorporated or voluntary, the complaint would have had the same effect as a pleading that it now has. If, wherever the word "church" appears, by its full name or otherwise, a mere abstraction had been used, as, for the sake of illustration, the letter "X," the complaint would then allege that by virtue of the rules and regulations of "X" the defendant assumed certain obligations and the plaintiff became entitled to certain rights, yet no one would seriously contend that such allegations constituted a cause of action. The defendant cannot be held liable on the contracts of his predecessor, unless he has expressly agreed in proper form and for a sufficient consideration to become liable thereupon. An agreement by one person to become liable for the debts of another must be an express promise in writing, and cannot arise by implication from the fact of membership in an organization having rules to that effect. The personal contracts of a bishop are the same as those of a layman, so far as their form, force, and effect are concerned. This is true of his engagements as trustee. The same evidence is required to constitute a "church trust," and to bind a bishop as trustee thereof, as would be required in the case of a layman alleged to be a trustee, under like circumstances. The mere receipt of property by one person alleged to be the trustee of such a trust, under the will of another person alleged to have been the preceding trustee thereof, forms no consideration for a promise subsequently made by the former, as an individual, to or for the benefit of third persons. No promise in any form is alleged to have been made by the defendant to the plaintiff, but simply a general promise, made to the church, as we read the complaint, by virtue of its rules and regulations. The promise could not have been made to Bishop Loughlin, for he was not alive when it is said to have been made. A promise made to pay the personal debts of the deceased bishop out of trust funds could not be enforced, as it would be a misappropriation. If, as alleged, Bishop Loughlin was individually liable to the plaintiff for his salary, that individual liability could be enforced against his individual estate by the usual procedure against his personal representatives. We find no trust set forth that is capable of enforcement, but simply a moral obligation, dependent entirely upon the integrity of the bishop. For aught that appears, the church at large depends wholly upon moral power to carry on its functions, without appealing to the civil authorities for aid, either through the legislature or the courts. The complaint alleges.

no common-law, equitable, or statutory cause of action. If all averments relating to the rules and regulations of the church were stricken out, nothing of substance would remain upon which the defendant could be held liable. No force can be given to the rules and regulations as alleged, because there is no allegation as to the civil standing, position, or rights of the body that is supposed to have made them. Even if an express promise had been made by the deceased bishop, as an individual, to the plaintiff, instead of a promise implied from the usages of the church, there would have been no consideration to support an agreement by the defendant, as an individual, to carry out the promise made by his predecessor. The receipt of trust property by him, as trustee, constitutes no consideration for an individual promise. In other words, the defendant cannot be held liable as trustee of the church to use trust funds to pay the individual debts of Bishop Loughlin, for that would be an unlawful use of trust funds, and he cannot be held liable as an individual to pay those debts for the want of a sufficient consideration and an express promise in proper form.

The claim of the respondent, that the bishop individually is the employer of the plaintiff, and liable as such for his compensation, is not sustained by the complaint. The legal relation of master and servant is not alleged, either expressly or impliedly; for, according to the complaint, the bishop, as such, holds the property of the church in trust, and has the power to assign priests to duty, but is liable as an individual, and not as trustee, for the services of the priests upon such assignments, by virtue of the laws of the church, and not through his personal promise. Obviously this relation is in no sense that of master and servant, but that of an ecclesiastical superior and inferior, with an alleged obligation arising from the laws of the church on the part of the former to become personally liable for the services rendered by the latter to the church. The relation of priest and congregation is not involved, but that of priest and bishop.

This subject was considered in *Twigg v. Sheehan*, 101 Pa. 363, 47 Am. Rep. 727, where a priest sued his bishop for salary, and the canon law bearing on the organization of the church and the relation of the priesthood and the bishops was before the court. The trial court found that the plaintiff was entitled to a salary of \$800 per year under the common law of the church, which guaranteed him a support when he was ordained as priest. The supreme court, however, held that, while the organic law of the Roman Catholic Church was to the effect that the church was bound to provide a decent support for its priests, this did not constitute an implied contract on the part of the bishop of the diocese to support the priests therein; that no priest, in the absence of an express contract, could bring assumpsit against his bishop for an amount sufficient to decently support him; and that the relation between a Roman Catholic bishop and priest is not that of hirer and hired or principal and agent. In deciding the case the court said: "The plaintiff alleges that the law of his church creates a duty from which springs an implied contract on the

part of the bishop to support him so long as he remained a priest of the diocese, and was not convicted of any offense or suspended from his priestly functions. Is this position sound? The obvious test is to reverse the position, and treat this as a suit by the bishop to recover damages from the plaintiff for a failure to perform his priestly functions, or any duty prescribed by his ordination vows. No one will contend that such a suit could be maintained. The plaintiff can lay down his office and its duties at pleasure. For doing so he could only be visited with ecclesiastical censure, and such punishment, if any, as the canons of the church prescribe. The bishop would have no remedy in the courts of law. It will thus be seen that there is no mutuality. . . . It would be doing a wrong to the Catholic Church, and degrade its priesthood from their high position, were we to hold that the relation between the bishop and his priest was that of hirer or hired, or employer and employee. The moving consideration in such contracts is the pecuniary advantages flowing from the relation. When a priest dedicates his life to the church, and takes upon himself the vows of obedience to its laws, he is presumed to be actuated by a higher principle than the hope of gain. Where he has an actual contract with his congregation or his bishop for a salary, it may be enforced as any other contract; but where he relies upon the duty of his church to support him, he must invoke the aid of the church if he seeks redress." In *Rose v. Vertin*, 46 Mich. 457, 41 Am. Rep. 174, it was held that a bishop is not liable for the salary of a priest whom he has engaged, and that they are fellow servants of the church, for which the bishop acts merely as a superior agent, and not as a principal. The learned justices united in saying that "the bishop was the priest's superior, and according to the established order of things in the economy of the church government, regulating the degrees of subordination and the methods of administration; it was the province of the bishop to designate the place for the priest to exercise his functions, and prescribe, under certain limitations, the rules and precepts for his guidance and control. But both were common servants of the church, and the service of the priest was not a service for the bishop, nor was the bishop, in respect to the employment, a principal. . . . Men are constantly going into positions under appointment by superior agents, and where no liability for compensation rests on the employing agent, and the means of payment, if they come at all, are to come from another source. Cases of illustration are infinite. They abound in business operations, and marked instances may be seen in the great missionary enterprises which are carried on. No one supposes the existence of a legal liability on the part of the appointing agency." In *First Soc. of M. E. Church v. Clark*, 41 Mich. 730, 737, it was declared that, "where there is no incorporation, those who deal with the church must trust for the performance of civil obligations to the honor and good faith of the members." See also Hoffman, Ecc. Law, 141, 145; Andrews, Church Law, 4, 57; Humph. Church Law, 2, 62. Without prolonging the discussion, we an-

nounce as our conclusion that the complaint does not set forth a cause of action, and that for this reason the third defense pleaded in the answer is sufficient, for, when the complaint is defective, the answer is not demurrable. *Baxter v. McDonnell*, 154 N. Y. 482, 486.

It is therefore our duty to reverse the judgments of the courts below, and to overrule the demurrer to the third defense set up in the answer, with costs, and, under the circumstances, to answer the question certified, as to the insufficiency of said defense, in the negative.

Haight, J., concurring:

I think that the question submitted to us, namely, whether the third defense interposed by the defendant is good in law upon its face to constitute a defense, should be directly decided. It is true that, where there is a defect in the plaintiff's complaint, he is not in a position to assail the sufficiency of his opponent's answer. But the defendant may waive defects in the complaint by omitting to call attention to them, or in not having questions with reference thereto certified to this court to be answered. Code Civ. Proc. § 190, subd. 2. The plaintiff does not count upon any express agreement or contract, but upon a claim founded wholly upon church laws or customs. The defense is that the plaintiff himself, prior to the commencement of this action, brought suit against the defendant for the same cause in the metropolitan court of the diocese, that being an ecclesiastical court possessing jurisdiction as such over the parties and the subject-matter of the controversy; that the cause was duly heard in that court and decided. The precise question is whether such a defense to such a cause of action or claim is good in law. Judge Bradley, in the court below, conceded that the plaintiff was bound by the determination of that tribunal so far as related to the matter of discipline and ecclesiastical rules, laws, and customs of church government; and, when rights of property are dependent upon the questions of doctrine, discipline, or church government, the civil court will treat the determination made in the highest tribunal within the church as controlling. *Watson v. Jones*, 18 Wall. 679, 20 L. ed. 666; *Connitt v. Reformed Prot. Dutch Church*, 54 N. Y. 551.

But he was of the opinion that that tribunal did not have jurisdiction to determine other civil and temporal rights. We need not question this rule. As we have seen, the plaintiff has alleged no express contract. He claims under some custom or law of the church that he should be paid a salary, as a priest, of \$1,000

per year, by the bishop. Here the plaintiff asks the civil courts to examine and pass upon questions growing out of his relations to the church and the bishop, as one of the priests of the diocese. In such a case, when it appears that the whole controversy has once been submitted by the parties to the ecclesiastical tribunal which the church itself has organized for that purpose, the civil courts are justified in refusing to proceed any further. The decision of the church judicatory may and should then be treated as a bar to the action and a good defense in law. When an individual joins an incorporated club or legally organized body with power to make laws and rules for its own government and for the regulation of the conduct of its members, the member becomes bound by those laws and rules, and a decision by the body or a duly constituted committee, proceeding according to judicial forms, touching his rights or relations as a member, is binding upon the courts. A priest or minister of any church, by assuming that relation, necessarily subjects his conduct in that capacity to the laws and customs of the ecclesiastical body from which he derives his office and in whose name he exercises his functions; and when he submits questions concerning his rights, duties, and obligations as such priest or minister to the proper church judicatory, and they have been heard and decided according to the prescribed forms, such decision is binding upon him and will be respected by the civil courts. The decisions of the courts in this country are substantially in accordance with this view. *Habler v. Produce Exchange*, 149 N. Y. 414; *People, Johnson, v. New York Produce Exchange*, 149 N. Y. 401; *O'Hara v. Stack*, 90 Pa. 477; *Stack v. O'Hara*, 98 Pa. 213; *Tuigg v. Sheehan*, 101 Pa. 363, 47 Am. Rep. 727; *Kerr's Appeal*, 89 Pa. 97; *Rose v. Vertin*, 46 Mich. 457, 41 Am. Rep. 174; *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95; *People, Meads, v. McDonough*, 8 App. Div. 591.

He can always insist, of course, that his civil or property rights as an individual or citizen shall be determined according to the law of the land; but his relations, rights, and obligations arising from his position as a member of some religious body may be determined according to the laws and procedure enacted by that body for such purpose. The question should be answered in the negative, and the judgment reversed, and the demurrer overruled, with costs.

Parker, Ch. J., and **O'Brien, and Bartlett, JJ.**, concur with both opinions. **Martin, J.**, concurs with **Vann, J.**, **Gray, J.**, absent.

OKLAHOMA SUPREME COURT.

OKLAHOMA AGRICULTURAL AND MECHANICAL COLLEGE, *Plff. in Err.*,

v.

Charles F. WILLIS *et al.*

(Okla.)

***The Agricultural and Mechanical College**, which is strictly a public or quasi corporation, created and existing under and by virtue of the laws of the territory of Oklahoma, cannot, in the absence of express statutory authority therefor, be sued, and no such authority exists in this territory; hence said institution cannot be sued.

(February 12, 1898.)

ERROR to the District Court for Payne County to review a judgment in favor of plaintiffs in an action brought to recover the contract price of labor and materials furnished by plaintiffs to defendant. *Reversed.*

The facts are stated in the opinion.

Mr. C. A. Galbraith, Attorney General, for plaintiff in error.

Messrs. King & Hutto for defendants in error.

Keaton, J., delivered the opinion of the court:

Several assignments of error are urged by counsel, but, under our view of this case, it is not only unnecessary, but would be improper, for us to pass upon any of the assignments argued. The judgment complained of, omitting certain formal parts, is as follows: "It is therefore ordered and adjudged by the court that the plaintiffs, Charles F. Willis and W. R. Bradford, have and recover of the defendant, the Oklahoma Agricultural and Mechanical College, the sum of six hundred ten and $\frac{10}{100}$ dollars, and that the same bear interest at the rate of 7 per cent per annum from this date, and for the further sum of ——— dollars as the cost of this suit; and thereon let execution issue after thirty days from this date,—to all of which the defendant excepts."

It is strenuously insisted that, as there is no statute of this territory expressly authorizing the issuance of executions against the property of public corporations, no execution can run against such property; and we think there is much force in this contention, although the authorities thereon are very much divided. 2 Dill. Mun. Corp. 4th ed. § 576. But, although the position has not been urged, or even referred to, by counsel for plaintiff in error, I am convinced that we must go further, and hold that no action can be maintained against the defendant, for the reason that there is no statute authorizing it to sue or be sued. That defendant is a public corporation under the laws of the territory of Oklahoma there can be no doubt. Section 143, Okla. Stat. 1893, provides: "The institution shall be

known as the Oklahoma Agricultural and Mechanical College, and shall be an institution corporate under the laws of Oklahoma; and the government and management thereof is hereby vested in a board of regents, to be known as the 'Agricultural and Mechanical College Board of Regents.'" In addition to the foregoing express provision, said college is to be supported entirely from public funds, and is under the direct and almost immediate control of the territorial legislature. See §§ 151, 159, 485-887, 889, Id.

The question of whether or not defendant can be sued, being a jurisdictional one, must be first determined, although not specifically called to our attention; and, as we hold that no suit can be maintained against said defendant, any opinions which we might express upon the points argued by counsel would be mere *dicta*; hence we confine this opinion to the one proposition necessary for a decision of the cause. In the celebrated case of *Dartmouth College v. Woodward*, Chief Justice Marshall, delivering the opinion of the majority of the court, uses the following language: "That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny." And in the same case Justice Story, in a very able concurring opinion says: "Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties, and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government." 4 Wheat. 518, 4 L. ed. 629. It will be readily observed that defendant is strictly a public or quasi corporation. The members of its managing board (board of regents) are public officers, appointed by the governor and legislative council of the territory; their terms of office and compensation for services performed being definitely fixed by statute. Stat. 1893, §§ 148, 150. In fact, as before stated, it is strictly and entirely a territorial institution, having been created by legislative enactment for public purposes only, being managed and controlled exclusively by and under legislative authority, and deriving its whole support from public funds.

As to the distinctions between public and private corporations, and between the different classes of public corporations, it is said by an eminent text-writer that "all corporations intended as agencies in the administration of civil government are public, as distinguished from private, corporations. Thus, an incorporated school district or county, as well as city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a municipal corporation. All

*Headnote by KEATON, J.

NOTE.—As to the nature of incorporated institutions belonging to the state, see note to State, *Little, v. Board of Regents* (Kan.) 29 L. R. A. 378; 40 L. R. A.

also *Lane v. Minnesota State Agri. Soc.* (Minn.) 29 L. R. A. 708; *Sterling v. Regents of University* (Mich.) 84 L. R. A. 150.

municipal corporations are public bodies, created for civil or political purposes; but all civil, political, or public corporations are not, in the proper use of language, municipal corporations. The phrase 'municipal corporations,' in the contemplation of this treatise, has reference to incorporated villages, towns, and cities, with power of local administration, as distinguished from other public corporations, such as counties and quasi corporations." 1 Dill. Mun. Corp. 4th ed. § 22. See also Id. §§ 23-26; *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109; *Finch v. Toledo Bd. of Edu.* 30 Ohio St. 37, 27 Am. Rep. 414; *Manuel v. Cumberland County Comrs.* 98 N. C. 9; *Doddall v. Olmsted County*, 30 Minn. 96, 44 Am. Rep. 185; *Eustman v. Clackamas Co.* 32 Fed. Rep. 24. In *Finch v. Toledo Bd. of Edu.* 30 Ohio St. 37, 27 Am. Rep. 414, it is said: "City and village school districts constitute a part of the state policy in promoting and fostering common schools, and have become state agencies in the school system of education contemplated in the Constitution. . . . Owing to the very limited number of corporate powers conferred on them, boards of education rank low in the grade of corporate existence, and hence are properly denominated 'quasi corporations.' This designation distinguishes this grade of corporations from municipal corporations, such as cities and towns, acting under charters or incorporating statutes, which are vested with more extended powers and a larger measure of corporate life. This superior grade, from the nature of their organization, benefits received, and power to raise needed funds, are held responsible by the common law, for private personal injuries caused by their own negligence, or that of their servants, while the inferior grade of public quasi corporations are liable for damages resulting from their negligence, only where made so by express legislation. This grade includes the defendant. It possesses but limited powers and a small corporate life,—a corporation in some sense political, but in no sense a municipal, corporation."

As already seen, the various sections of the acts creating and locating this institution, and authorizing the issuance of bonds and the levying of taxes for the erection and support thereof, provide how, by whom, and for what purposes all the funds appropriated for its use shall be disposed of. While § 147, Stat. 1893, authorizes it to take title to real estate, make contracts, locate and erect buildings, "and do all things necessary to make the college effective as an educational institution," yet it does not follow, from the granting of these powers, that the corporation can be sued. In the absence of statutory authority therefore, it is the rule of the common law, adhered to by most, if not all, of the American states, that no suit can be brought—much less, execution issue—against a corporation which is strictly public, generally called a "quasi municipal corporation," such as a county, school district, or road district. "In this case a sovereign is one of the contracting parties; for the government of the county of Contra Costa is a portion of the state government, and, as against a sovereign, there are no remedies except such as the sovereign, in the exercise of that good faith by which all gov-

ernments are presumed to be actuated, may accord. The state government, neither in its general nor its local capacity, can be sued by her creditors, or made amenable to judicial process, except by her own consent. Her creditors must rely solely upon her good faith, as to the time, mode, and measure of payment. . . . At the time the contract was made between Gilman and the state, as represented in the local government of Contra Costa county, no remedies, in a judicial sense, existed either against the state or county. . . . The subsequent passage of the act by which persons holding claims against counties were allowed to sue them, when such claims were rejected by the county government, did not at all improve the condition of Gilman or his assignee in this respect, nor add to the obligation of the state or county to pay his claim. A judgment, under that act, against a county, only had the effect of converting a disputed into an audited claim. . . . Beyond the entry of judgment the judiciary were not authorized to proceed, and hence in respect to payment, Gilman and his assignee had no higher claim after he obtained his judgment than before, and, as before, was still dependent upon the good faith of the state. His remedy—if remedy it may be called—still lay in the voluntary exercise of the taxing power by the state. In other words, the state, by reason of her sovereignty, still held control of the question of payment as to all its incidents of time, mode, and measure." *Sharp v. Contra Costa County*, 34 Cal. 284; *Gilman v. Contra Costa County*, 8 Cal. 53, 48 Am. Dec. 290; *Emerie v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130. "Counties being merely parts of the state government, they partake of the state's immunity from liability. The state is not liable, except by its own consent; and so the county is exempt from liability, unless the state has consented. Counties are not liable to implied common-law liabilities as municipal corporations are." 4 Am. & Eng. Enc. Law, p. 359; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. ed. 470. "As has been already stated, the county is a creation of the legislature and a part of the sovereign government, and as such it cannot be sued except by the consent of the state. Therefore persons dealing with a county, for whose liabilities the legislature has provided no means of enforcement, must rely wholly upon its good faith, or they must seek a remedy by application to the legislature." 4 Am. & Eng. Enc. Law, p. 369, and cases cited in notes 4-6. In *Rusack v. Davenport*, 6 Iowa, 443, doubt was expressed whether in this state, and under our statutes, a road district could sue or be sued as a corporation. . . . We have no law declaring that each district shall constitute or be a body corporate, capable of suing and being sued. Nor is there any statute giving them the power to sue, or making them liable to a civil action. It is provided that each road district shall be responsible for all damages sustained by any person in consequence of defects in the roads and bridges in said districts. . . . Beyond this, there is nothing to indicate that they are to be treated as corporations; nor is there any provision as to how they

are to be made responsible for the damages sustained in consequence of defects in roads and bridges. Under such circumstances, we are of the opinion that a road district cannot become a party in a court of justice in this state, as a corporation, quasi or otherwise." *White v. Road Dist. No. 1, 9 Iowa, 202.*

It seemingly needs no argument to show that the public educational institutions of a state are as much a part of its sovereignty as are its counties. If defendant can be sued, so can all the other territorial educational institutions. The established rule of law, as well as the civil political policy of almost every state in the Union, forbid such suits, and we have no disposition to vary this rule, which is so well founded both in reason and authority, so as to except therefrom the young, though thriving, educational institutions of this territory. To hold that these institutions can be sued, and the property held by them for the most important of all public purposes seized under execution, attachment, and other such process, would be to greatly impede their progress and usefulness, while it has ever been the policy of our people, through their legislative assemblies, to foster and encourage them in every proper way. The obligations of the defendant in the case at bar are the obligations of the territory (§ 185, hereinbefore cited); and to the territory its creditors must look for payment, where there is no fund appropriated for the payment of their claims. If a fund exists for the payment of any just claim against defendant, and the board of regents refuse to audit same, I have no doubt but that the creditor can maintain an action in mandamus to compel the board to pass upon and properly audit such claim. Probably this board could be so compelled to audit such a demand, even though no fund existed out of which it could be paid; but, in this event, if his claim should be allowed, the claimant would have to look to the legislative power of the territory for payment. *People, McCauley, v. Brooks, 16 Cal. 11.*

A similar question to the one under consideration was decided in *Drake v. Oskaloosa Normal School, 11 Iowa, 54*, wherein the plaintiff sued the board of trustees of the normal school at

Oskaloosa, in their corporate capacity, "for work and labor done, and materials furnished in and about the erection of a house for the use of said school;" and the trial court sustained a demurrer to plaintiff's petition, which ruling was affirmed on appeal,—both courts holding that the action could not be maintained against the defendant as a corporation. In passing upon the question presented in that case, the supreme court says, in part, the following: "To hold that, under such circumstances, plaintiff could maintain this action against defendant named, would be in effect to disregard the general laws of the state, upon the subject of corporations, whether for pecuniary benefit or otherwise. There is no provision of law anywhere that either expressly or by implication recognizes the defendant sued in this case as a body capable of suing or being sued. . . . If it is asked, Has the plaintiff no remedy? we answer that we only determine that he has none against the defendant as named in this record. It may be that the persons contracting with him may be liable to him as individuals, or that he must look for compensation or aid to the lawmaking power of the state, or the liberality of the friends of education, and especially those disposed to encourage the school named. None of these questions do we undertake to determine."

In the statutes of some of the states is found a provision, under the general head of "Corporations," authorizing all public corporations to sue and be sued, unless expressly prohibited by the laws creating them and providing for their management and control. The statutes of Oklahoma contain no such general provision, but, on the contrary, it is provided that "public corporations are formed or organized for the government of a portion of the territory. Such corporations are regulated by local statute." Stat. 1898, § 925. For the reasons stated, the judgment of the District Court is reversed, and the cause remanded, with directions that same be dismissed.

All the Justices concur, except Dale, Ch. J., who presided at the trial of the case below, and takes no part in this decision.

SOUTH CAROLINA SUPREME COURT.

Stewart Spearman MACK, by Guardian *ad Litem, Resp't.,*
v.

SOUTH BOUND RAILROAD COMPANY,
Appt.

Barnett Salley MACK, *Resp't.,*
v.

SAME, *Appt.*

(.....S. C.....)

1. Evidence as to the failure to give statutory signals at road crossings is ad-

NOTE.—As to freight as the basis of a cause of action, see note to *Ewing v. Pittsburgh, C. C. & St. L. R. Co. (Pa.) 14 L. R. A. 666*; also *Sloane v. South-40 L. R. A.*

missible in an action for injuries not received at a crossing, where reckless negligence in running a train is alleged.

2. Irrelevant testimony will not require a reversal, if it was harmless.

3. Recovery for injuries occasioned by fright, which was caused by the negligence of a railroad company, can be had, although no physical injury was sustained except that caused by the fright.

4. A charge that the duty of a railroad company is greater to a minor than to an adult when on the track is not erroneous as a statement that mere minority exempts from the obligation to look and listen for a train.

ern California R. Co. (Cal.) 82 L. R. A. 198; *Mitchell v. Rochester R. Co. (N. Y.) 84 L. R. A. 781*; *Spade v. Lynn & B. R. Co. (Mass.) 88 L. R. A. 512.*

5. Punitive damages may be given for injury by a railroad train caused by gross negligence, recklessness, or wanton disregard or malice.

6. The killing of a mule by a train raises a presumption of negligence on the part of the railroad company.

(April 19, 1896.)

APPEAL by defendant from judgments of the Common Pleas Circuit Court for Lexington County in favor of plaintiffs in actions brought to recover damages for personal injuries and for the killing of a mule which were alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. J. C. Hutson and William H. Lyles, for appellant:

It was error for his honor to allow the introduction of testimony as to failure to give the statutory signals at the Augusta and other road crossings.

Neely v. Charlotte, C. & A. R. Co. 83 S. C. 186; *Barber v. Richmond & D. R. Co.* 84 S. C. 444; *Kinard v. Columbia, N. & L. R. Co.* 89 S. C. 514.

A person using a railroad track as a foot-path for his own convenience, elsewhere than at a lawful crossing, and injured by a train while so doing, cannot recover damages of a railroad company, unless it be guilty of wanton or gross negligence.

Spicer v. Chesapeake & O. R. Co. 84 W. Va. 514, 11 L. R. A. 385.

Where a boy thirteen years old, and "apparently capable of appreciating the peril of his situation," is walking on the track in front of a locomotive, and there is an opportunity for him to avert the danger by stepping off, the engineer is justified in assuming that he will step off.

Meredith v. Richmond & D. R. Co. 108 N. C. 616; *Sheehan v. St. Paul & D. R. Co.* 46 U. S. App. 498, 76 Fed. Rep. 201, 22 C. C. A. 121; *Anderson v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 195; *Wabash R. Co. v. Jones*, 163 Ill. 167; 1 Thomp. Neg. p. 448; Cooley, Torts, p. 660.

Properly speaking, there is no positive duty owing from a railroad company to a trespasser on its track; it is not a part of its duty in exercising ordinary care in the operation of its road to provide against the possibility that trespassers may be on its track, and the extent of its duty is to refrain from wilful or deliberate injury. Except at crossings it has the right to an exclusive use of its track and premises, and is entitled to assume that they are clear; it is not bound to anticipate that persons will be on them or to make provision for the safety of such persons.

19 Am. & Eng. Enc. Law, pp. 935, 936; *Houston & T. C. R. Co. v. Symkins*, 54 Tex. 615, 38 Am. Rep. 637; *Little Schuylkill Nav. R. & Coal Co. v. Norton*, 24 Pa. 465, 84 Am. Dec. 675; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 875, 84 Am. Dec. 460; *Kelly v. Michigan C. R. Co.* 65 Mich. 186; *State, Ricketts, v. Baltimore & O. R. Co.* 69 Md. 494; *McMullen v. Pennsylvania R. Co.* 182 Pa. 107; *Central R. & Bkg. Co. v. Vaughan*, 93 Ala. 209; *Atlanta & O. Air Line R. Co. v. Gravitt*, 40 L. R. A.

93 Ga. 869, 26 L. R. A. 553; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106; *Toomey v. Southern P. R. Co.* 86 Cal. 374, 10 L. R. A. 139; *Candelaria v. Atchison, T. & S. F. R. Co.* 6 N. M. 266; *Glass v. Memphis & C. R. Co.* 94 Ala. 581; *Missouri P. R. Co. v. Brown* (Tex.) 13 S. W. 670; *Brown v. Louisville & N. R. Co.* 97 Ky. 228; *Thomas v. Chicago, M. & St. P. R. Co.* 93 Iowa, 248; *Sullivan v. St. Louis S. W. R. Co.* (Tex. Civ. App.) 86 S. W. 1020.

The engineer has a right to presume that one is in possession of all his senses, and that he will look out for his own safety.

1 Harris, Damages by Corporations, § 308; *Darwin v. Charlotte, C. & A. R. Co.* 23 S. C. 531, 55 Am. Rep. 32; *Carter v. Columbia & G. R. Co.* 19 S. C. 20, 45 Am. Rep. 754. See editorial comments of 45 Cent. L. J. 125, August 18, 1897, on case of *Dobbins v. Missouri, K. & T. R. Co.* (Tex.) 88 L. R. A. 578.

It was error to hold the defendant liable for damages for the consequences of fright caused by the running of the train in proximity to young Mack, when there was no actual collision between the train and him, and no physical injury derived therefrom, or from his efforts to escape the collision.

Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L. R. A. 781; *Kalen v. Terre Haute & I. R. Co.* cited in 45 Cent. L. J. 423; *Canning v. Williamstown*, 1 Cush. 451; *Salina v. Trooper*, 27 Kan. 544; *Atchison, T. & S. F. R. Co. v. McGinnis*, 48 Kan. 169; *Morse v. Duncan*, 14 Fed. Rep. 396; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 308; *Johnson v. Wells, F. & Co.* 6 Nev. 224, 8 Am. Rep. 245; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 814; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 686; *Hale v. Columbia & G. R. Co.* 34 S. C. 292; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203; *Western U. Teleg. Co. v. Wood*, 13 U. S. App. 817, 6 C. C. A. 432, 21 L. R. A. 706, 57 Fed. Rep. 471.

The question whether a child, even under the age of fourteen, is so mature as to be guilty of contributory negligence under the circumstances, is ordinarily a question for the jury.

Bridger v. Asheville & S. R. Co. 25 S. C. 24, 27 S. C. 456; *Shirk v. Wabash R. Co.* 14 Ind. App. 126; *Central R. Co. v. Phillips*, 91 Ga. 526.

There was error in the charge in indicating to the jury that it was their duty to give punitive damages in case of gross negligence.

Robinson v. Superior Rapid-Transit R. Co. 94 Wis. 354, 34 L. R. A. 205.

Messrs. Abney & Thomas, for respondent:

It is the duty of an engineer running a locomotive to exercise ordinary care and prudence in keeping a lookout upon the track to avoid injuring anyone who may be upon the track. This is also true as to animals.

If the engineer was not required to keep any lookout at all for stock trespassing upon the track, the mere fact of the killing of the stock could not raise a presumption of negligence. In this state there is such presumption after the fact of killing is made out, and this even when the animal is a trespasser.

Jones v. Columbia & G. R. Co. 20 S. C. 249; *Simpkins v. Columbia & G. R. Co.* 20 S. C.

259; *Long v. Southern R. Co.* 50 S. C. 49; *Darwin v. Charlotte, C. & A. R. Co.* 28 S. C. 581, 55 Am. Rep. 32; *Carter v. Columbia & G. R. Co.* 19 S. C. 20, 45 Am. Rep. 754; *Hale v. Columbia & G. R. Co.* 34 S. C. 292; 2 Wood, Railroads, Minor's ed. 1894, § 820.

If the conduct of the engineer was reckless or wanton, the injured party can recover. Upon that question the jury were entitled to consider the case.

Samuels v. Richmond & D. R. Co. 85 S. C. 493.

If the fright causes nervous convulsions and illness, the negligence is the primary cause of the injury, and the injury is one for which action may be brought.

Purcell v. St. Paul City R. Co. 48 Minn. 184, 16 L. R. A. 203, 81 Am. L. Rev. 589, 29 Am. L. Rev. 209; *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L. R. A. 198; Sedgwick, Damages, § 47, p. 67, 8th ed. § 861; *Bell v. Great Northern R. Co.* Ir. L. R. 26 C. L. 428; *Louisville & N. R. Co. v. Whitman*, 79 Ala. 328; *Stutz v. Chicago & N. W. R. Co.* 78 Wis. 147; *Kendall v. Albia*, 78 Iowa, 241.

Gary, A. J., delivered the opinion of the court:

The above entitled actions were commenced on the 15th of August, 1895, and by consent were tried together before his honor, Judge Buchanan, and a jury, at the September, 1897, term of the court for Lexington county. The fifth paragraph of the first cause of action in the first of the above-entitled actions is as follows: "(5) That on the afternoon of the said mentioned day, between six and seven o'clock, the plaintiff Stewart Spearman Mack, as was his wont and customary duty, was sent by his father to drive the cows from the pasture, which was on the south side of said railroad, at or near the 7-mile post. That while engaged in driving said cattle from said pasture to the house of said Barnett Salley Mack, which was on the north side of said railroad track (it being necessary to cross the track at a private crossing which had been in use for years, and which use was well known to the defendant), the plaintiff, who was riding a mule, being unable to control said mule, on account of his tender age and lack of strength, was carried by said mule, which had become unruly and unmanageable, in and upon the track of defendant, at or near the said 7-mile post; and, in endeavoring to get said mule off said track, the plaintiff alighted, and was pulling the said mule, by the bridle and a plow line attached thereto, away from and across said track; and, while so engaged, his attention being absorbed in his efforts to control the mule and prevent him from going further down the track and getting away from him (being in open and plain view of an approaching train from the south for half a mile or more), a locomotive, with a train of cars attached, belonging to the defendant, its agent, les-ee, or lessees, without any signal or warning whatsoever, running at a rapid and reckless rate of speed towards Columbia, came upon the plaintiff, who was not aware of its approach, on account of his being so engaged in endeavoring to get the mule off said track, and struck the mule, and instantly killed the same. The plaintiff, in order to

save his own life, threw himself down between and along the cross-ties just outside of the rail, bruising and injuring his person, and just barely escaped being struck by the locomotive and cars of said defendant, its servants and agents, which said locomotive and cars ran immediately over and above the plaintiff at a rate of speed of more than 60 miles an hour; and being of such tender age, inexperienced, and ignorant of the operation of railroads and the running of locomotive cars thereon, and owing to the great and imminent danger in which he was, and the reckless movement of said train over him, was terribly frightened, his nervous system was shocked, his mind was affected and partially destroyed, his reason unbalanced, and he for a long time was made ill and sick, and suffered great mental anguish and physical pain, arising from the terrible shock to his nervous system and the fright which he received; and by reason thereof he was incapacitated from performing or attending to his ordinary duties, and his capacity for work greatly diminished, and he will for a long time, and probably will for the balance of his life, be affected in mind and body, and it will, to great extent, affect his means of making a livelihood and of advancing his happiness in life. That prior to said accident and injury he was perfectly healthy and sound, both physically and mentally, and had every reason to think and believe that he would so continue; but the injury to his mind and body by reason of such fright and nervous shock has greatly diminished his capacity for performing his duties, and will hereafter diminish and affect his capacity and means of acquiring property, and means of advancing his happiness in life, which he had a right to expect that he would be fully able to do, and acquire all those means of happiness which he, as a perfectly healthy and sound person, could have acquired, and he will hereafter pass through life subject to the effects which said fright and nervous shock have produced." The specifications of negligence are alleged in paragraph 6 thereof as follows, to wit: "(6) That the South Bound Railroad Company, its servants, agents, lessee, or lessees, were negligent in this: That although the plaintiff and the mule he was endeavoring to pull away from the track could be seen for at least one half a mile, and were in plain and open view of the engineer driving the locomotive (the track at said point being perfectly straight), and although the said train could have been easily stopped before it reached the point on said track where the plaintiff and mule were, the engineer in charge of said locomotive made no effort whatsoever to stop or diminish the rate of speed of the train, nor did he give any signal, either by the sounding of the steam whistle of the locomotive, or by ringing of the bell thereon, nor did he take or exercise any prudence or foresight, or do anything whatsoever to prevent the running of the said train upon the plaintiff and said mule, but that the said engineer and persons in charge of said locomotive and train, although they saw, or could easily have seen by the exercise of the slightest outlook or observation, upon the track in front of said advancing locomotive and train, the plaintiff and the mule, and

did see, or could have easily seen by the slightest observation or outlook from the train, that he was a child of tender years, and endeavoring to get his mule across the track, and although the said engineer or persons in charge of said locomotive saw, or could have easily seen by the exercise of any prudence or outlook whatsoever, that the plaintiff was not aware of the approach of the train, yet the said engineer, or persons in charge of said locomotive and train, carelessly, negligently, without any prudence or foresight or observation or outlook, which he should have kept upon the track before him, ran the said locomotive and train at a reckless rate of speed over said plaintiff, and against said mule, and so injured and frightened the plaintiff as above stated, and instantly killed the mule, and that by reason of the said negligent act and want of care on the part of the defendant, its servants, agents, lessee, or lessees, the plaintiff was damaged, in his person, mind, and health, \$2,500." The allegations of the second cause of action set forth in said complaint are substantially the same as those contained in the first cause of action, except the acts of negligence on the part of the defendant are alleged to have been wilful, malicious, wanton, and reckless, by reason of which the plaintiff claimed exemplary damages. The second complaint was brought by Barnett Salley Mack, the father of Stewart Spearman Mack, in which the allegations are substantially the same as those set forth in the first cause of action in the first complaint. In the first cause of action he claimed damages for the killing of his mule, which he valued at \$175. The second cause of action alleged in said complaint was for the injuries alleged to have been sustained by his son; and the plaintiff asked damages for the loss of services of his son, and expenditures for medicines, medical attention, and care of his son, in the sum of \$1,200. The defendant answered both complaints, and, in effect, denied generally the allegations of the complaint, and set up the defense of contributory negligence, both on the part of the father and the son. At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, which was refused. The jury rendered a verdict in favor of Stewart Spearman Mack for \$650, and a verdict for Barnett Salley Mack for \$335. The defendant appealed, upon exceptions, the first of which is as follows:

"(1) Because, against the objection of the defendant, his honor, the presiding judge, allowed the witnesses produced for the plaintiff to testify as to the failure of the train which caused the accident to give the statutory signals upon approaching the Augusta Road crossing, and other road crossings." Some of this testimony was admitted without objection, and it is questionable whether the objection was properly interposed to the other part of said testimony. Furthermore, it does not appear that the presiding judge ruled upon the admissibility of said testimony. But said testimony tended to show an utter disregard of the requirements of law as to the manner of running the train, and was responsive to the allegation of reckless negligence. This exception is therefore overruled.

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The second exception is as follows: "(2) Because his honor, the presiding judge, allowed the witness John Weston to testify, against the objection of the defendant, in answer to the question, 'Who travels that last road,—what kind of people?' When it had been admitted that the accident had not occurred at the crossing, and the crossing had nothing to do with it." The testimony was irrelevant, but harmless. This exception is overruled.

The third exception is as follows: "(3) Because his honor, the presiding judge, against the objection of the defendant, allowed other witnesses to testify as to the character of the crossings on the Augusta road and the Plantation road crossing." Waiving the objection to this exception that it is too general, still it cannot be sustained, as the testimony, although irrelevant, was harmless.

The fourth exception is as follows: "(4) Because, against the objection of the defendant, his honor, the presiding judge, allowed a witness, Barnett Salley Mack, to testify that the railroad hands worked the Plantation road crossing." Even if there was error, it was harmless, and this exception is overruled.

The fifth exception is as follows: "(5) Because his honor, the presiding judge, refused the motion for a nonsuit upon the grounds stated in the case for appeal." Waiving the objection to this exception, that it is not sufficiently specific, it cannot be sustained. The grounds upon which the defendant made the motion for a nonsuit are as follows: "First. That the action could not be maintained as an appeal under the statute regulating the giving of signals at crossings, because it was proved that it had not occurred at any crossing or traveled place. Second. That the action could not be maintained as a common law action for negligently injuring the plaintiff Stewart Spearman Mack, or negligently killing the mule, because the evidence did not tend to establish any negligence on the part of the railroad company, through its servants, in the running of the train which caused the injury." The first ground cannot be sustained, for the reason that the plaintiff distinctly stated upon the trial of the case that the action was not brought under the statute. The second ground cannot be sustained, as the allegations of the complaint, and the testimony adduced to support them, showed that this was not the case of an ordinary trespasser. There was testimony tending to prove every material allegation of the complaint, and this exception is overruled.

The sixth and seventh exceptions, which will be considered together, are as follows: "(6) Because his honor, the presiding judge, refused, upon request of the defendant, to charge as follows, to wit: 'It being admitted that there was no actual collision between the plaintiff Stewart Spearman Mack and the defendant's train, and no physical injury resulting from such a collision at any public crossing, traveled place, or any other place, the defendant's servants were not bound to have stopped the train because it ran in proximity to the plaintiff, and the defendant is not responsible for the consequences of fright occasioned thereby.' (7) Because his honor charged the jury as follows, to wit: 'But if the defend-

ant, by their servants, were guilty of a lack of ordinary care, and had run upon the plaintiff, thus making itself liable for negligence, and, while guilty of such lack of ordinary care, ran so immediately upon the plaintiff that he had to jump, being impressed with the overbearing necessity to jump, and such necessity not having been brought upon himself, and he had to jump beyond and off of the track; and, if he were injured by such lack of ordinary care,—then that would be a natural and proximate injury, such as the law gives an action for, and they would be responsible for the consequences of such natural fright, if such fright was so caused;’ thereby erring, in indicating that a mere ‘lack of ordinary care’ on the part of the defendant would make the defendant liable for the consequences of natural fright caused by running in proximity to the plaintiff, and that irrespective of question of contributory negligence on the part of the plaintiff.” In disposing of this request, his honor said: ‘I cannot charge this request, as framed, because the court cannot say that no physical injury has resulted to the plaintiff here, and the use of the word ‘proximity,’ associated with the language here in the request to charge, would be open to a construction that the court could not charge. But I charge you this: They were not obliged to stop because of the nearness to the track,—by reason of the plaintiff being near to the track,—nor would they be liable for such injury, provided the plaintiff exercised due and proper care, according to his age and circumstances; but if the defendants, by their servants, were guilty of a lack of ordinary care, and had run upon the plaintiff, thus making themselves liable for negligence, and, while guilty of such lack of ordinary care, ran so immediately upon the plaintiff that he had to jump, being impressed with the overbearing necessity to jump, and such necessity not having been brought upon himself, and he had to jump beyond and off of the track, and if he were injured by such lack of ordinary care, then that would be a natural and proximate injury, such as the statute gives an action for, and they would be responsible for the consequences of such natural fright, if such fright was so caused. Now, I have made that definite, for the purpose of showing you the meaning of the word ‘proximity.’ A railroad does not have to stop, in these days of fast trains, when a person is close to their track, unless they see that he is going upon the track, or unless they stop, exercising the care of an ordinary person, some injury would result. But, while they don’t owe that duty, suppose a man were approaching in such a condition, and at such an angle to the railroad, and the fireman or the servants were to see him in time to stop, and they were to see that there was something the matter with this man,—judging from his actions that he could not have heard the train,—or to impress them with the fact that he was deaf, and, if they did not stop the train, he would continue, and it would result in a collision with him upon the track of the railroad. Then I say that if they were so impressed, and were to go on, and thereby make that act an act of wilfulness, although he may be guilty of carelessness and negligence in going across the track, yet

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that would not excuse the railroad, if they could have avoided it by exercising ordinary care,—because he is in the wrong, and they could have avoided it. They should not go upon and kill a person, or run over property, when it could be avoided, no matter whether the man is in the wrong. I mean, in the sense that such injury would be wilful. I therefore charge that, with this modification, and so far as consistent with the matter requested here.”

For the first time the question is presented to this court whether a railroad company is liable for injuries sustained in consequence of fright caused by its negligence. The authorities are very conflicting, and those which decide that the railroad is not liable for such injuries are not in harmony as to the reason for such rule. In the case of *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 84 L. R. A. 781, and cases therein cited, it is held that the railroad company is not liable, on the ground that damages for such injuries are too remote, while in the case of *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, the court says: “This case presents a question which has not heretofore been determined in this commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether, in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress, occasioned by the negligence of another, which does not result in bodily injury; but that, when the fright or fear of nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury. . . . The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and, to a greater or less extent, disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful, and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others. It must also be admitted that a timid or sensitive person may suffer, not only in mind, but also in body, from such a cause. Great emotion may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence; and, if compensation in damages may be recovered for a physical injury so caused, it is hard, on principle, to say why there should not also be a recovery for

the mere mental suffering, when not accompanied by any perceptible physical effects. It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule.

The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright, and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 84 L. R. A. 781; *Erving v. Pittsburgh, C. O. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666; *Hasile v. Texas & P. R. Co.* 28 U. S. App. 60, 60 Fed. Rep. 557, 9 C. C. A. 134, 23 L. R. A. 774. In the following cases a different view was taken: *Bell v. Great Northern R. Co.* Ir. L. R. 26 C. L. 428; *Purcell v. St. Paul City R. Co.* 48 Minn. 184, 16 L. R. A. 203; *Fitzpatrick v. Great Western R. Co.* 12 U. C. Q. B. 645. See also Beven, Neg. pp. 77 *et seq.* It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard v. Lennox*, 155 Mass. 70; *Fillebrown v. Hoar*, 124 Mass. 580; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759.

We are much impressed with the reasoning of the court in the case of *Sloane v. Southern California R. Co.* 111 Cal. 668, 82 L. R. A. 193, in which the following language is used: "The real question presented by the objections and exception of the plaintiff is, whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body, rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from

causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

The mental condition which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury."

In the case of *Purcell v. St. Paul City R. Co.* 48 Minn. 184, 16 L. R. A. 203, the court says: "Of course, negligence without injury gives no right of action. On the argument there was much discussion of the question whether fright and mental distress alone constitute such injury that the law will allow a recovery for it. The question is not involved in the case. So it may be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish ground of action. Here is a physical injury, as serious, certainly, as would be the breaking of an arm or leg. Does the complaint show that defendant's negligence was the proximate cause of that injury? If so, the action will, of course, lie. What is, in law, a proximate cause, is well expressed in the definition, often quoted with approval, given in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, as follows: 'The primary cause may be the proximate cause of a disaster, though it operate through successive instruments, as an article at the end of a chain may be moved by force applied to the other end, that force being the proximate cause of the movement; or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd*, 2 W. Bl. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? There may be a succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury. In this case the only cause that can be suggested as intervening between the negligence and the injury is plaintiff's condition of mind, to wit, her fright. Could that be a natural, adequate cause of the nervous convulsions? The mind and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease. A mental shock or disturbance sometimes causes injury or ill-

ness of body, especially of the nervous system.

Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions, and consequent illness, the negligence was the proximate cause of those injuries. That a mental condition or operation on the part of the one injured comes between the negligence and the injury does not necessarily break the required sequence of intermediate causes."

Mr. Sedgwick, in his work on Damages, 8th ed. vol. 2, p. 642, in commenting on the opinion of Palles, C. B., in the case of *Bell v. Great Northern R. Co.* Ir. L. R. 26 C. L. 423, says: "The learned chief baron then referred to the case of *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222, in which the privy council held that mere mental terror was not a consequence which would ordinarily flow from the negligence proved in that case. This case, however, was not approved; but the court followed an earlier, unreported Irish case (*Byrne v. Great Southern & W. R. Co.* in the court of appeal), where compensation for injury resulting from nervous shock was allowed in a much stronger case than the one at bar. The learned chief baron continued (page 442): 'In conclusion, I am of opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompany such negligence in point of time.' The principle adopted in this case would seem to be the true one. The negligence of the company being admitted, any injury directly resulting should be compensated." See also *Mentzer v. Western U. Teleg. Co.* 98 Iowa, 752, 28 L. R. A. 72.

These views are in harmony with the principles laid down in the case of *Harrison v. Berkley*, 1 Strobb. L. 525, 47 Am. Dec. 578, which was an action for damages against a shopkeeper for unlawfully selling whisky to a slave, by means whereof he became intoxicated and died. In that case the court said: "It is therefore required that the consequences to be answered for should be natural, as well as proximate. [*Ward v. Weeks*] 7 Bing. 211; [*Kelly v. Parlington*] 5 Barn. & Ad. 645. By this I understand, not that they should be such as, upon a calculation of chances, would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the concurrence of any such extraordinary conjuncture of circumstances or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from. In requiring concurring consequences, that they should be proximate and natural to constitute legal damage, it seems that in proportion as one

quality is strong may the other be dispensed with; that which is immediate cannot be considered unnatural; that which is reasonably to be expected will be regarded, although it may be considerably removed. *Bennett v. Lockwood*, 20 Wend. 228, 32 Am. Dec. 532.

The defendant, however, has further insisted that, if the drinking and intoxication were the proximate and natural consequences of his act the exposure and death were not; but that the death resulted mainly from the exposure, and not from the intoxication only. It may well be said (speaking in the language of every-day life, which attempts no philosophical analysis) that the exposure was the immediate effect of the intoxication, and that the two produced the death. Thus, without any unconnected influence to be perceived, the death has come from the intoxication, which the defendant's act occasioned. The defendant cannot complain that an agent which his own act naturally brought into operation has occurred to produce the result."

We are satisfied that the reasoning is in favor of the liability of a railroad company in such cases, and that, as a general proposition, it is liable for such injuries where there is a lack of ordinary care. These exceptions are overruled.

The eighth and ninth exceptions will be considered together, and are as follows: "(8) Because his honor, the presiding judge, refused, upon request of the defendant, to charge as follows, to wit: 'It being admitted that the plaintiff Stewart Spearman Mack suffered no injury at any traveled place or public crossing referred to in the statute, any failure on the part of the defendant's servants to ring a bell or blow a whistle at any such traveled place or public crossing was not evidence of such negligence on the part of the defendant in this case as will entitle the plaintiff to a recovery.' (9) Because his honor, the presiding judge, in connection with his refusal of such request, charged as follows, to wit: 'It is not charged that it was at a public highway or crossing, and that, therefore, the mere omission to ring the bell or blow the whistle would not be conclusive presumption of negligence,—this being a common-law action, should be taken as a circumstance only. I so charge that request, with that qualification: That the injury is not charged to have been committed at a crossing, whereby the application of this principle and rule of evidence, making it conclusive presumption of negligence from the omission to ring the bell or blow the whistle, will apply,' thereby erring, in indicating that the failure to give the statutory signals at the Augusta Road crossing and other crossings was a circumstance from which the jury might infer negligence." A request to charge must be construed with reference to the issue made by the pleadings, and the testimony adduced upon the trial of the case. If the presiding judge had charged the request in the form in which it was presented, he would have invaded the province of the jury. The testimony, as we have said, was competent for the purpose of showing an utter disregard of the requirements of law as to the blowing of the whistle, and was responsive to the allegation of recklessness on the part of the defendant. Even if the defendant was not required by the statute to blow

the whistle, in approaching the crossing, before it reached the plaintiff, still it was a matter for the consideration of the jury whether there was negligence in blowing the whistle at that time, not as a requirement of the statute, but as a fact showing a want of due care on the part of the defendant under the circumstances of the case. *Czech v. Great Northern R. Co.* (Minn.) 38 L. R. A. 302. These exceptions are overruled.

The tenth exception is as follows: "(10) Because his honor, the presiding judge, refused the request of the defendant to charge as follows, to wit: 'If the jury believe that the plaintiff, while looking and listening, could hear the train, and that any ordinary, prudent person would, under like circumstances, have done so, then he was negligent; and if, then, under those circumstances, he went on the track, in view of an approaching train, the plaintiff cannot recover,'—but modified the same by adding: 'I charge you that, with this modification: The "person" there refers to an adult; and due care is owing to the circumstances of the person. His duty would be greater to a minor;' thereby erring in indicating to the jury that the mere minority of the plaintiff Stewart Spearman Mack, although a boy of fourteen or fifteen years of age, would exempt him from the obligation to look and listen for an approaching train." The intention of the presiding judge in modifying the request was to make it responsive to the allegations of the complaint. The charge of the presiding judge is not susceptible of the construction set forth in the exception. The minority of the plaintiff was a fact to be considered by the jury in determining the question of negligence, but his honor did not charge the jury that the mere minority of the plaintiff would exempt him from the obligation to look and listen for an approaching train. This exception is overruled.

The eleventh exception is as follows: "(11) Because his honor, the presiding judge, refused, upon request of the defendant, to charge as follows, to wit: 'If the jury find that the defendant's servants had every reason to suppose that the plaintiff, or any prudent person, would not go upon the track, there was no negligence in running trains at a fast speed, and the plaintiff cannot recover,'—but modified the same by adding: 'I charge you that, with the modification of the preceding charge; charge both together;' thereby erring, in indicating that the mere minority of the plaintiff Stewart Spearman Mack would make it negligence on the part of the servants of the company to have run the train rapidly, even though they had every reason to suppose that the plaintiff would not go upon the track." This exception is disposed of by what was said in considering the tenth exception.

The twelfth exception is as follows: "(12) Because his honor, the presiding judge, refused, upon request of the defendant, to charge the jury that 'the defendant was not bound to slacken speed of train, where no reasonable ground existed for the supposition that the plaintiff would go on or near the track,' but modified the same by saying, 'I charge you that, with the limitation of nearness to the track that I have indicated heretofore.'" 40 L. R. A.

Waiving the objection to this exception, that it fails to point out any specific error of law, still the modification of the request by the presiding judge was not erroneous.

The thirteenth exception is as follows: "(13) Because his honor, the presiding judge, refused, upon the request of the defendant, to charge, 'that, even if the jury should believe that no signals were given at or near any crossing, yet the defendant would not be liable, if it were reasonable to suppose that no ordinarily prudent person would attempt to go near or upon a track when the train was plainly in sight and advancing, and when the defendant's servants had every reason to suppose that the plaintiff was aware of the fact,' but modified the same by adding: 'Well, as an abstract proposition that is so. "Prudent person of ordinary intelligence" applies to an adult,—applies to a person who can take care of himself, who is supposed to have average intelligence;' thereby erring, by indicating that the mere minority of the plaintiff Stewart Spearman Mack would make the failure to give the signals, at or near the crossing, negligence towards the plaintiff, although the train was plainly in sight and advancing, and the servants of the defendant had every reason to suppose that the plaintiff was aware of the fact." This exception does not contain all the remarks of his honor in charging the request. They are as follows: "Well, as an abstract proposition, that is so. 'Prudent person of ordinary intelligence' applies to an adult,—applies to a person who can take care of himself, who is supposed to have average intelligence. In addition to that, as I have indicated before in my charge on one of these requests, signals were required at a traveled place,—that conclusiveness of presumption from the omission to ring the bell or blow the whistle applied to a public highway, street, or some crossing like that; but that does not deprive the plaintiff of his right at all; nor does it relieve them of their duty that the law lays upon them,—if necessary, to make signals for the purpose of avoiding an accident, in exercising ordinary care and prudence." This exception is disposed of by what was said in considering the other exceptions, and is overruled.

The fourteenth exception is as follows: "(14) Because his honor, the presiding judge, refused, upon request of the defendant, to charge the jury 'that the jury cannot render any verdict for punitive damages unless the evidence is clear that the defendant's servants were guilty of the most reckless, gross, and malicious negligence,' but modified the same by adding: 'Well, I cannot charge that, as stated there, because the plaintiff must recover by the preponderance of the evidence. I suppose what counsel meant to say was, "Guilty of recklessness, wanton, wilful, malicious, or acts of gross negligence." That is the general rule. Punitive or smart money is given where the action has been prompted by recklessness, by wantonness, by wilfulness, by malice, or by bap ned through negligence;' thereby erring in indicating that the jury might give punitive damages or smart money upon injury suffered through ordinary negligence." When the charge is considered in its entirety, and when all of his honor's language in refusing to charge

the request is taken into consideration, it is evident that the presiding judge did not intend to charge that the defendant was liable for exemplary damages in case there was only ordinary negligence. This exception is overruled.

The fifteenth exception is as follows: "(15) Because his honor, the presiding judge, in summing up charged the jury as follows, to wit: 'This is not an action for a collision at a street or highway, or public traveled place. Therefore the omission of the signals (as I have already charged you) required by the statute for such crossings does not throw light upon the subject, and show a presence or want of ordinary care with reference to either or all the causes of action;' thereby erring, in indicating to the jury that, the failure to blow the statutory signals at the Augusta road crossing and other public crossings were circumstances that might be considered as proving negligence on the part of the defendant." This exception is disposed of by what was said in considering the other exceptions, and is overruled.

The sixteenth exception is as follows: "(16) Because, his honor, the presiding judge, charged the jury as follows, to wit: 'While the mere finding of cattle, horses, or mules killed upon the railroad raises presumption of negligence, making it a rule of negligence, has not been modified by the adoption of the stock law, yet it is an element to be taken into consideration in considering the question of negligence;' thereby indicating to the jury that the mere finding of the body of the mule near the railroad track was a circumstance that they might take into consideration in determining the question of negligence, although the plaintiff's witnesses had given full testimony as to all the circumstances attending the killing." The killing of the mule by the defendant raised the presumption of negligence on the part of the defendant, and this presumption continued until it was rebutted by the testimony. The fact that the witnesses were examined by plaintiff in regard to the killing of the mule did not destroy the presumption arising from the mere

fact of killing, nor prevent the application of that rule. If the facts showed that there was no negligence, then, of course, the presumption would be ineffectual. This exception is overruled.

The seventeenth exception is as follows: "(17) Because his honor, the presiding judge, further charged the jury: 'I say the finding of the animal upon the track raises a presumption of negligence. It is only a presumption. It may be rebutted. But that is a presumption the law raised. And if you come to the conclusion that the mule was killed through the lack of care upon the part of the railroad, and the presumption is confirmed,—the presumption is not rebutted,—then the value would be the value of the mule; thereby indicating that the mere finding of the body of the mule near the railroad track was a circumstance to be taken into consideration by the jury in determining the question of negligence.' The killing of the mule was not disputed, and this was sufficient to sustain the presumption of negligence. So that, even admitting that there was error, it was harmless. This exception is overruled.

The eighteenth exception is as follows: "(18) Because his honor, the presiding judge, charged the jury as follows, to wit: 'The damages to the son may be ordinary compensatory damages, or if there be gross negligence, gross carelessness, or recklessness, or wanton disregard or malice, then go one step further: You may give him, not only such damages as will compensate him, but give him smart money,—punitive damages,—to punish defendant;' thereby indicating that it was the duty of the jury in such case to give smart money,—punitive damages,—to punish defendant." His honor stated the circumstances under which the jury had the right to give smart money, and there was no error in his charge. This exception is overruled.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

IOWA SUPREME COURT.

STATE of Iowa
v.
Victor REPP, *Appt.*

(.....Iowa.....)

1. The mere finding of bees in a tree on the land of another person gives the finder no right to the bees or to the tree.

NOTE.—Property rights in bees.

- I. Generally.
- II. *Trespass and trover.*
- III. *Larceny.*
- IV. *Tithes.*

I. Generally.

It seems that bees belong to the first party reducing them to his possession, and, while followed from the hive of their owner and located by him are held to be his property unless he abandons them.

In Cooper's *Justinian*, Inst. lib. 2, tit. 1, § 14, it was said that "bees also are wild by nature; therefore L. R. A.

2. A trespasser who finds bees on the land of another, and hives them, but is not the owner of the hive in which he puts them or the land on which he leaves them, has no interest in them which is the subject of larceny.

(January 18, 1898.)

A PPEAL by defendant from a judgment of the District Court for Monroe County con-

fore, although they swarm upon your tree, they are not reputed, until they are hived by you, to be more your property than the birds which have nests there; so, if any other person inclose them in a hive, he becomes their proprietor. Their honey-combs also, if any, become the property of him who takes them; but clearly, if you observe any person entering into your ground, the object untouched, you may justly hinder him. A swarm which hath flown from your hive is still reputed to continue yours as long as it is in sight; and may easily be pursued; but in any other case it will become the property of the occupant."

victing him of larceny of a swarm of bees. *Reversed.*

The facts are stated in the opinion.

Mr. T. B. Perry, for appellant:

The court should have permitted the defendant to show that he did not take the gum and bees stealthily, but openly.

8 Greenl. Ev. 7th ed. § 157.

If one takes the goods of another and carries them upon his own land, the owner may

enter to retake them, because the wrong of the other excuses the entry.

Cooley, Torts, p. 50.

As Mosely stole the gum from the defendant, he could not, by giving it to Stevens, invest him with any right to it, even if the latter were innocent of the wrongful act of Mosely.

Cooley, Torts, pp. 51, 52; *Iole Royal Min. Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520.

Bees have a local habitation, more often in

So, Wood's Civil Law, bk. 2, chap. 3, p. 103, says: "Under the consideration of wild creatures we may place bees, which are also wild by nature; therefore if they settle upon your trees, they do not belong to you before you have covered them with an hive, no more than birds who have built their nests there, or the young ones in the nests before they are taken. It is likewise lawful for any to take the honeycombs from thence, tho', as before you may prohibit them from coming upon your ground. But if they are once hived, the honeycombs belong to the possessor; and if the swarm flies from your hives, they still belong to you as long as they are in sight and under any probability of recovery, or if they continue their custom of flying abroad and returning."

Domat's Civil Law, vol. 1, bk. 3, pt. 1, subd. 7, § 2133, says: "As we may possess living creatures which it is not possible to have always in our power and custody, so we retain the possession of them whilst we shut them up, whilst we have them under the care of a keeper, or if, being made tame, they return home without a keeper, as bees to their hives, and pigeons to their dove-houses. But the creatures which escape out of our custody, and do not come back, are no longer in our possession till we recover them again."

Puffendorf's Law of Nature, 4, chap. 6, § 5, says: "Yet bees are no doubt wild by nature since their custom of returning to their hive doth not proceed from their familiarity with mankind, but from their own secret instinct; they being in all other respects utterly unteachable. It is nevertheless one of Plato's laws, whoever shall pursue the swarms which belong to others, and by striking on the brass shall draw them with the delightful sound to fix near himself, let him make restitution for the damage. Where he seems to presuppose that the owner of the bees did not follow them when they left his hives, Pliny will have the bees to be neither wild nor tame; others divide them into both those kinds. But that, so long as they return to our hives they are properly our own, and cannot be hurt without our loss and damage, is very laboriously proved in that declamation of Quintillian, entitled 'The Poor Man's Bees.'"

"Articles which the proprietor of a farm has placed thereon, for the service and management of such a farm, are immovable by destination.

Thus immovables by destination, having been placed by the proprietor for the use and management of his farm, are . . . bee hives." Code Napoleon, § 524.

Bees also are *feræ naturæ*, but when hived and reclaimed a man may have a qualified property in them by the law of nature as well as by civil law. Bracton's Law, 2, chap. 1, § 8.

In Bell's Law of Scotland, p. 336, it was said that "when wild animals confined and appropriated have regained their natural liberty, they are again free to be acquired by occupancy. But distinction is made, and a different rule prevails, in respect to such of those animals as have *antimum revertendi*.—as pigeons, hawks in pursuit of prey, bees hiving while pursued by the owner. 2 Stair, Law of Scotland, 1, § 33; 2 Erskine, Law of Scotland, 1, § 10."

40 L. R. A.

Replevin lies for a swarm of bees. *Fitz. N. B. 68.*

And a swarm of bees going from the hive could be reclaimed if they could be followed and were known. *Merrills v. Goodwin*, 1 Root, 209.

A man's finding bees in a tree upon another man's land gave him no right either to the tree or the bees. *Merrills v. Goodwin*, 1 Root, 209.

In *Goff v. Kilts*, 15 Wend. 550, it was said that bees are *feræ naturæ*, and when hived or reclaimed a person may have a qualified property in them by the law of nature as well as the civil law, and hiving or inclosing them gives property in them.

In *Goff v. Kilts*, 15 Wend. 550, it was said that an unreclaimed swarm of bees belong to the occupant who first hives them.

In a suit against the owner of bees for injuries caused by the bees to horses passing on the highway, it was said that if courts are to take judicial notice of the nature of things so familiar to man as bees, which I suppose they would be justified in doing, "then I would observe that however it might have been anciently, in modern days the bee has become almost as completely domesticated as the ox or the cow." *Earl v. Van Alstine*, 3 Barb. 630.

II. Trespass and trover.

The party discovering wild bees and first appropriating them to his possession acquires title, but he cannot maintain trespass or trover against a party taking the same unless he has first reduced them to his possession; and it seems that no one is entitled to enter upon the land of another without permission and cut a bee tree to capture wild bees or their honey. Where two parties have obtained permission from the owner to cut a bee tree, the one first taking possession will have a better title to the bees and honey; but a license to one party to cut a tree may be revoked by the owner of the land and the same license given to another party.

So, where a swarm of bees left the hive of the plaintiff and went into a tree on the land of A. B., and the plaintiff followed the bees and marked the tree in which they entered, he could maintain an action of trespass against a third party who cut the tree down and killed the bees and took the honey away, although it was said that he would not have had the right to enter upon another person's land in order to recover them. *Goff v. Kilts*, 15 Wend. 550.

In that case the case of *Ferguson v. Miller*, 1 Cow. 243, was distinguished, as that case was between two persons each claiming as the first finder; also the case of *Gillet v. Mason*, 7 Johns. 16, as that case presented a question between the finder and the person interested in the soil.

So, where a party discovered a bee tree on the land of a third party and obtained consent to cut the tree, and while doing so was discovered by another party who had obtained a license to look for the bees and if found to cut the tree, and the second party prevented the first from completing the removal of the bees and honey and appropriated the same to his own use, the first party could maintain an action of trespass and case, having possession and a superior right over the party who took the

a tree than elsewhere, and while there they may be said to be within control, because the tree may at any time be felled. But the right to cut it is in the owner of the soil, and therefore such property as the wild bees are susceptible of is in him also.

Cooley, Torts, p. 485.

honey. In this case it appears that the owner of the land supposed the finder of the tree was entitled to take the bees and honey, and made no attempt to revoke the license. *Adams v. Burton*, 43 Vt. 38.

And where two persons claimed to be first discoverers of wild bees in a bee tree, and each obtained license from the owner to cut the tree, the bees belonged to the licensee first taking possession. It was said that the license was without consideration and liable to be revoked at pleasure. *Ferguson v. Miller*, 1 Cow. 248, 18 Am. Dec. 519.

Where a party placed an empty bee box in a tree on the land of another without obtaining his consent; and subsequently bees entered the same, and a third party appropriated the bees and honey, the party who first placed the box there could not maintain an action of trover for the value of the bees and honey, as he was a trespasser and the bees were not his property. It was held that bees are *feræ naturæ* and the only ownership in them until reclaimed and hived is *ratione soli*, and this qualified ownership cannot be changed or terminated by the act of a mere trespasser. *Rexroth v. Coon*, 15 R. I. 35.

So, where a man discovered bees in a tree on the land of another, and marked the tree with the initial of his name, such finder was not vested with any exclusive right of property, and could not maintain trespass against a person for cutting down the tree and carrying away the bees. *Gillet v. Mason*, 7 Johns. 18.

A party who found a swarm of bees in a tree on another party's land, and marked the tree, and notified the landowner, could not maintain trover against him for taking the honey, as the finder of the bees acquired no property in the tree, or could not cut the tree. *Fisher v. Stewart, Smith* (N. H.) 60.

And a man finding bees in a tree standing upon another man's land acquired no right either to the tree or the bees, and could not maintain trespass against a third party taking them. *Merrills v. Goodwin*, 1 Root, 209.

III. Larceny.

In *STATE V. REPP* it was held that a trespasser who finds bees on the land of another and hives them, but is not the owner of the hive in which he puts them or the land on which he leaves them, has no interest in them which is the subject of larceny. This is in accord with the authorities. Larceny may be committed by stealing bees when they have been reduced to possession. But it is not larceny to take wild bees or cut down a bee tree and take the honey.

In case for these words, Thou has stole my bees (innuendo a stock of bees) and Thou art a thief, after a verdict for the plaintiff it was moved for arrest of judgment that felony cannot be committed of bees because they are *feræ naturæ*. *Sed, per curiam*. The subsequent words, viz., Thou art a thief, show that the stealing was of such bees of which felony may be committed, and so actionable. *Tibbs v. Smith, T. Raym.*, 38, 3 Salk. 325.

A motion of arrest of judgment was refused where an indictment charged larceny of three bee hives of the value of \$5, three swarms of bees of the value of \$3, and 40 pounds of honey of the value of \$3, of the goods and chattels of C., as in this case the three swarms of bees were described to be of the goods and chattels of one C., which is 40 L. R. A.

A man's finding bees in a tree standing upon another man's land gives him no right either to the tree or the bees.

1 Waterman, Trespass, 1875, p. 358.

Messrs. Milton Remley, Attorney General, and *Jesse A. Miller*, for the State:

Bees are *feræ naturæ*, and though confined to a

in effect an averment that when stolen they were his property and in his possession, and therefore were clearly a subject of which larceny could be committed, and as to the 40 pounds of honey that was the subject of larceny whether made by wild bees or bees that had been reclaimed, where it was described as "of the goods and chattels" of C., and a conviction for stealing any one of the three named articles would sustain a judgment of petit larceny. *Harvey v. Com.*, 23 Gratt. 941.

And an indictment charging larceny of one bee hive, 100 pounds of honey and 10 pounds of wax, and a swarm of bees of the value of \$5, of the personal goods of A. B., was sustained, as it alleged the bees to be the goods of A. B. and in his possession when stolen, and bees when in the possession of any person are the subject of larceny. *State v. Murphy*, 8 Blackf. 408.

In *Hannam v. Mockett*, 2 Barn. & C. 944, it was said that "bees are property and the subject of larceny."

In *Com. v. Hazelwood*, 84 Ky. 661, it was said that bees may be the subject of larceny.

But in an action of slander for charging the plaintiff with being a thief, it was held that the plaintiff was not guilty of a felony by taking a swarm of bees and their honey from the tree of another man which the owner of the tree had reduced to possession by confining them while in the top of the tree, as some bees while they remain in the tree are not the subject of a felony. *Wallis v. Mease*, 3 Binn. 546.

And it was not slander to charge a person with having stolen a bee tree, as the term "bee tree" related to the wild, and not to the reclaimed, insect, the insect *feræ naturæ* and not yet reduced to property, and the term "tree" was applicable to standing timber, and neither of these articles were subjects of larceny. *Cock v. Weatherby*, 5 Smodes & M. 333.

So, it was not slander to charge that "he has stolen my bee tree," as the charge referred to the larcenous taking of the tree, and not of the bees or honey. *Idol v. Jones*, 13 N. C. (2 Dev. L.) 162.

IV. Tithes.

It seems that bees were not titheable, but that tithes could be collected on honey and wax.

"And upon a surmise made that he was sued for tithes of bees, that in consideration he paid honey and wax, and was at the charge for hives and maintenance of them in winter, he should be discharged of the tithes of the bees themselves. And upon these surmises a prohibition was granted." Anonymous, Cro. Car. 404.

It was held that there was no tithe due of a swarm of bees because they were wild by nature. *Rolle*, Abr. 651, pl. 5.

But the honey of bees is titheable. *Barfoot v. Norton*, Cro. Car. 559, W. Jones, 447.

Burn's Ecclesiastical Law, vol. 8, p. 516, § 15, says: "Bees are reckoned amongst the things that are *feræ naturæ*, and by consequence tithe free; and it hath been adjudged that they shall not be paid in kind by the tenth swarm. *Gibs*, 677. But of the wax and honey of bees tithes shall be paid in kind *de jure*. 1 *Rolle*, Abr. 635; Anonymous, Cro. Car. 404. And that is, by the tenth measure of honey, and the tenth weight of wax. *God*, 889, Deg. p. 2, C. 7. And there is a consultation provided in the register for the tithe of honey and of the wax of bees."

I. T.

tree by the owner of the tree, while they remain in the tree and are not secured in a hive they are not the subject of larceny.

Cock v. Weatherby, 5 Smedes & M. 338; *Wallis v. Mease*, 3 Binn. 546.

But though bees are *fera natura*, they become property by being reclaimed and hived, and they are then subject of larceny, for, while they are not fit for food, their honey is.

State v. Murphy, 8 Blackf. 498; *Harvey v. Com.* 23 Gratt. 941.

And as between the discoverer of wild bees and one who afterward finds them, the first finder, if he has proceeded to take possession of the bees, has paramount right and title to them.

Adams v. Burton, 48 Vt. 36.

Ladd, J., delivered the opinion of the court:

In July, 1895, Stevens found a bee tree on the land of Cody, and, without the latter's permission, chopped it down, and put the bees in a gum obtained from Mosely. These were left near the fallen tree on Cody's land. The gum was cut from a tree on defendant's land, without his knowledge or consent; and finding it with the bees, where left by Stevens, he removed them, at dusk of day, to the orchard of his mother, and inclosed them in a telescope gum, about 33 inches square, nailed to that procured from Mosely. This was unknown to the mother whose residence was about 1 mile from the bee tree, while that of the defendant was 3 miles further away. It does not appear that the defendant knew who hived the bees, or that Stevens was aware that Mosely was not the owner of the gum. When Stevens discovered the bees, after several days' search, the defendant refused to do more than return them, and after some parley this prosecution was begun.

Wild game is under the control of the state, and only becomes the subject of private ownership when reclaimed by the art and industry of man. A somewhat different rule applies to bees, though *fera natura*. These have a local habitation. Blackstone states: "It hath also been said that with us the only ownership in bees is *ratione soli*; and the charter of the forest, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found." The same rule is laid down

in Cooley, Torts, p. 485, where it is said that bees "have a local habitation, more often in a tree than elsewhere, and while there they may be said to be within control, because the tree may at any time be felled. But the right to cut it is in the owner of the soil, and therefore, such property as the wild bees are susceptible of is in him, also." And it has been so adjudged in *Ferguson v. Miller*, 1 Cow. 248, 18 Am. Dec. 519, and *Rezroth v. Coon*, 15 R. I. 85. By the law of nature, the person who hived the swarm would be entitled to it; but, under the regulation of property rights since the institution of civil society, the forest, as well as the cultivated field, belongs to the owner thereof, and he who invades it is a trespasser. *Goff v. Kilts*, 15 Wend. 550. See *Adams v. Burton*, 48 Vt. 36. The mere finding of bees on the land of Cody gave Stevens no right to them, or to the tree. *Merrile v. Goodwin*, 1 Root, 209; *Gillet v. Mason*, 7 Johns. 16. In cutting down the tree and taking the bees, he was a wrongdoer. Had he acted with the license of Cody, he might have acquired ownership, but he could obtain no title by his wrongful acts as a mere trespasser. *Rezroth v. Coon*, 15 R. I. 85. In that case the plaintiff had placed a box in the crotch of the tree belonging to Green, without permission, and later the defendant, without the consent of either, took the box from the tree, emptied it of bees and honey, and then replaced it. In holding that the plaintiff was not entitled to recover, the court said: "The plaintiff was a trespasser upon the land of Green. . . . He had no right to place the box or hive in the tree, and by placing it there he acquired no title to the bees which subsequently occupied it, or to the honey which they produced." No better title could be acquired by removing the bees from the tree top to a box on the land, than by luring them to a box placed in a tree top. Title to a thing *fera natura* cannot be created by the act of one who at the moment is a trespasser, and Stevens obtained no interest in the bees by the mere wrongful transfer from the tree to the gum. He neither owned the land on which he left them, nor the gum in which they were hived. Having neither title nor possession, he had no interest therein, the subject of larceny. As the information alleged ownership in Stevens, and the case was tried on that theory, we need make no inquiry as to any taking from Cody. But see *Wallis v. Mease*, 3 Binn. 546.

Reversed.

WYOMING SUPREME COURT.

STATE of Wyoming

v.

Otto GRAMM *et al.*

(.....Wyo.....)

1. Liability for money lost by failure of the bank in which it was deposited

NOTE.—For the conflicting authorities as to the liability on an official bond for loss of money by theft or bank failure, see *Wilson v. People*, Pueblo & A. Valley R. Co. (Colo.) 22 L. R. A. 449, and note; 40 L. R. A.

with due care by the state treasurer is not imposed by his bond conditioned to account for all money coming into his hands by virtue of his office, and to perform all the duties of his office when his statutory duty is to receive and keep all moneys of the state not required to be received and kept by some other person.

2. The rule which makes a public officer an insurer of the safety of the pub-

also *State, Overton County v. Copeland* (Tenn.) 31 L. R. A. 844; *Fairchild v. Hedges* (Wash.) 31 L. R. A. 851; *Bush v. Johnson County* (Neb.) 32 L. R. A. 223; *Healdsburg v. Mulligan* (Cal.) 33 L. R. A. 461.

lie funds under his control is not based upon the mere fact that he is a public officer intrusted with public funds, but is based upon the principle that by his bond, considered alone or in connection with the statutes defining his duties, he has contracted to become an insurer, and the rule is limited to cases involving such contracts.

3. A trustee's depositing money in a private bank is not negligence as matter of law.

4. Estoppel against the state from pursuing a treasurer's bond is not effected by its proceeding against the insolvency assignee of one with whom the treasurer had deposited the money, and accepting a dividend from him.

(Corn, J., dissents.)

(March 10, 1898.)

RESERVATION by the District Court for Laramie County for the opinion of the Supreme Court of questions arising in an action brought to enforce liability upon the bond of defendant Gramm as state treasurer for moneys which had been deposited by him in a bank and lost through its insolvency. *Answers returned favorable to defendants.*

Statement by Potter, Ch. J.:

This case was submitted to the district court upon the motions of plaintiff and defendants, respectively, for judgment upon the pleadings. The suit is brought in the name of and by the state upon the bond given by Otto Gramm, as state treasurer, on the 4th day of July, 1893, with Henry G. Balch, Daniel C. Bacon, William C. Wilson, Jr., Francis E. Warren, and Thomas A. Kent as sureties.

The material allegations of the petition are substantially as follows: That said Otto Gramm was elected to the office of state treasurer, on the 11th day of September, 1890, for a term ending on the 7th day of January, 1895. That he entered upon the discharge of the duties of such office on the 7th day of November, 1890, and continuously acted as such officer until January 7, 1895, at which time he was succeeded by Henry G. Hay. He had given a bond upon first assuming the duties of the office, but, owing to the death of two of his sureties, he gave the bond in suit, upon the requirement of the secretary of state. The bond was duly approved. That during his term of office said Gramm had received the sum of \$44,147.31, which it was his duty to pay over to his successor, but he had failed to make such payment. Judgment is claimed for said amount, with interest.

All of the defendants, except William C. Wilson, Jr., who, it is presumed, was not served with process, appeared and filed an answer, admitting the election of said Gramm to the office aforesaid, his entering upon and continuance in the discharge of the duties thereof, the execution and approval of the bond, but denying that on January 7, 1895, or at any time thereafter, said Gramm had in his possession the sum of money mentioned in the petition, or any other sum of money, belonging to plaintiff, unless the money thereafter shown to have been deposited in bank be held to have been at that time in his possession.

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The answer also specifically denies the making of any default in payment to the successor of said Gramm, unless the facts thereafter set forth constitute such default, and denies the truth of the charge that he did not truly and justly account for all moneys that came into his hands as such treasurer, and alleges that he did honestly, truly, and justly account for all moneys that came into his hands as such officer at any time after the giving of the bond sued on. The answer further denies that there was any duty of his office which said Gramm did not faithfully, truly, and justly perform. The answer then continues with the following, which we quote: "And these defendants aver that on the 20th day of July, A. D. 1893, and for many years prior thereto, one Thomas A. Kent was engaged in the general banking business, in the city of Cheyenne, in the county of Laramie, and state of Wyoming, and was of excellent repute and financial standing as a banker in said city of Cheyenne, and throughout the state of Wyoming; that at divers times prior to the said 20th day of July, A. D. 1893, the said Otto Gramm, as treasurer of the state of Wyoming, did deposit with and intrust and deliver to the said Thomas A. Kent, doing business as T. A. Kent, banker, as aforesaid, divers sums of money, in the aggregate many thousands of dollars, which said sums of money were of the public funds of the said state of Wyoming, and were in the possession of said Otto Gramm as state treasurer, as aforesaid, and were, as aforesaid, deposited in the said bank conducted by the said Thomas A. Kent, banker; and that at the respective times when each and all of said sums of money were as aforesaid deposited with said Thomas A. Kent, banker, the said public funds and moneys were known by the said banker to be public moneys of the state of Wyoming, and were by him received and held subject to the check and order of the said Otto Gramm as state treasurer of the state of Wyoming, all of the said deposits being made in the name of Otto Gramm, state treasurer, and being kept entirely separate and distinct from any private funds of the said Otto Gramm, and being so as aforesaid deposited to the sole use and benefit of the said state of Wyoming. And defendants aver that on the said 20th day of July, A. D. 1893, solely by reason of a great, sudden, unusual, unprecedented, and entirely unlooked-for business panic in the community in which the said Thomas A. Kent was doing business as a banker, the said Thomas A. Kent suddenly became insolvent, and executed a deed of assignment under the laws of the state of Wyoming, wherein and whereby he assigned to one Joel Ware Foster, for the benefit of the creditors of the said Thomas A. Kent, all of his property, including any and all moneys so as aforesaid in his hands belonging to the state of Wyoming, and deposited with him by the said Otto Gramm as state treasurer of the state of Wyoming; that the amount of such state funds in his hands at the time of the assignment was fifty-six thousand, four hundred fifty-four dollars and seventy cents (\$56,454.70). And defendants further aver that for a period of at least eighteen years prior to the assignment of the said Thomas A. Kent it was the common and uninterrupted

custom in the territory of Wyoming and in the state of Wyoming for the treasurer of the said territory and state to deposit the public funds belonging to the said territory and to the said state in banks, subject to check of the treasurer thereof, which said custom has all times been generally known to the citizens of the state of Wyoming and of the territory of Wyoming, and to the officers thereof; that the said custom was a reasonable one, and was necessary for the safe-keeping of the funds belonging to the state of Wyoming and belonging to the said territory of Wyoming; that there was no other way whereby the funds belonging to the state or to the territory could be as safely and securely kept as by depositing the same in the manner aforesaid,—all of which was at all times well known to the said territory of Wyoming and to the officers thereof, and to the said state of Wyoming and to the officers and inhabitants thereof, who, with such full knowledge at all times, failed and refused to provide any safe or secure place for keeping the said funds, and at all times acquiesced in the actions of the said treasurers and of the said defendant Otto Gramm in depositing said funds in bank, according to the custom aforesaid. And defendants aver that the insolvency of the said Thomas A. Kent, banker, was wholly unknown to the said Otto Gramm, or to these defendants, or to the community in which he carried on his business, until the execution of the said assignment, and that the said insolvency was wholly unanticipated until he made his assignment as aforesaid; that in truth and in fact the said Kent, banker, would not have become insolvent but for the sudden, great, and unusual panic which occurred at that time in the community where he carried on his business as a banker; that the property and assets of the said Thomas A. Kent, at the time of the said assignment, were such as to have much more than paid all of his debts and liabilities at the values which said property possessed immediately prior to said assignment, which values said property and assets had maintained for many years prior to said assignment. And defendants aver that the said Otto Gramm was not in any degree negligent, nor in any degree unfaithful to his trust as treasurer of the state of Wyoming, nor in any degree at fault in depositing or retaining said moneys, or any of them, in the said bank, and that the moneys so deposited in said bank are the moneys which the plaintiff seeks to recover in this action. And defendants aver that the said Gramm was not in any degree at fault, or in any degree negligent, or in any degree lacking in skill, or in any degree unfaithful in the care, custody, or safe keeping of said moneys, or any of them; that no negligence of the said defendant Otto Gramm in any degree—that no unfaithfulness of the said defendant Otto Gramm in any degree—caused or in any way contributed to the loss of said funds, or any of them.” It is further alleged that in January, 1894, the state brought its action for said moneys against the assignee for the benefit of creditors of said Thomas A. Kent, and that the state, by authority of the legislature, elected to and did receive dividends from said assigned estate amounting to \$12,307.39.

The plaintiff filed a reply, admitting the 40 L. R. A.

lack of negligence or fault on the part of the officer, the reply in that respect being as follows: “Comes now the above-named plaintiff, the state of Wyoming, and for its reply to the answer of the defendants in said cause admits that on the 20th day of July, A. D. 1893, and for many years prior thereto, one Thomas A. Kent was engaged in the general banking business in the city of Cheyenne, in the county of Laramie, and state of Wyoming, and was of excellent repute and financial standing as a banker in said city of Cheyenne, and throughout the state of Wyoming; that at divers times, prior to the said 20th day of July, A. D. 1893, the said Otto Gramm, as treasurer of the state of Wyoming, did deposit with the said Thomas A. Kent, banker, many thousands of dollars of the public funds of the said state of Wyoming, which said public funds were known by the said Thomas A. Kent, banker, to be public moneys of the state of Wyoming, and which were by him received and held subject to the check and order of the said Otto Gramm as state treasurer of the state of Wyoming, and were kept entirely separate and distinct from the private funds of the said Otto Gramm. And plaintiff further admits that on the 20th day of July, A. D. 1893, by reason of a business panic in the community in which the said Thomas A. Kent was doing business as a banker, the said Thomas A. Kent suddenly became insolvent, and executed a deed of assignment under the laws of the state of Wyoming to one Joel Ware Foster of all of his property, including all moneys in his hands belonging to the said state of Wyoming, said money amounting to the sum of fifty-six thousand, four hundred fifty-four dollars and seventy cents (\$56,454.70). And plaintiff further admits that for a period of at least eighteen years prior to the assignment of the said Thomas A. Kent, it was the common and uninterrupted custom in the territory of Wyoming, and in the state of Wyoming, for the treasurers of the said territory and state to deposit the public funds belonging to said territory and state in banks, subject to check of the treasurer thereof, which said custom has at all times been generally known to the citizens of the state of Wyoming and of the territory of Wyoming, and to the officers thereof, and the said state of Wyoming and its officers and inhabitants had failed to provide any other place for keeping said funds. And plaintiff further admits that the insolvency of the said Thomas A. Kent was wholly unknown to the said Otto Gramm, or to either of said defendants, or to the community in which he carried on his business, until the execution of the said assignment, and that the said insolvency was wholly unanticipated until he made his assignment as aforesaid, and that the property and assets of the said Thomas A. Kent, at the time of the said assignment, were such as to have much more than paid all of his debts and liabilities at the values which said property possessed immediately prior to said assignment, which values said property and assets had maintained for many years prior to said assignment. Plaintiff further admits that the said Otto Gramm was not in any degree negligent, nor in any degree unfaithful to his trust as treasurer of the state of Wyoming, nor in any degree at fault in de-

positing or retaining said moneys, or any of them, in the said bank, and that no negligence or unfaithfulness on the part of the said defendant, Otto Gramm, in any degree caused or contributed to the loss of the said funds by the failure of said bank." The allegations of the answer concerning the pursuit of the money in the hands of Kent's assignee, and the receipt of dividends by authority of a legislative resolution, are also admitted. It appears by such reply that the amount of money in the hands of the officer which had been deposited in said bank, and was there at the time of the assignment, was \$56,454.70, and that the sum sued for is the balance, after deducting the amount recovered from the assignee by the suit against him, and by way of dividends.

Upon the submission of the motions for judgment upon the pleadings, the district court reserved the following questions, held to be difficult and important, to this court for its decision thereon: (1) Under the bond set out with the petition are the defendants liable for losses of state funds by the state treasurer, Otto Gramm, which occurred without any negligence or unfaithfulness in any degree on the part of said state treasurer in any way relating to his trust as treasurer? (2) Under the bond sued on, if the facts are that for eighteen years prior to the loss hereinafter set forth it had been the uninterrupted custom, known to the officers and inhabitants of Wyoming, for the defendant, Otto Gramm, as state treasurer, and his predecessors in office, to deposit the funds of Wyoming in bank, as was done in this instance, and if with this knowledge the officers and inhabitants of Wyoming had failed to provide any other place for keeping said funds; and if, without any negligence or unfaithfulness to his trust in any degree on the part of said Otto Gramm as state treasurer, he deposited \$56,454.70 of the funds of the state in T. A. Kent's bank, as the state funds payable upon the check and order of himself as state treasurer, and kept entirely separate from the private funds of said Otto Gramm; and if said Otto Gramm, as state treasurer, was not in any degree at fault in depositing or retaining moneys in said bank; and if said banker was of excellent character and repute as a banker at the city where he did business as a banker, and was entirely safe and solvent until the day of his assignment; and if suddenly, and solely by reason of a sudden, great, and unprecedented, and unexpected financial panic in the community where he did business, the said banker became suddenly insolvent, and assigned his property, including the funds of the state in his hands; and if said Otto Gramm, as state treasurer in accounting with his successor for the funds in his hands, made full report of the deposits made by him as aforesaid, and turned over to his said successor the vouchers therefor; and if the state of Wyoming, upon said vouchers, and under express authority of a resolution of the legislative assembly of the state of Wyoming, filed its claim with the assignee of said banker, claiming as its own the said moneys (\$56,454.70) so deposited with the said banker by said Otto Gramm as state treasurer, and thereafter received from said assignee, as dividends upon said claim, the sum of \$12,807.34,

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—would the defendants, under and by reason of these facts, be liable upon the bond sued on? (3) Under the bond sued on, did the defendants become insurers of the funds of the state of Wyoming, placed in the hands of Otto Gramm, as state treasurer, and liable, in all events, for any loss that might occur of any such funds? (4) Under the pleadings should judgment go, and, if so, should it be for the plaintiff or for the defendants?

Mr. Benjamin F. Fowler, Attorney General, for the State.

Messrs. Van Orsdel & Burdick and John W. Lacey, for defendants:

The provision for accounting is satisfied by an honest and truthful account, either producing the funds or furnishing lawful excuse for their nonproduction.

Many of the cases turn upon the language of the statute or bond, where language is used far more exact and much more indicative of insurance than anything that can be found in the case at bar.

New Providence v. McEachron, 83 N. J. L. 339; *Hancock v. Hazard*, 12 Cush. 112; *State, Wyandot County, v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *United States v. Prescott*, 3 How. 578, 11 L. ed. 734; *Com. v. Comly*, 3 Pa. St. 372; *Jefferson County Comrs. v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *Rock v. Stinger*, 36 Ind. 346; *Colerain v. Bell*, 9 Met. 499; *State v. Waleen*, 17 Colo. 117, 15 L. R. A. 456.

In this state it is the law that the money received by the treasurer is not the property of the treasurer, but the property of the state.

State v. Foster (Wyo.) 20 L. R. A. 226.

The words "faithfully discharge the duties," etc., stipulate for the fidelity and honesty of the treasurer, and either by themselves, or in connection with the words "well and correctly behave therein," also stipulate for his competence and diligence. To constitute a breach of the bond the officer must have acted either dishonestly or without competent skill and knowledge, or without due diligence. The breach alleged in this case does not fall under any of these heads.

Atlantic & N. C. R. Co. v. Cowles, 69 N. C. 59; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. ed. 47; *American Bank v. Adams*, 12 Pick. 303; *Union Bank v. Clossary*, 10 Johns. 271; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *Chicago, B. & Q. R. Co. v. Bartlett*, 120 Ill. 603.

Receivers and their sureties are not insurers of the funds in their hands as receivers, but only liable in case of failure to exercise fidelity or prudence or diligence.

Barton v. Ridgeway, 92 Va. 163; *Hamm v. J. Stone & Sons Live-Stock Co.* (Tex. Civ. App.) 35 S. W. 427; *Powers v. Loughridge*, 38 N. J. Eq. 396.

The liability on executors' and administrators' bonds is not that of insurers. Unless there has been a lack of fidelity, diligence, or skill there is no liability for loss of the property.

Moore v. Eure, 101 N. C. 11; *Lehman v. Robertson*, 84 Ala. 489; *State, Townsend v. Mengher*, 44 Mo. 356, 100 Am. Dec. 298; *Foster v. Davis*, 46 Mo. 268; *Newton v. Bushong*, 22 Gratt. 628; *Re Maxwell*, 21 N. Y. S. R. 189; *Re Kohler*, 15 Wash. 613.

If guardians and trustees "are to be held responsible for all negligence, and are not allowed the exercise of a reasonable discretion and prudent care in the management of their trusts, it will deter prudent men from assuming the office, which in itself is sufficiently onerous and already undertaken by such men with reluctance."

Fahnestock's Appeal, 104 Pa. 46.

The guardian and his sureties are liable only in case of lack of fidelity, diligence, or skill.

Law's Estate, 144 Pa. 499, 14 L. R. A. 103; *Wilmer's Appeal*, 87 Pa. 120; *Neff's Appeal*, 57 Pa. 91; *Beuch v. Moser*, 4 Kan. App. 66; *O'Connor v. Decker*, 95 Wis. 202.

The common-law rule is admitted to have been different from the rule laid down in *United States v. Prescott*, 3 How. 578, 11 L. ed. 784.

United States v. Thomas, 15 Wall. 337, 21 L. ed. 89; *Walker v. British Guarantee Assn.* 18 Q. B. 277.

All the language of the statute relating to the subject-matter is predicated upon the idea that the moneys which come into the official custody of the county treasurer are not his own private funds, but the county's, and they remain so until legally paid out.

Cumberland County v. Pennell, 69 Me. 357, 31 Am. Rep. 284; *Mechanics' Bank v. Hallouell*, 52 Me. 545; *Thompson v. White*, 45 Me. 445; *Colerain v. Bell*, 9 Met. 499; *Hancock v. Hazard*, 12 Cush. 112; *Muzzy v. Shattuck*, 1 Denio, 238; *Looney v. Hughes*, 26 N. Y. 514; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637.

The responsibility of the county treasurer, in the absence of any statute enlarging it, is measured by the common-law rules applicable to bailees for hire other than common carriers and innholders.

United States v. Thomas, 15 Wall. 337, 21 L. ed. 89; 1 Perry, Tr. § 441, and notes; 3 Redf. Wills, 394; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *Walker v. British Guarantee Assn.* 18 Q. B. 277; *Planters' & M. Bank v. Hill*, 1 Stew. (Ala.) 201; *Peck v. James*, 3 Head, 75; *State, Overton County, v. Copland*, 96 Tenn. 296, 51 L. R. A. 844; *The Governor v. McEuen*, 5 Humph. 265; *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; *Healdsburg v. Mulligan*, 113 Cal. 205, 33 L. R. A. 461; *Livingston v. Woods* (Mont.) 49 Pac. 487; *Jefferson County Comrs. v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *Mechem*, Pub. Off. § 301.

A *cestui que trust* may either follow the trust estate or the trustee, but may not do both.

A *cestui que trust* cannot have judgment against his trustee for the trust moneys which have come into his hands, and at the same time have lands purchased with such moneys judged to be the trust property.

Barker v. Barker, 14 Wis. 142; *Fears v. Lynch*, 28 Ga. 249; *Merket v. Smith*, 33 Kan. 66; *Fowler v. Bovey Sav. Bank*, 113 N. Y. 450, 4 L. R. A. 145; *Priestly v. Fearnie*, 3 Hurlst. & C. 977; *Scarf v. Jardine*, L. R. 7 App. Cas. 845; *Raisson v. Turner*, 4 Johns. 469; *Sanger v. Wood*, 3 Johns. Ch. 416; *Morris v. Rexford*, 18 N. Y. 552; *Gardner v. Ogden*, 22 N. Y. 827, 78 Am. Dec. 192; *Bank of Beloit v. Beall*, 34 N. Y. 478; *Rodermund v.* 40 L. R. A.

Clark, 46 N. Y. 854; *Bowen v. Mandeville*, 95 N. Y. 237; *Cheeseman v. Sturges*, 9 Bosw. 246; *Mattlage v. Poole*, 5 Hun. 556; *Riley v. Albany Sav. Bank*, 36 Hun. 513, 103 N. Y. 669; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Clough v. London & N. W. R. Co.* L. R. 7 Exch. 26; *Raymond v. Proprietors of Crown & E. Mills*, 2 Met. 319; *Sears v. Carrier*, 4 Allen, 839; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Moller v. Tuska*, 87 N. Y. 166.

Potter, Ch. J., delivered the opinion of the court:

The facts admitted by the pleadings and stated in the reserved questions raise the general question whether the state treasurer, under our statutes relating to that officer and the bond given by him, is liable for public funds in his possession which have been lost by reason of the failure of a bank in which he had deposited them for safe keeping, he being without any fault, blame, or negligence. The reputable character of the bank in the community and among business men, and its excellent reputation for solvency and safety as a place of deposit, is admitted, as well as that the treasurer was not negligent or careless in depositing or leaving the public funds in such bank. While thus acquitting the late officer of all blame, it is urged on the part of the state, by the attorney general, that the treasurer and his sureties, under the statutes and the bond, are insurers of the safety of the public money coming into the custody of the officer, and that, notwithstanding that he has been honest, faithful, and capable in the discharge of his duties, and the moneys have been lost in the absence of any kind of fault on his part, they must respond for all such moneys. The contrary rule is contended for on behalf of defendants. The matter has been fully and ably presented to the court on both sides, both in briefs and upon argument. The decisions of the courts in this country upon this question present an irreconcilable conflict. It is one of first impression in this court. We have examined all the authorities with much care, and have arrived at a conclusion only after mature reflection. We realize the importance of the question, so far as the present case is concerned. It is a matter, however, which, for the future, can and ought to be clearly settled by legislation. In the process of determining the principle which must govern a decision upon the question before us, and the application of the various conflicting authorities to it, it will be useful, in the first place, to set down certain well established rules upon which all the courts are in accord. The point of divergence will thus be the more observable and the better understood.

I. In general, all trustees who have the custody of money, such as executors and administrators, guardians and receivers, and the like, are held not to be liable for the loss of funds occurring without their fault or negligence, and this is so regardless of the form or character of the bond which they may have given, or the statutes or orders of court prescribing their duties. Such trustees are held merely to diligence and prudence in the care of the funds. The rule is stated as follows in 2 Story, Eq. Jur. § 1269: "The rule in all cases of this sort is that, where a trustee acts by other

hands, either from necessity or conformity to the common usage of mankind, he is not made answerable for losses." He is to keep the money as a prudent man would keep his own. *Norwood v. Harness*, 98 Ind. 134, 140, 49 Am. Rep. 739. In this case, on page 144, the court says: "His business is to keep the money safely, and banks are commonly used as safe places of deposit by prudent men." Notwithstanding that his duty "is to keep the money safely," the trustee, an administrator, was held not liable for money lost by the failure of a bank in which it had been deposited without negligence. *Twitty v. Houser*, 7 S. C. N. S. 153; *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Coz v. Rooms*, 38 N. J. Eq. 239; *Deberry v. Ivey*, 55 N. C. (2 Jones, Eq.) 370; *McCabe v. Fowler*, 84 N. Y. 314; *State, Townshend, v. Meagher*, 44 Mo. 359, 100 Am. Dec. 298. In the case last cited the suit was brought upon the bond of an administrator, which was conditioned that he should pay over and account for the money or property that should come to his hands belonging to the estate as required by law. It was said that "it is well-established equity law that under certain circumstances executors and administrators are absolved from responsibility, notwithstanding the bond, and notwithstanding the failure to produce the property or pay over its value in money, . . . no negligence being imputable to the administrator or executor. 2 Wms. Exrs. 142, and cases there cited. The obligation of the bond, therefore, in such cases is not absolute." In determining what was "required by law," referring to that phrase in the bond, the court did not resort to any exception found either in the bond or statute, but went to the common law, and as a result of an investigation on that line determined "that executors and administrators, according to the decided cases and views of eminent law writers, stand in the position of trustees of the persons who are interested in the estates upon which they administer, and that they are subject to liability only for want of due care and skill, and that the measure of care and skill required of them is the same as that demanded of bailees for hire, namely, that which prudent men exercise in the direction of their affairs." The cases upon this particular branch of the subject abound in expressions to the effect that such a person, having trust money in his possession, would be negligent if he did not deposit the same in a bank, as that is the place where the most prudent men deposit for safe-keeping their own money, and in some instances such trustees have been held liable for the loss of money on the ground that they were negligent in failing to deposit it in bank. See also *Powers v. Loughridge*, 38 N. J. Eq. 396; *Moore v. Eure*, 101 N. C. 11; *Lehman v. Robertson*, 34 Ala. 489; *Foster v. Davis*, 46 Mo. 268; *Re Kohler*, 15 Wash. 618; *Law's Estate*, 144 Pa. 499, 14 L. R. A. 103; *Fahnestock's Appeal*, 104 Pa. 46; *Jones v. Lewis*, 2 Ves. Sr. 240; *Knight v. Lord Plymouth*, 3 Atk. 480.

2. It is also well settled that there is nothing at common law which distinguishes public treasurers or depositaries from any other financial managers or trustees.

3. The absence of any such distinction is recognized in another well-settled doctrine, 40 L. R. A.

that public officers, having in their official custody money belonging to others than the public are not responsible for its loss occurring without negligence on their part. That rule has been adopted in this country in cases where the officer and his sureties have been sought to be charged in suits upon the official bond. *Wilson v. People, Pueblo & A. Valley R. Co.*, 19 Colo. 199, 22 L. R. A. 449; *People, Nash, v. Faulkner*, 107 N. Y. 477. In the case of *Wilson v. People*, 19 Colo. 199, 22 L. R. A. 449, action was brought upon the official bond of a clerk of the district court, to recover certain moneys which had been deposited with that officer in condemnation proceedings. The money had been deposited by the clerk, to his credit as clerk, in a bank which subsequently failed. The bond was conditioned that the officer shall "faithfully perform all the duties of said office as prescribed by law, that he will punctually pay over to the person legally authorized to receive the same all moneys that may come into his hands by virtue of said office," etc. The court was unanimous in absolving the officer and his sureties from liability, no negligence being imputable to him. The opinion in the case does not attempt to draw any distinction between cases of public and private funds, but in a subsequent case in the same court, which will be hereinafter cited, such a distinction was made, although over the dissent of the writer of the opinion in the *Wilson Case*, Mr. Justice Goddard. It will be observed that the condition of the bond above quoted was about as strong, if not entirely so, as in any of the cases holding the officer as to public funds to a strict accountability. In the case of *People, Nash, v. Faulkner* the court of appeals of New York refused to hold the obligation of the bond of a surrogate as absolute, and as rendering himself and sureties liable as insurers of money belonging to others than the public in his official custody, and lost without his fault by the failure of a bank in which it had been deposited. The material conditions of the surrogate's bond were as follows: "Well and truly and faithfully, in all things, perform his duties as county judge of Livingston county, and shall well and truly and faithfully perform his duties as surrogate of said county of Livingston, and shall well and faithfully apply and pay over all moneys and effects that may come into his hands as such county judge in the execution of his office, and shall well and faithfully apply and pay over all moneys and effects that may come into his hands as such surrogate in the execution of his office without fraud, deceit, or delay." With this much, which may be considered as settled law, upon which the decisions are apparently not in conflict, we come to the precise question of the liability of public officers for public funds; and here we are confronted with divergent views, and it is difficult even to reconcile all the authorities which reach the conclusion that such an officer, as to such funds, is an insurer, and bound to respond in any event, with the possible exception of loss occasioned by the act of God or the public enemy. In the consideration of this case we have endeavored to extract the principle from the decisions favoring that strict and absolute rule, and note the ef-

fect of the application thereof to our own statutes, and the bond, which is the basis of the present controversy. If, when so applied, such authorities, if followed by us, would render the treasurer and his sureties insurers of the public funds, a further investigation may become necessary to determine whether or not they or the opposing decisions announce the rule more agreeable to our conditions.

The first case involving this question in this country arose in New York.—*Albany County Supers. v. Dorr*, 25 Wend. 440, decided in 1841,—wherein it was held that a county treasurer was not responsible for public money stolen from his office where there is no imputation of negligence or other default on his part. This case, however, has ceased to be an authority, for the reason that in *People, Nash, v. Faulkner*, 107 N. Y. 477, the court of appeals announced that, owing to his having often been criticised, and in view of another case next to be adverted to, the question should be considered an open one in that state, although it was denied that it had been at all overruled, and for the further reason that in a more recent case the contrary doctrine has been adopted in that state. *Muzzy v. Shattuck*, 1 Denio, 283, arising in the same state, was a case involving the responsibility of a tax collector for moneys collected by him, and stolen from his possession, without any fault, want of care, or omission of duty on his part. He was held responsible, but solely upon the ground that, under the statutes, that officer was a debtor for all the money collected, which, of course, meant that, upon the collection of any tax money, the legal title thereto was in him, and it was not the money of the public, but the officer became *eo instante* a debtor for the amount, and the statute had provided the only method by which such obligation could be discharged. In passing, it may be said that the courts have not usually accepted that view, and this court announced a different view in the case of *State v. Foster* (Wyo.) 29 L. R. A. 226. The cases which are based upon a holding that the officer is a debtor for the public funds in his possession must be eliminated from this case as precedents.

The leading case upholding the doctrine that the treasurer occupies the position of an insurer, and on the strength of which the most, if not all, of the cases have adopted that rule of decision, is *United States v. Prescott*, 8 How. 578, 11 L. ed. 734, which was decided at the December term, 1844. Not all the courts, however, nor the same court in later decisions, which have followed that case, and cited it approvingly, have kept to the fundamental principle underlying it. It was an action brought upon the official bond of Prescott, given for his faithful performance of the duties of receiver of public moneys at Chicago. The defense pleaded was that the sum not paid over had been feloniously stolen from his possession, notwithstanding that he had used ordinary care and diligence in keeping the same. A demurrer was filed to the plea, and thereon the opinion of the judges were opposed, and the case was certified to the supreme court upon the question whether "the felonious taking and carrying away the public moneys in the custody of a receiver of public moneys,

without any fault or negligence on his part, discharged him and his sureties." On the part of defendants it was contended before that court that the officer was a depositary for hire, and that, unless his liability was enlarged by the special contract to keep safely, he is only subject to the liabilities imposed by law upon such a depositary, and that the special contract did not enlarge his liability. In response, apparently, to that point, the learned justice delivering the opinion said: "This is not a case of bailment, and, consequently the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and principles which are founded upon public policy." Without quoting in full the condition of the bond, it will answer all purposes by calling attention to the fact that it required the officer to well, truly, and faithfully keep safely, without loaning or using, all the public moneys coming into his possession, and, when orders for their transfer or payment had been received, that he should faithfully and promptly make the same as directed. After quoting the bond, the opinion proceeds as follows: "The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him when required to do so; and the question is whether he shall be exonerated from the condition of his bond on the ground that the money had been stolen from him. The objection to this defense is, that it is not within the condition of the bond, and this would seem to be conclusive." And again: "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely,' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds which might be practised with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public." It was held that the defense was not good. It is evident from the most casual reading of the opinion just quoted from so largely, that, as concerned that action, all idea of a bailment was eliminated from the case. The matter of public policy was not brought in as an attachment to any common-law rules relating to bailment. It was not said or held, either expressly or by implication, that the common-law principles affecting the responsibility of bailees for hire, as applied to depositaries of public funds, needed to be modified and made more strict. The court distinctly started out upon the theory that no question of bailment was involved, and placed whatever liability there existed squarely and solely upon the bond. It having been determined by the learned court that the bond, out of which arose the only liability to respond, contained a positive agreement to keep all moneys received safely, and to pay them out or transfer them promptly whenever directed to do so, concluded that

public policy forbade any relaxation by the courts of that condition; and, further than that, the only reason given for the existence of that public policy was the opportunity for fraud which would be offered were such defenses permitted, and the chance which an officer would have to manufacture a case of loss without fault. It must be remembered that this was the first case announcing that doctrine.

The next case in point of time, *Muzzy v. Shattuck*, 1 Denio, 233, has already been commented upon. Following that came *Com. v. Comly*, 3 Pa. St. 372, decided at the July term, 1846, by the Pennsylvania supreme court, which involved the liability under his bond of a collector of tolls; the condition thereof being that "he shall account for and pay over all moneys he may receive for tolls." The defense was a larceny of the money received for tolls from a secret apartment in a locked desk in the collector's office. The trial court had instructed the jury that, if the collector had kept the public money as a prudent man would keep his own, and exercised that care and diligence which every person of common prudence takes of his own affairs, and if the money was actually stolen as sworn to, then the verdict should be for the defendant. The opinion of the court, delivered by Mr. Chief Justice Gibson, commences by citing the decision in the case of *United States v. Prescott*, and stating that the same is founded in sound policy and sound law, and the learned justice said: "The responsibility of a public receiver is determined, not by the law of bailment, which is called in to supply the place of a special agreement where there is none, but by the condition of his bond." And, concerning the matter of public policy: "The keepers of the public moneys, or their sponsors, are to be held strictly to the contract; for, if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant."

In 1858, the case of *Hancock v. Hazzard*, 12 Cush. 112, was decided by the supreme judicial court of Massachusetts. The action was on the bond of the treasurer and collector of the town of Hancock. The defense in this case was that the unpaid money had been stolen without fault of the collector. In a former case (*Colerain v. Bell*, 9 Met. 499) it had been said, with reference to such an officer, under the peculiar provisions of the statutes, that the money received by him as collector, in the collection of taxes, is his own money, and not that of the town. That case was referred to in the case reported in 12 Cush. 112, and the court said: "He is a debtor, an accountant, bound to account for and pay over the money he has collected. The loss of his money, therefore, by theft or otherwise, is no excuse for nonperformance. This is founded on the nature of his contract and considerations of public policy,"—citing *United States v. Prescott*. The court also said that the obligation is not regulated by the law of bailments. It is not difficult to understand that, if the officer is a debtor, no law of bailment is involved. It does, however, require something of an effort to understand what considerations of public policy and the case of *United States*

v. Prescott had to do with the case, if the officer was a debtor before he lost the money, unless, indeed, the Massachusetts court construed the decision in the *Prescott Case* as making out that the money in Prescott's hands was his own. At any rate, the case from Massachusetts is not in any sense a precedent for us, under our statutes.

On this side of the judicial controversy the next case arose in Ohio,—*State, Wyandot County, v. Harper*, 6 Ohio St. 608, 67 Am. Dec. 863, decided in 1856. Harper had been county treasurer, and his bond contained the following condition: "Harper shall honestly and faithfully pay over, during his continuance in office, all moneys that shall come into his hands for state, county, and township, or for other purposes, according to law." His residence was broken open, and certain public moneys stolen therefrom, without his fault or negligence. Under the terms of the bond and the statute, it was held that the treasurer was an insurer "against the delinquencies of himself, and against the faults and wrongs of others, in regard to the trust placed in his hands." The case of *Muzzy v. Shattuck*, which was based upon the theory that the officer was a debtor, and the *Prescott Case*, and *Com. v. Comly*, 3 Pa. St. 372, based upon a different consideration, were, strangely enough, cited in support of the court's conclusion, without comment. The court adds: "The distinction between this and a common case of bailment, is that the law of the latter is generally founded upon the absence of any positive engagements between the parties to the hiring, or, as it is called, the '*locatio conductio*,' and therefore the question arises. What obligation may, with reference to public policy and general convenience, be implied by law, in the absence of such positive engagements? The express contract of the parties may, as in the case now under consideration it has done, vary or supersede those derived from the law of bailments."

A critical examination of some of the early cases cannot fail to impress one with the thought that they observed no distinction between moneys the legal title to which is by law vested in the officer, and those which are merely in official custody and care, but belong to the public; and the various decisions which respectively base their conclusions upon one condition of affairs or the other are cited indiscriminately, as bearing upon and forming a precedent upon the same proposition. This is particularly noticeable in the Indiana cases, when read together. We can readily understand a court which, as in the *Prescott Case*, has found a special contract which defines the obligation of the officer, and upon that ground enforces it, and refuses any equitable relaxation of the obligation for reasons of public policy; but it must be confessed it is embarrassing to determine the exact reason behind an opinion which approves and follows that doctrine, and at the same time find support for its conclusions in another case, which is founded upon the theory that the money is in the possession of the officer as a debtor. Both kinds of cases have, it is true, held the officer liable under his bond; but the reasons are far different, and in more recent times, when it has been necessary for the public to seek after

its money in the hands of others, to whom the officer has intrusted it, the distinction between a debtor and a mere custodian or keeper has become very marked. I do not regard the Ohio case above referred to as imputing the character of debtor to the treasurer, but as holding that the special contract has fixed the extent of his responsibility. The case of *Halbert v. State, Martin County Comrs.*, 22 Ind. 125, may not be based upon the debtor theory, although the learned justice who wrote the opinion said, in *Rock v. Stinger*, 36 Ind. 346, that it followed that, the officer not being a mere bailee, the technical title to the money in his hands was in himself, and, in case of his death, it would go to his personal representative, rather than to his executor. And, indeed, in still another case, it was directly held that the title to the money was in the officer. It is, therefore, at least doubtful whether the conclusion of the Indiana court was not influenced to some extent by that theory. In *Halbert v. State, Martin County Comrs.*, 22 Ind. 125, decided in 1864, the strict liability was enforced, as well as in the later case of *Rock v. Stinger*, 36 Ind. 346, and under statutes and bonds not as positive, in respect to an engagement to keep safely and pay over, as any of the other cases previously cited herein.

We have thus rather minutely discussed the foregoing decisions, for reasons which will become obvious, and from necessity, as it seemed to us, even at the expense of extending this opinion beyond ordinarily reasonable limits, to the end that we might arrive at some satisfactory and exact knowledge of the reasons upon which the doctrine of the majority of the cases upon the subject have been grounded. With the cases above adverted to as leading precedents, quite a number of the state courts have more recently announced the same doctrine. Many adopt the rule by mere reference to authority, and with no attempt at argument. See *Fairchild v. Hedges*, 14 Wash. 117, 81 L. R. A. 851; *Pine Island Bd. of Edu. v. Jewell*, 44 Minn. 427; *Hennepin County Comrs. v. Jones*, 18 Minn. 199 (Gil. 182); *Wilson v. Wichita County*, 67 Tex. 647; *Gartley v. People, Pueblo County* (Colo.) 49 Pac. 272; *Rose v. Douglass Twp.* 52 Kan. 451; *Nason v. Erie County Directors of Poor*, 126 Pa. 445; *State v. Nerin*, 19 Nev. 162; *Taylor Dist. Twp. v. Morton*, 37 Iowa, 550; *Tillinghast v. Merrill*, 151 N. Y. 135, 34 L. R. A. 678; *Thompson v. Township Sixteen*, 30 Ill. 49; *State, Mississippi County, v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *State, The Township, v. Powell*, 67 Mo. 396, 29 Am. Rep. 512; *Baily v. Com. (Pa.)* 9 Cent. Rep. 223; *Bush v. Johnson County*, 48 Neb. 1, 32 L. R. A. 223. The doctrine announced in such comprehensive terms by the *Prescott Case* has, however, been considerably modified in a later case in the same court. The *Prescott Case* was followed by that court in *Boydson v. United States*, 13 Wall. 17, 20 L. ed. 527; *Bevans v. United States*, 13 Wall. 56, 20 L. ed. 531; *United States v. Morgan*, 11 How. 154, 13 L. ed. 643; *United States v. Dashiell*, 4 Wall. 182, 18 L. ed. 319; *United States v. Keebler*, 9 Wall. 38, 19 L. ed. 574. The United States cases following the *Prescott Case* make one matter clear, viz., that the officer is a bailee, but under special obligations. It was 40 L. R. A.

said, in the opinion in *Bevans v. United States*, 13 Wall. 56, 20 L. ed. 531: "Bailee he was, undoubtedly, but by his bond he had insured the safe-keeping and prompt payment of the public money which came to his hands." And it is, further on in the opinion, stated that the officer had not only assumed the common law obligations of a bailee, but had given bond to keep safely the money in his hands.

The case which modified to some extent the rule stated in the *Prescott* and subsequent cases in the United States Supreme Court, above cited, is *United States v. Thomas*, 15 Wall. 337, 21 L. ed. 89. The direct result of this case was to exonerate a bonded government officer for the loss of public moneys, occurring by the act of the public enemy, and the bond, however stringent in its terms, was held not absolute, if performance of its conditions should be prevented by the act of God or the public enemy, without any neglect or fault on the officer's part. The real effect of this case has been much disputed. It has been thought by some to have practically overruled the former decisions, but one of the able judges—Mr. Justice Miller—dissented from the majority opinion because it did not flatly overrule the *Prescott* and subsequent cases. That distinguished jurist, in a dissenting opinion of much clearness and vigor, stated that he had not believed, and did not then believe, that there was any principle of public policy, recognized by the courts or imposed by law, which made a depository of the public money liable for it, when it had been lost or destroyed without any fault or negligence or fraud on his own part, and when he had faithfully discharged his duty in regard to its custody and safe-keeping. This opinion, although written by a dissenting judge, has been approved and followed by a respectable number of the state courts since then, and its utterances strongly approved by many other judges, who have found themselves obliged, for the like reasons as therein expressed, to dissent from the views of the majority of their court.

Whatever may be said of the majority opinion in the *Thomas Case*, it is entirely manifest, and open to no possible contradiction, that it was necessary, and so held, to modify the general expressions contained in the opinion in the *Prescott Case*. The learned justice who delivered the opinion in the *Thomas Case*, Mr. Justice Bradley, in discussing the duties and responsibilities of a public financial officer, said: "The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property public or private. If, in any case, a more stringent obligation is desirable, it must be prescribed by statute, or exacted by express stipulation." To this general rule, so clearly stated, we think no well-considered case has offered opposition. The learned justice then goes on to show that the basis of the common-law rule is founded on

the doctrine of bailment; that the public officer, with property in his official possession, is a bailee: and that the rules growing out of that relation must govern, unless the legislature, at its pleasure, shall change the common-law rule of responsibility; and, proceeding, says: "Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute the rule of responsibility in the discharge of those duties, or a legal excuse for the nonperformance of them, or a discharge from their obligation. The common law, which is common reason, prescribes that; and statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law." After referring to the solicitude shown by Congress for the due and faithful discharge of duties by public officials, which is found indicated by statutes requiring officers to keep safely, without using or loaning, or depositing in banks, etc., all public moneys in their hands, and the exacting of a bond to a like effect, the opinion proceeds to state, in substance, that the officers are yet nothing but bailees, but that they are subject to special obligations, and the ordinary law of bailment cannot be invoked to determine the degree of their responsibility, but that is fixed by special contract. While I do not regard the case just discussed as deciding anything more than that, under the most stringent of statutes and bonds, the officer would be absolved from liability for losses caused by an overruling necessity, yet it does seem to me that the relation which an officer bears to the money in his hands, and the manner in which the extent of his responsibility is to be measured, is clearly stated; and I am of the opinion that no court at this day holds, or would hold as generally as the *Prescott Case* seems to do, to the effect that the officer would be liable at all events, and that no circumstances of any character whatever could exonerate him.

So far we have adverted only to those cases which adopt the rule of strict liability. As has been indicated, the courts of this country are by no means in accord upon this proposition. The courts of last resort in a few of the states have refused to accede to the idea that there exists any rational distinction between the measure of the responsibility of an officer with public funds, and one having private moneys in his control, or any bonded trustee upon whom is imposed the duty of keeping money belonging to others. The existence of a public policy forbidding any relaxation of the condition of a bond given by the public official, when there has been no sort of negligence or fraud on his part, is strenuously controverted by such courts, as well, especially in more recent cases, by a respectable number of dissenting judges. I shall not attempt more than a very brief citation and reference to the cases maintaining a view opposed to the *Prescott Case* and those following it. They are, *Cumberland County v. Pennell*, 69 Me. 357, 31

Am. Rep. 284; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *Peck v. James*, 3 Head, 75; *State, Overton County, v. Copeland* (decided in 1895) 96 Tenn. 296, 31 L. R. A. 844; *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; *Healdsburg v. Mulligan* (decided in 1896) 113 Cal. 205, 33 L. R. A. 461; *Livingston v. Woods* (Mont.) 49 Pac. 437,—the latter case overruling a former decision in that state.

The Alabama case was one involving the loss of public moneys caused by their being stolen; but in a more recent case in that state (*Alston v. State*, 92 Ala. 124, 13 L. R. A. 659) a probate judge was held liable for a loss of money occasioned by the failure of a bank, but upon the sole ground that the officer had no authority to deposit the money in a bank, and his unlawful act constituted him a debtor for the money so deposited. The opinion in the case of *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284, is very able and logical. The authorities are fully commented upon, and the *Prescott Case*, among others, is reviewed, and the court says: "Notwithstanding the high character of the several courts whose decisions are above cited, we cannot yield our convictions as to the construction to be given to the bond in such case, or concur in relation to the new-born public policy, based upon supposed facility or temptation, which depositaries of public money are said to possess, for collusive robberies. 'For,' as was said by Redfield, J., in *Bridges v. Perry*, 14 Vt. 262, 'we cannot believe that they are founded upon any just warrant, either of sound judgment or constant experience.' . . . On the contrary, this is the first case in this state in which the 'shallow pretense' of robbery without fault on his part has been interposed by a treasurer in action upon his official bond. Ever since the decision of *Potter v. Titcomb*, 7 Me. 302, the people of this state have entertained a different view from that promulgated for the first time in *United States v. Prescott* as to the effect of an official bond stipulating for a 'faithful discharge' of official duties. In the case last cited, Mellen, Ch. J., . . . said: 'The design of all official bonds is to secure from losses those who are or may be interested in the faithful discharge of the duties mentioned in them. Such bonds are given to protect against damage occasioned by unfaithfulness, negligence, or dishonesty in such officers.'" And again: "Were the law otherwise in this state, and known to be such, faithfulness and honesty, even if they continued to be considered commendable personal qualities, would be held, if not mere abstractions, matters of secondary importance, at best, in candidates. Such qualifications, accompanied by the highest capability, would, in the absence of sufficient property in the principal to secure his sureties, fail to obtain them; for many a responsible person would gladly sign a bond as surety, guaranteeing the faithfulness, honesty, and capacity of his neighbor, which were so potent in effecting his election to the responsible public station of county treasurer, who would long hesitate to insure the public against possible loss happening in spite of such qualities; for to insure against such a loss is not only vouching for the integrity of the officer, but practically for that of the rest of mankind,—that they will

not rob him." The fact should be mentioned that, after the earlier decisions by the Supreme Court of the United States on this subject, Congress passed a law authorizing the court of claims to hear and determine and afford relief in cases of all claims of a disbursing officer for relief where a loss had occurred without fault or negligence on his part; thus offsetting in a large degree, as to Federal officers, the harshness of the rule promulgated by the courts, and, it may be said, perhaps justly, as indicating congressional disbelief in the public policy discovered by the court. And in Indiana and Ohio the legislature in some instances enacted special laws to relieve public officials who claimed to have suffered loss in the absence of neglect. *Mount v. State, Richey*, 90 Ind. 29, 46 Am. Rep. 192; *Scio Bd. of Edu. v. McLandsborough*, 86 Ohio St. 227, 38 Am. Rep. 582. The other cases which agree with the Maine court contain opinions giving evidence of much research and ability, and in all cases fully exploiting there reasons for refusing adherence to the doctrine that the treasurer and his sureties upon the bond are insurers.

Should it become necessary for this court at any time to determine which line of decisions to follow, I am constrained to confess that at present it seems to me the weight of authority can hardly be said, upon this question, to be settled by the preponderance of the number of courts advocating or adopting either view, but that it is a sufficiently open subject to require one's judgment to be formed only upon that line of reasoning which shall commend itself as possessing the most wisdom and comporting with what is the most just, taking into careful consideration the enlightened public policy, and the individual rights of its citizens. Of the more recent cases upon the broad proposition, Montana, California, and Tennessee have followed in the footsteps of Maine; and Colorado, Washington, and Nebraska have adopted the theory of strict responsibility. With reference to the matter of public policy, the California court, in the case cited *supra*, uses the following language: "It is urged, in many of the cases which hold the officer to an absolute responsibility for all moneys coming to his hands, that if robbery or larceny were held to be a defense, it would endanger the security of public funds, and encourage simulated robberies and pretended larcenies. But we cannot assume that courts of justice are unable to protect the public in such cases; and, even if they could not do so in all cases, justice does not require that the public shall be protected by enforcing against its servant, the officer, and his sureties, a liability the law has not imposed upon them, and which they have not assumed."

In the opinion of the majority of the court, however, this case does not require our assent to or dissent from the cases enforcing the more liberal rule. We express no opinion upon the general proposition. In our judgment, the important question is whether, under the principle announced in the *Prescott Case*, and those others which intelligently follow it, there is any such liability upon the bond sued on in this action as is contended for. We are inclined to believe that a few of the courts, in attempting to apply the theory of absolute re-

sponsibility, have perverted the original doctrine, while apparently enforcing it. We should hesitate to fall into a similar error. For that reason we have discussed the cases lying at the foundation of the rule, that we might be able to intelligently state the principle upon which the decisions rest. That principle is that, although the officer is a bailee, he has entered into a contract, with sureties, positively engaging to do something. The bond may fully express that engagement, or it may be aided by the statutes which prescribe the duties agreed to be performed. Finding a positive and solemn agreement, subject to no exception stated in the bond or statutes, to distinguish between a bond in such case and bonds in other cases to which reference has been made, the courts resort to the matter of public policy, which they hold requires that the absolute agreement or condition shall not be relaxed by any consideration of care or faithfulness, honesty, or skill, which may have been displayed by the officer. That public policy is held to arise, and only to arise, out of the possibility of fraud and simulated defenses, which public depositaries and their sureties could and would interpose, if any defense of lack of negligence or fraud on the officer's part is to be permitted. As was stated in an earlier part of this opinion, public policy is not invoked to alter any law of bailment. It does not act upon the common-law obligations of a bailee, but is effectual only to keep the official strictly and absolutely to his bond and the conditions thereof. It is universally recognized and so stated in *Boyd v. United States*, 13 Wall. 17, 20 L. ed. 537, that, *virtute officii*, the officer is not an insurer, but he may make himself so when he enters into a solemn obligation by contract. Such an obligation has been found to exist in bonds, and under statutes supplemented by bond, which require the depositary of public funds to keep them safely, or to pay over to his successor, or to some other officer, all moneys which he shall have officially received, or to pay over all moneys belonging to his office, or language of similar, but as strong, import. In the case of a collector of taxes, whose duty it is to pay all money which he collects to some general depositary, and his bond requires that he shall pay over all the money which he shall collect or receive in his official capacity; in the case of a treasurer, who is required by statute or bond, or both, to keep safely all the money coming into his hands, or, if that provision is lacking, or it may be present, he is required to pay to his successor all moneys belonging to his office,—it is held that the condition of the bond in either event would be broken if the officer did not, in fact, pay over all moneys officially received by him, or did not keep the funds safely, or had failed to pay over all the money belonging to his office, as the case might be. The latter requirement is in the bond or statute in the Missouri, Colorado, and some other cases. It is obvious, therefore, that, primarily, our inquiry should be directed to the condition of the bond,—to the positive engagement which these parties have entered into. No court has held that, where the condition of the bond is that the officer will prudently and diligently keep the

money, he is an insurer; but it has been held that such a condition does not make the officer an insurer. The fact alone that a bond is given is not sufficient. No well-considered case so holds, with the possible exception of the case of *Tillinghast v. Merrill*, 151 N. Y. 135, 34 L. R. A. 678. From a reading of the statutes concerned in that decision, together with the decision itself, it might appear that no attention was given to the bond, and that the statute did not impose upon the officer any positive and clear duty to do either of the things above mentioned; yet we observe, by reference to the statutes of that state, that the bond was required to be conditioned that the officer should keep safely all moneys coming into his hands. I cannot believe that the learned court overlooked the bond, and paid no attention to it, as it must have been before it. In that case it was conceded by the court, as it has been in very many of the cases, that the rule of absolute liability is a harsh one, and shocks one's idea of justice, and that it is capable of working much hardship upon the individual. But the court said, in substance, that right there public policy came in, and, as a general guard against fraud and simulated defenses, demanded that the court enforce the rule that depositaries of public funds and their sureties are insurers of the absolute safety to the moneys in the official care. That case, admittedly, was decided without any regard to former adjudicated cases outside of New York.

We come now to a consideration of the condition of the bond in suit, and what will constitute a breach thereof. Have the parties entered into a certain, positive engagement, from which, under the decisions maintaining the rule of strict responsibility, they cannot be exonerated for losses occurring without the fault or negligence of the principal in the bond? The condition of the bond in suit is as follows: "Now, therefore, if the above-bounded Otto Gramm shall and will truly and justly account for all the moneys coming into his hands by virtue of his said office as treasurer of the state of Wyoming, and shall faithfully and truly perform all the duties of his said office, then this obligation shall be void; otherwise, the same shall remain in full force and effect." The bond is required by § 1687, Rev. Stat., as follows: "The territorial [state] treasurer shall give bond to the territory [state] of Wyoming, in the penal sum of not less than \$75,000 conditioned that he will truly and justly account for all moneys coming into his hands by virtue of his office." The additional provision, embodied in the bond, that the treasurer "shall faithfully and truly perform all the duties of his said office," is not made a statutory part of the condition; but, as the other condition must be construed, we do not think, with respect to the breach alleged in this action, the aforesaid supplemental condition adds anything to the obligation of the contract. The undoubted meaning of the condition to "truly and justly account for all moneys" is that he shall account therefor according to law; and, in respect to such an accounting for moneys, it operates the same as a condition to perform the duties which the law has imposed. What are the statutory duties in respect to the moneys com-

ing into the treasurer's hands? They are embodied in the following provisions: "The treasurer shall: First—Receive and keep all moneys of the territory [state], not expressly required by law to be received and kept by some other person. Second—Pay all warrants duly and legally issued by the auditor so long as there are in his hands funds sufficient to pay such warrants: provided, that his payment for any purpose shall in no case exceed the amount appropriated for such purpose. Third—Keep a just, true, and comprehensive account of all money received and disbursed. Fourth—Keep a just and true account of each head of appropriation made by law, and the disbursements made under the same. Fifth—Render his accounts to the auditor for settlement quarterly, or oftener if required. Sixth—Report to each house of the legislative assembly within ten days after the commencement of each regular session, a detailed statement of the condition of the treasury, and its operations for the two preceding years." Rev. Stat. § 1696. The provision about rendering accounts to the auditor is, perhaps, modified by the law, subsequently enacted, providing for a state examiner whose duty it is to examine the books of all financial officers. "The territorial [state] treasurer shall in no case disburse or pay out the territorial [state] funds except on warrants drawn by the auditor." Id. § 1734. "Biennially, at the end of their respective terms of office, the treasurer and auditor shall, upon the day above named [March 31], deliver to their successors all official books, papers, records, and balances of funds which may be in their possession: provided, that if either or both of such successors be not appointed, confirmed, and qualified, the existing incumbent of the office shall retain such territorial property until such appointment, confirmation, and qualification of his successor shall have taken place." Id. § 1731. The section from which this last-quoted provision is taken was enacted while Wyoming was a territory, as, indeed, were all the laws above referred to, and when the treasurer and auditor were appointive officers, and served for a term of two years, which expired biennially on March 31. Under the Constitution and laws of the state, they are elective officers and hold for a term of four years, which expires on the first Monday of January, instead of March 31. Therefore, so much only, if any, of the provision of § 1731, with regard to delivery of books and funds to a successor, is in force which requires it to be done at the expiration of the official term.

The engagement of the defendants herein, in and by the bond, was that the treasurer should account according to law for all moneys coming into his hands. He was required to receive and keep all funds of the state not expressly required to be received and kept by some other person, to pay out or disburse no state funds except upon auditor's warrants, and, at the expiration of his term of office, to deliver all balances of funds in his possession to his successor. It is reasonably clear that the phrase, "balances of funds in his possession," refers, applies to, and means all such funds which should, under the law, be in his possession,—such balances of funds as, having

regard to his duties and responsibilities, he ought to have in his possession; or, to put it, perhaps, more distinctly, all such funds which he has received, and has not lawfully paid out, or for which he is not entitled to any credit, legally or equitably, and for which he is bound in law to respond. Had there been a statute expressly exonerating the treasurer from all losses occurring without his fault, then, under § 1781, it is evident any funds so lost would not be legally regarded as in his possession, which he is thereby required to deliver to his successor. There is no such statute. Nevertheless, under all the decisions, as hereinbefore explained, he will be exonerated for such losses, or, rather, he will not be liable for them unless he and his sureties have positively contracted to become so. There is no express statutory requirement that the treasurer shall pay to his successor all the moneys belonging to his office, nor that he will pay to him, or any other person, all the money which he shall have received. We are therefore obliged to resort to that provision concerning his duty to receive and keep the moneys of the state to determine whether there has been an agreement to safely keep, or to securely preserve, the public funds. It is manifest that unless, by that provision, the statute has imposed upon the treasurer the absolute and unmistakable duty to keep safely the moneys, there is nothing elsewhere in the statute, or in the bond, which in any sense approaches an agreement to "safely keep" such money. The proposition that this case is within the principle of strict responsibility, and that the line of decisions adopting that rule should be accepted as precedents, or authority, assuming them to correctly announce the law, must stand or fall upon the construction of that provision of § 1696, which says that "the treasurer shall receive and keep all moneys of the state, not expressly required by law to be kept by some other person." It is observable that the statute does not expressly state that the treasurer shall keep "safely" the public funds. That word "safely," which has cut so important a figure in a majority of the cases, is absent from our statute. Does the requirement that he shall receive and keep mean, intrinsically, as used in the section, the same as "keep safely"? Is the latter word mere surplusage? In what sense did the legislature employ the word "keep," in respect to the public moneys? In answering these questions, it should not be forgotten that we are construing, not only a statute, but a contract, because only upon the contract can any liability in this action be maintained. Further than that, we are construing a contract which, it is contended, is absolute, so far as it goes, and not entitled to any equitable defense; a contract which, if found to agree to "safely keep" the public moneys, renders the contractors insurers; a contract which, it is insisted, must be strictly enforced, although by doing so a harsh rule is adopted, and a distinction is made between the officer and all other kinds of trustees.

The court has no sort of authority to make a contract between the state and these defendants. The contract, whatever it is, has already been made. The court has no right to impose upon the defendants any higher degree

of responsibility than the legislature has done, and by their bond they have assumed. If, by the intrinsic purport of the statute, the duty is not imposed upon the treasurer to keep safely the public funds, without exception, it would exceed the judicial prerogative to force such duty upon him. The duty of the court is merely to construe and interpret the statutes, not to make them. The first specified duty of the treasurer is that he "shall receive and keep all moneys of the state not expressly required by law to be received and kept by some other person." In what sense is the duty to receive and keep thus prescribed? The last part of the provision, which qualifies the first as to that which the treasurer is to receive and keep, *viz.*, that money of the state not expressly required by law to be received and kept by some other person, will not be understood by anyone to comprehend only such money as is required to be kept safely by some other person; but the idea clearly conveyed is that the exception refers to state funds which belong in the custody of other persons. This must indicate somewhat the sense of the entire sentence. It would be the sheerest folly to attempt to supply the word "safely," following and qualifying the word "kept." Ought the court, nevertheless, to interpret the entire provision as requiring the officer to keep safely the state moneys, so as to mean without exception and loss in any manner? The answer to that depends upon three considerations: (1) The sense in which the language respecting the prescribed duty is employed in the provision; (2) the susceptibility of the provision to any other reasonable construction; (3) the significance of the word "safely," if supplied or implied.

In regard to the matter first suggested: The provision under discussion is the only one respecting the general custody of state moneys. While stating a duty of the officer, it describes that which he shall receive and keep. Construing the entire sentence, and giving due effect to all its parts, and, in view of the significant absence of anything therein to indicate the method or manner in which the money shall be received or kept, it must be held to have reference only to the custody of the money, and that it has no greater force than if it had said that the treasurer shall receive and have the custody and care of all money of the state not expressly required to be received and cared for by another person. The conclusion that this is the correct interpretation of the statutory provision in question appears to me to be irresistible.

Take, however, the second matter suggested for consideration: Is the provision susceptible of any other reasonable construction than that it imposes upon the treasurer the clear duty to keep the money safely? What has already been said in some degree furnishes an answer to this inquiry. There is, however, a further answer. Several degrees of care to be bestowed upon property or money intrusted with a depository are recognized in the law, only two of which we need notice: First. That degree which is the highest known to the common law, *viz.*, the exercise of diligence, fidelity, faithfulness, and such care as a prudent man would take of his own property or money.

As to large amounts of public funds, we might assume and hold that the care ought to be such as a very prudent man would exercise,—a high degree of vigilance in addition to fidelity. Second. That the money shall be kept safely at all events and without loss, except, probably, that which may result from the act of God or the public enemy. The degree of care first above mentioned is that which is always implied, in the absence of a special contract, as to money or property in the hands of a trustee. The responsibility of absolute safe-keeping, free from loss, is never applied or enforced, except when found to be specially contracted for. Take our statute. It requires the officer to keep certain moneys, without further specification. Is it susceptible of the construction that diligence and prudence are only intended as a measure of responsibility? Is it reasonably susceptible of any other? We can imply the less strict measure of liability, because such implication does no violation to any rule of law or interpretation. It is the implication which would arise if the statute had said that the treasurer shall have the custody of the money, and nothing more. It adopts the measure of care and liability which would follow, in the absence of a special contract differing therefrom. To supply the word or imply the duty which, some of the cases hold, imports an absolute safe keeping without loss, and a liability which admits of no defense of loss without fault or negligence, we must supply or imply that which has no place in the law outside of an express or special agreement. In that event, it is necessary to say that the provision for keeping the money, standing alone, means more than it meant at common law, and imports the very highest degree of care and responsibility known to the law anywhere. We are unable to conceive of any possible authority for going to that length. In our judgment, the provision is not only reasonably susceptible of the more liberal interpretation, but it is not reasonably susceptible of any other.

The third point suggested for consideration is the significance of the word "safely," if it is to be supplied. The word not being found in the statute, and coming in only by way of implication from that which is expressed, the question arises, In what sense is it implied, if at all? At common law, the duty of a trustee with respect to money in his hands is more frequently than otherwise spoken of as to keep safely. Yet, when so used and spoken of, it has no stronger force or meaning than that the money shall be kept and cared for with diligence and prudently, by the exercise of that degree of vigilance which has already been adverted to,—less than the requirement for absolute safety. When we imply that word, or the duty represented thereby, as following or resulting from the express requirement of the statute, we must take it with its common-law significance and interpretation. We have no authority to interpolate it into the statute with any confined or strict meaning which it is held to possess when found in an express contract. Again, in the absence of a bond to perform the duty, the requirement to keep safely, although clearly expressed in the statute, would not impose the absolute responsibility upon

the officer as an insurer. We are convinced that the provision of the statute under discussion actually means that the treasurer shall receive and keep the money according to law. There is no regulation of the manner in which, or the persons from whom, he shall receive the money in this particular provision. To determine those matters, we must resort to other portions of the statute or to implication. Neither is the manner or method in which the officer shall keep the money regulated by this particular provision of the statute. To determine that matter, also, we must find the regulation in other portions of the statute or resort to implication. Having undertaken the duty of keeping the money, he must perform that duty according to law. The statute, however, nowhere else regulates that matter, nor the measure of his liability. Clearly, therefore, we are required to furnish the manner and the measure of the liability by implication, upon well-known principles of law, inasmuch as the condition of the bond compels us to look elsewhere to determine its force and extent. From either of the considerations above discussed the conviction is forced upon us that the duty imposed upon the treasurer by statute and all reasonable implications therefrom was that he should have the custody of the money of the state, and should exercise a diligent and prudent care over the money, but in a high degree, and should also bring to the performance of such duty strict fidelity and faithfulness; and it therefore follows that by the bond neither the treasurer nor his sureties undertook any greater responsibility, for the reason that they contracted that the treasurer should justly and truly account for the public moneys, which accounting, we hold, means according to law.

We have said that the statute does not regulate or prescribe the manner in which the money shall be kept. The Constitution, indeed, contains some restrictions upon its use, and some commands upon the legislature concerning money received from certain sources. It is provided by that instrument that the making of profit, directly or indirectly, out of any public money, or using the same for any purpose not authorized by law, shall be deemed a felony, and be punished as provided by law. Const. art. 15, § 8. The legislature is required to pass laws "for the suitable keeping, transfer, and disbursement of the land-grant funds, and shall require of all officers charged with the same, or the safe-keeping thereof, to give ample bonds for all moneys and funds received by them." Id. art. 18, § 4. The legislature has not required a separate bond for the land funds, nor enacted any law concerning the keeping thereof. Permanent land funds are authorized to be invested by the treasurer in certain kinds of securities. Laws 1890-91, p. 389; Laws 1895, p. 125. It seems evident that all of these provisions fall short of prescribing the degree of care which shall be exercised by the officer. Statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law. *United States v. Thomas*, 15 Wall., at page 845, 21 L. ed. 92; Bacon, Abr. title *Statute*, I (4). It seems to me quite clear that it is not only possible to give to the statute the common-law interpreta-

tion, but that, in connection with the context, that is the sense in which the legislature enacted it; that, if a more rigorous duty was designed to be imposed, other words would have been employed which would have plainly indicated it. In regard to a school district treasurer, the statute provides that he shall have the custody of all moneys belonging to the district. Rev. Stat. § 3959. It is therefore not an absurdity to suppose that the legislature may have used such words only as shall require, not absolute security to be afforded by a public treasurer, but the exercise of appropriate diligence and vigilance. If to "keep safely" implies more than to keep diligently, honestly, and faithfully, then, I ask, What right has the court to imply the higher and more onerous responsibility? The statute is certainly susceptible of the less harsh and burdensome construction. I have no doubt but that, in a sense, the treasurer is charged with the safe-keeping of the moneys intrusted to his care, in the sense that he is to guard the same, and exercise a high degree of vigilance to prevent its loss. Any trustee, administrator, receiver, guardian, or public officer, as to private moneys, is charged with the safe-keeping of the funds in his control. He has the responsibility of their care. But the fact that one is charged with the safe-keeping of money does not imply that he is an insurer of its safety, and such a rule has at no time been promulgated. It is only where the party has positively contracted to safely preserve that he is found to be an insurer.

I am aware that the learned judge delivering the opinion in the case of *Thompson v. Township Sixteen*, 30 Ill. 101, said that, the duty of the officer being to keep the money, it follows that he is to keep it safely. The court did not say that to keep meant to keep safely, but that the duty to keep safely followed the duty to keep. But I cannot regard the statement as anything but mere *dictum*, for the reason that, immediately preceding such remark, the opinion quotes the statute, which in express terms required the officer to "keep safely." This remark is adopted in the case of *State v. Nevin*, 19 Nev. 163, and applied to a statute of Nevada, which did not even expressly require the treasurer to keep the moneys, but did provide that he should receive all moneys "due and accruing to his county, and disburse the same on the proper orders," etc. The Nevada statute further provided that, at the expiration of his office, the treasurer should deliver to his successor all public moneys in his possession, and that at least once a year the money in his office should be exhibited to the county board. Unless the requirement as to the periodical exhibition of the money adds something to the other statutory provisions, and amounts to an unmistakable indication that the money is, by statute, required to be securely preserved, I should be inclined, with all due respect, to regard the Nevada case as going beyond the doctrine laid down by the leading cases announcing the theory of strict responsibility, and I should hesitate to follow it. I think that case, however, and most, if not all, of the cases enforcing the doctrine of strict liability, can be clearly distinguished from the case at bar, owing to the difference between

the bond or statutes; and, eliminating the cases based upon a positive and clear condition in the bond or requirement of statute, and considering the authorities which deny the strict liability in any case, there is not, upon a statute and bond like that here, a great weight of authority nor preponderance of cases favoring the doctrine that the treasurer and his sureties are insurers of the safety of the public funds. The earlier cases have been referred to. A brief reference to some of the later ones will be useful.

In the New Jersey case (*New Providence Twp. v. McEachron*, 83 N. J. L. 339) the statute prescribing the duties of a township collector was, "Shall pay the moneys which he shall have received by virtue of any such assessment, to the county collector." The court said that "the condition of the bond, read, as it must be read, in connection with the provision of the statute above quoted, is of the purport that the collector will pay over the moneys received by him in his official character. The obligation to do this is unconditional, and there is no principle on which a qualification can be arbitrarily annexed to it." In the case at bar, if the condition of the bond is not an unconditional obligation to keep safely all moneys received, and deliver to a successor all moneys not paid out on lawful warrants, there is equally no principle upon which such an obligation can be annexed to it. In Minnesota, in the case of *Hennepin County v. Jones*, 18 Minn. 199 (Gil. 182), the statute expressly required the officer to "safely keep" all moneys coming into his hands. In the later case of *Pine Island Bd. of Edu. v. Jewell*, 44 Minn. 427, no such express provision appears, but the court, following the previous decision, held the officer liable, on the ground that, according to the weight of authority, the principle of strict liability is enforced, not only where the direct terms of a statute impose the duty to pay over all moneys received, but where such duty is to be gathered from its general tenor, and the duty was found in the general tenor of the statute. The Nebraska court adopts similar language; its statement in *Bush v. Johnson County*, 48 Neb. 1, 32 L. R. A. 228, at page 10, 48 Neb., being "where the law, in positive terms, or from its general tenor, and without any limitation upon the obligation, requires that the officer pay over public funds which have been received by him and held as such." But in that case, the bond itself was conditioned for the payment over of all the moneys of the county which the officer received. It is evident, therefore, that the reference to the principle as affected by the "general tenor of the statute" was unnecessary. In the Texas case (*Wilson v. Wichita County*, 67 Tex. 647) the condition of the bond was that the treasurer would "safely keep" the school fund, etc. In the earlier Texas case of *Boggs v. State*, 46 Tex. 10, the bond is not given, but the language of the opinion indicates that it was conditioned for the payment over by a collector of all moneys received, less his commissions. The Kansas case does not quote the bond or statute, but the opinion states that the officer assumed the duty of safely keeping the public funds coming into his hands, and cites certain sections of the stat-

utes. They required the officer to receive and take charge of all moneys belonging to the township, and pay out and account therefor upon orders drawn upon him by the township trustee. That much would not seem to go further than our own statute, but there was a penal statute, also cited, which subjected the officer to a fine if he should neglect or refuse, on demand, after the expiration of his office, to deliver to his successor all moneys or other property appertaining to such office. This provision clearly distinguishes the Kansas case from the one at bar, and puts it in the class with the Colorado and Missouri cases, where the statutes required all money belonging to the office to be paid over. The Iowa case was founded upon a bond conditioned for a faithful performance of the duties of the office, and the statute required the officer to "hold" the money. It may be doubtful whether there is any distinction between that case and the one at bar. If not, we are not prepared to yield our convictions upon the construction, which we believe the true one, to be placed upon a statute like our own. In Washington, the Constitution provides that the legislature shall provide for the strict accountability of county officers for all public moneys which may officially come into their possession. And in *Fairchild v. Hedges*, 14 Wash. 117, 31 L. R. A. 851, the bond required by statute which seems to have been construed in the light of the constitutional provision, was conditioned that "all moneys received by him [the officer] for the use of the county shall be paid as the commissioners shall from time to time direct," and "for the faithful discharge of his duties." In that case Mr. Chief Justice Hoyt dissented, saying that it was a strained construction of the statute and obligation which made the officer the guarantor of the safekeeping of the public moneys.

All of the cases adopting the strict doctrine do so upon the terms of the bond or statute, and, distinguishing them according to the principle or reasons behind the respective decisions, or the various terms or provisions of the statute, none of them, with the possible exception of the cases from Iowa and Washington, and the later Minnesota case, can be said to have found the strict contract in a bond and statute at all similar to that in the case at bar. The cases in which the general proposition has been determined, one way or the other, involve losses occurring in various ways. In some of them the money has been lost by larceny, robbery, or burglary, and in others through the insolvency of a bank in which it had been deposited. No distinction, upon principle, between the various causes of loss, in the absence of negligence, has been made in the adjudicated cases. If the bond, according to its own terms, does not require that the money be kept safely, or that all that has been received or all belonging to the office shall be paid over, without exception, the extent of its obligation may be controlled by the statute. But to authorize the application of the strict rule, the obligation must be certain, positive, and clear, and made express by the direct terms of the bond or statute, read in connection with it. If nothing appeared in the statute prescribing

the officer's duties, the courts would imply that he was to keep the money safely, and to pay or deliver to his successor all the balance of money in his hands. As so implied, however, the engagement or duty would not be absolute, and a defense of loss without fault would be permissible. To say, as was said in Illinois, in *Thompson v. Township Sixteen*, 80 Ill. 101, that the duty of the officer being to keep the money, it follows that he is to keep it safely, is nothing more or less than implying the duty to keep safely. This may be allowable for certain purposes, but not for the purpose of making an express and absolute statute or contract. When we enter the field of implied duties, we must respect the law thereof. When the duty to keep safely is implied, and not expressed, its meaning and effect are determined as at common law; and at common law that requirement meant only to keep diligently and prudently.

We are unable to give our consent to reading into the statute the very words or language or provision omitted therefrom, which will render applicable, and the only thing which will render applicable, the harsh rule, which is not found elsewhere, respecting depositories of money. No liability can be predicated upon the theory that the treasurer is a debtor for the money in his hands. Our statutes proceed upon a different idea altogether, and this court, in *State v. Foster* (Wyo.) 29 L. R. A. 226, held that the state and county treasurers are but custodians of the public funds committed into their hands. Neither can it be said that the deposit of the public funds in a bank is an unlawful act, and constitutes the treasurer a debtor. The admitted facts show that for many years the custom has been for custodians of the public funds to deposit them in banks for safekeeping, and that no other safe place has been provided. The legislature has known of this custom, as well as the people generally, and it would be going very far at this late date to hold such an act unlawful. Further than that, the Constitution contains a provision recognizing banks, at least national and state banks, as proper places for deposit of public funds. It provides that all public money shall, whenever practicable, be deposited in a national bank, or bank incorporated under the laws of this state; provided that the said bank shall furnish security to be approved as provided by law, and shall also pay a reasonable rate of interest, which interest shall accrue to the fund from which it is derived. Const. art. 15, § 7. That section is inoperative, however, as the legislature has not provided by law for the approval of the security, nor enacted any law for carrying the provisions of the section into effect.

The fact that the funds in Treasurer Gramm's hands were deposited in a private bank cannot, in my judgment, affect our determination. None of the cases on either side of the question make any distinction between a deposit of public moneys in corporate and private banking institutions. In some of the cases, and in many of those involving the liability of other kinds of trustees, the money was in private banks. The relation of banker and depositor, and of the banker to the fund, is the same, whether the

bank is private or corporate. One cannot fail to recognize the fact that, when the deposit is in a private bank, the moneys are placed in the possession of an individual, who has given no security to the state, and that it is in his power, if so disposed, by illy-advised transactions, to hazard the safety of the money. To a certain extent the same power exists as to a corporate bank, national or state. The extent of the business dealings may be limited. They may not be authorized to use the money of depositors in outside speculations or investments not strictly connected with the banking business. They may, however, actually do what they are not authorized to do. Moreover, they may, by bad loans, lose the money left with them on deposit just as completely as if it had been thrown into unwarranted business enterprises. On the other hand, while, as to a corporate bank, the responsibility behind the corporate assets is usually limited, all the property of a private banker is behind his institution. In the case at bar it is alleged and admitted that, at the time of the assignment of Mr. Kent, he had sufficient property to pay his debts, but that that result became impossible by reason of subsequent depreciation in values. After all, however, as between different kinds of banks, the question is one of diligence, faithfulness, and care. If it was negligence in the officer to deposit the public funds in a private bank, that question is eliminated from this case, because it is alleged and admitted that it was not negligence. It cannot be said to be negligence *per se*, or as a matter of law, for any trustee to place the funds in his control in a private bank. In no kind of case has such a doctrine been asserted. Whatever the facts are, we are not to determine them. They are before us, admitted by the pleadings and stated in the questions. Our duty is only to determine the law as applicable to them.

Although it is not necessary that we decide the question of estoppel presented in argument, were the defendants liable, we do not think the fact that the state brought suit to trace the funds into the hands of the assignee of the banker having them on deposit, nor the acceptance of dividends from the estate of said banker, would affect the question, or constitute an estoppel against the state from pursuing the treasurer upon his bond. The money belonged to the state, and no efforts of the state to recover it from other hands could possibly affect whatever the liability of the treasurer might be for the unrecovered balance. We understand, however, that it is not even contended by counsel that suit to trace and recover the funds operates as an estoppel: but it was urged that the acceptance of dividends from the assigned estate, upon a claim filed by the state, in pursuance of a resolution by the legislature, does have that effect. We do not think so. The assignor had in his hands money belonging to the estate, and he was accountable therefor, and is still accountable therefor; but any liability of the treasurer was not thereby released. These views are supported by *Nason v. Erie County Directors of Poor*, 126 Pa. 445; *Rose v. Douglass Twp.* 52 Kan. 451.

The defendants did not enter into a bond which contains a condition that the treasurer

would keep safely the moneys of the state in his hands, so that he would be liable absolutely in case they were lost, without any fault or negligence on his part. The questions reserved for our decision are based upon the facts, admitted by the pleadings, that there was no fault, or want of care or diligence, on the part of the treasurer, and that he is not chargeable with any fraud or negligence, or unfaithfulness in any degree. We answer the first, second, and third questions in the negative. The fourth question, which pertains to what judgment should be rendered, is not necessary or proper, under our former decisions, to be answered.

Knight, J., concurs.

Corn, J., dissenting:

I do not concur in the conclusion reached by a majority of the court. In cases like the present, under slightly varying statutes, the courts of the United States, and the courts of perhaps twenty of the states, have held such officers and their sureties to a strict responsibility for the public funds; and, in my opinion, not only the greater number, but the great weight, of authority sustains that view. A few of the state courts have held otherwise. The suit is upon the bond,—the contract between the state and the defendants. Any recovery must be upon this contract. It is an express contract in writing. So far as the sureties are concerned, it is evident that, prior to the execution of the bond, they had no responsibility in the premises whatever, and that their liability now is only what they have assumed by their contract. A few courts holding the minority view, as in *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284, have reached the conclusion that the responsibility of the defendants is governed by what is termed the "law of bailments," and that the treasurer is a bailee for hire, and is bound only to bring to the discharge of his trust "that prudence, caution, and attention which careful men usually exercise in the management of their own affairs, and he is not responsible for any loss occurring without any fault on his part." It is to be observed that the law of bailments here invoked, which fixes the liability of a bailee for hire, is simply the contract implied by law between the parties when they themselves have made no express contract fixing the degree of responsibility of the bailee. *Com. v. Comly*, 3 Pa. St. 372. It has no application where the parties themselves have made their own contract; and, indeed, it is not applied alike in all cases of bailment for hire. Where there is no express contract, as in the case of common carriers and innkeepers, the contract implied by law is for "more stringent liability, owing to the relations of the parties."

In this case the treasurer and his sureties have contracted, in the words of the bond, that he shall "faithfully and truly perform all the duties of his office." Those duties are prescribed by the statutes of this state. Section 1696 provides that "the treasurer shall: First,—receive and keep all moneys of the state, not expressly required by law to be received and kept by some other person; second,—pay all warrants duly and legally issued by the audi-

tor so long as there are in his hands funds sufficient to pay such warrants." Section 1784 provides: "The state treasurer shall in no case disburse or pay out the state funds except on warrants drawn by the auditor." Section 1781 provides that at the end of their respective terms of office the treasurer and auditor shall "deliver to their successors all official books, papers, records, and balances of funds which may be in their possession." These are his duties with reference to the public funds, and he and his sureties have contracted that he shall faithfully and truly perform them. It is clear that the plaintiff must recover under this state of facts, unless it is held either that they do not show a contract for the safe-keeping of the money, or else that the loss of the funds by the failure of the bank in which they were deposited is an equitable excuse for the nonperformance of the contract. The duty prescribed by the statute is that he shall "receive and keep" the funds. But some stress is laid upon the circumstance that while some statutes, under which the treasurer has been held to a strict liability, provide that he shall "safely keep," the word "safely" is omitted from ours, and it is argued that the latter indicates the requirement of a smaller degree of responsibility. and I understand that this is the view adopted by my associates, and that upon this distinction they rest the decision of this case,—that is, that by the use of the words "to receive and keep," omitting any such additional words as "safely," "securely," or the like, the officer is simply made the custodian of the funds, and that his bond to faithfully perform the duties of his office is not an unconditional contract to safely keep the funds. Where the custody of other property than money is involved, there might, no doubt, be a distinction between keeping and keeping safely,—that is, keeping uninjured; and it is easy to perceive that such property might be kept and turned over, but in such condition as to show negligence in complying with the requirement to keep safely. But, in the case of money, if it is kept at all and is forthcoming when required, it is kept safely; and there is no issue in this case which makes such a distinction important or relevant. If the defendant had kept the money and turned it over, there could be no complaint that he had not safely kept it. In Illinois, in a suit upon the bond of a township treasurer, the defense was interposed that the money was stolen without the fault of the defendant. The condition of the bond was that the treasurer "shall faithfully discharge all the duties of said office according to the laws which are or may hereafter be in force, and shall deliver to his successor in office all moneys, books, papers, securities, and property in his hands as such township treasurer, then the obligation to be void," etc. By § 56 of the statute he was required, among other things, to charge himself with all moneys received. By § 62 he was required "to demand, receive, and safely keep, according to law, all moneys," etc. The bond in this case being conditioned only for the performance of his duties and the turning over of the moneys "in his hands," and the 62d section providing only for a safe-keeping "according to law," it was urged by counsel that the duties of township treasurer did not

embrace keeping safely the moneys coming to his hands. The court says: The fact that the township treasurer is required to receive money, and enter it in his cash book, implies, without any other special regulation, that he is to keep it, and, being required to keep it, it follows that he is to keep it safely. This is one of the duties of his office he has undertaken to faithfully discharge. Another duty, no less imperative, is that he will deliver to his successor in office all moneys in his hands as such township treasurer, which he could not do if he suffered it to be lost out of his hands or it should be so lost by any accident. The undertaking is that the money shall be in his hands. These duties he has undertaken to perform unconditionally. Besides all this, he is required, by § 62, to receive and safely keep, according to law, all moneys, etc., belonging to the township.

We cannot discover a shade of difference between this and the case of *United States v. Prescott*, 8 How. 578, 11 L. ed. 734, cited by the counsel for the defendant in error. As in that case, so here is an undertaking safely to keep the money by the very force of the language of the condition of the bond, independent of the provisions of the 62d section. *Thompson v. Township Sixteen*, 30 Ill. 99. In *State v. Nevin*, 19 Nev. 162, the condition of the bond was to "well and truly and faithfully perform and execute the duties of treasurer." The provision of the statutes was that the county treasurer "shall receive all moneys due and accruing to his county, and disburse the same on the proper orders issued and attested by the county auditor. . . . He shall so arrange and keep his books that the amount received and paid out . . . shall be exhibited in separate accounts," etc. "He shall at all times, keep his books and office subject to the inspection and examination of the board of county commissioners, and shall exhibit the money in his office to such board at least once a year," etc. "He shall annually make complete settlements, . . . and shall at the expiration of his term of office deliver to his successor all public moneys, books, and papers in his possession." The defendant insisted that his responsibility was simply that which the common law imposes upon a bailee for hire. The court say the duty to safely keep the money is made absolutely clear by the provisions of the statute referred to. In *Tillinghast v. Merrill*, 151 N. Y. 135, 34 L. R. A. 678, decided December 1, 1896, one of the latest cases upon this subject, the statute is quoted as follows: "It is the duty of every supervisor (1) to disburse the school moneys in his hands applicable to the payment of teachers' wages upon and only upon the written orders of the sole trustee, or a majority of the trustees, in favor of qualified teachers." By paragraph 8 of the same section a supervisor is required to pay to his successor all school moneys remaining in his hands. The court says: "In this statute it will be observed that there are no explicit declarations of the legislative intent, as in the case of town collectors, to create a supervisor the debtor of the county for public moneys in his hands, and the condition of the bond to safely keep, faithfully disburse, and justly account for the same does

not add to the liability created by statute." Upon the decision of the same case in the supreme court of New York, Martin, J., dissented upon the specific ground that the condition of the bond to "safely keep," etc., imposed upon the officer no greater responsibility or liability than the statute. 77 Hun, 489. In Iowa, township treasurers are required by the statute to give bond "conditioned for the faithful performance of their duties." The same act makes it the duty of the treasurer to hold all moneys belonging to the district, and pay out the same upon the order of the president, countersigned by the secretary. The court says: "The condition of the bond upon which this action is brought substantially complies with the requirements of the statute; it is, in effect, identical with the condition prescribed in the law. It is made his duty to hold all moneys of the district, and to pay them out, but only upon vouchers signed by the proper officers. He is bound by the obligation of the bond, not to exercise due care and diligence in the discharge of this duty, but to perform it absolutely, without conditions or exceptions. He is to hold the money of the district. This is the provision of the law. His contract, expressed in the bond, binds him to the discharge of this duty. He will not be relieved from his contract by showing any degree of diligence or care which falls short of absolute compliance with the terms of his contract." *Taylor Dist. Twp. v. Morton*, 87 Iowa, 553. The court did not recognize the nice distinction relied upon in the majority opinion in this case that to "hold safely" might be construed as a contract to hold without loss, while the obligation to "hold" is to be shaded down into a contract to use due care and diligence in holding. But it pointedly rejects such interpretation of the requirement to "hold" the money, although, as in our own statute, the word is entirely unqualified by "safely," "securely," or any word of like import. In Kansas the statute requires a township treasurer to give bond "conditioned for the faithful discharge of his duties." The section prescribing his duties provides: "The township treasurer shall receive and take charge of all moneys belonging to the township, or which are, by law, required to be paid to him, and shall pay out and account for the same upon orders drawn upon him by the township trustee, and shall discharge such other duties as may be required of him by law." Under this statute the court says: "By accepting the office of township treasurer, McNabb assumed the duty of receiving and safely keeping the money of the township, and paying it out according to law. He or his sureties are bound to make good any deficiency which might occur in the funds which came under his charge, whether they were lost in the bank or otherwise." *Rose v. Douglass Twp.* 52 Kan. 452. Here there was no express requirement that the officer should "safely keep," or even, as in our statute, that he should "keep" the funds, but simply that he should "receive and take charge of them." But it is unnecessary to multiply authorities. While there are several cases wherein the statute or the bond sued on employed the expression "safely keep," or "keep safely," there 40 L. R. A.

is, as I believe, no reported case sustaining the distinction which seems to be relied upon by the majority of the court for the decision of this case. This view has been frequently insisted upon by counsel, but, so far as the cases have come to my knowledge, has in every instance been rejected by the courts.

The majority of the court having reached the conclusion that no contract has been shown binding the treasurer to keep safely or securely the moneys of the state, declined to express an opinion upon the question what measure of liability such contract imposes when proved. In my view, the bond and the statute clearly, and under all the authorities, constituting such a contract, there is no other question for this court to decide than the character of liability which it imposes.

It has been held by the Supreme Court of the United States, and by the highest courts of perhaps twenty other states, that where, in whatever form of words, the bond is conditioned for the payment over of the public moneys, or for the keeping or safe-keeping of them, or the statute prescribes such, in substance, to be the duty of the officer, and the bond is conditioned for the performance of the duties of the office, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon and assumed by the officer will be deemed absolute, and the plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery; that, the contract being absolute in its terms, there is no defense at law but a production of the funds; and that loss by accident or otherwise is not a defense in equity, but the allowance of such a defense would be dangerous to the public interests, and is forbidden by considerations of public policy. This is substantially the view adopted in *United States v. Prescott*, 3 How. 578, 11 L. ed. 734; *United States v. Dashiell*, 4 Wall. 182, 18 L. ed. 319; *United States v. Keebler*, 9 Wall. 83, 19 L. ed. 574; *Boyd v. United States*, 18 Wall. 17, 20 L. ed. 527; *Bevans v. United States*, 13 Wall. 56, 20 L. ed. 531; *New Providence v. McEachron*, 38 N. J. L. 389; *Hancock v. Hazard*, 13 Cush. 112, 59 Am. Dec. 171; *Thompson v. Township Sixteen*, 30 Ill. 99; *State v. Croft*, 24 Ark. 550; *State, Wyandot County, v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Com. v. Conly*, 3 Pa. 872; *Halbert v. State, Martin County Comrs.* 22 Ind. 125; *Gartley v. People, Pueblo County (Colo.)* 49 Pac. 272; *Rose v. Douglass Twp.* 52 Kan. 452; *Bush v. Johnson County*, 48 Neb. 3, 32 L. R. A. 228; *State v. Nevin*, 19 Nev. 163; *State, Mississippi County, v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *Taylor Dist. Twp. v. Morton*, 87 Iowa, 550; *Pine Island Bd. of Edu. v. Jewell*, 44 Minn. 427; *Tillinghast v. Merrill*, 151 N. Y. 185, 84 L. R. A. 678; *Fairchild v. Hedgcs*, 14 Wash. 117, 31 L. R. A. 851; *Wilson v. Wichita County*, 67 Tex. 647; *Griffin v. Mississippi Leves Comrs.* 71 Miss. 767; *United States v. Watts*, 1 N. M. 562; *Omro Supers. v. Kaime*, 39 Wis. 468.

There are many other cases announcing substantially the same principles. There are some of those above referred to which hold that the statute has made the officer the legal

owner of the public funds committed to his keeping, and for that reason they are, by the majority of this court, discarded and set aside as of no authority under our laws, which do not vest the legal title to the public funds in the treasurer. I confess myself unable to understand why this feature should make those decisions of no authority in this case. If it is upon the theory that the officer is held to be a mere borrower of the public funds for his own use and benefit, and to be held to repayment as upon a promissory note like any other borrower of money, it is sufficient to say that no court has ever hinted at any such ownership in the officer. They have held simply that the technical legal title by the statute vested in the officer. If it is because of some legal or equitable principle that, while courts of chancery will relieve against the enforcement of unconscionable contracts to refund moneys which do not and never did belong to the defendant, they will not relieve against unconscionable contracts to pay out one's own money to make good the losses of another, it is sufficient to say that no such principle exists. In the case of ordinary trustees, the legal title is in the trustee. Almost without exception in the United States the legal title to the money and personal property of the decedent vests in the executor or administrator. But in these cases courts of equity will, and constantly do, relieve from liability arising out of bonds absolute in their terms. It is therefore clearly not for the reason that the statutes have vested in the officer the legal title to the public funds that these cases hold him to a strict liability. But the fact of such technical legal title has been emphasized in those cases to make it clear that, the officer not being a bailee, the law of bailments did not govern, and these cases have then been determined by reference to the express contract, as in *United States v. Prescott* and the other cases taking the same view. This is made perfectly evident by the opinion in *Hancock v. Hazard*, 12 Cush. 112. The complete opinion is as follows: "A collector of taxes by accepting the office, takes the risk of the safe-keeping of the money he has actually received. His obligation is not regulated by the law of bailments, and the cases cited to that effect are inapplicable. He is a debtor,—an accountant,—bound to account for and pay over the money he has collected. The loss of his money, therefore, by theft or otherwise, is no excuse for non-performance; this is founded on the nature of his contract and considerations of public policy. *United States v. Prescott*, 3 How. 578, 11 L. ed. 784. It being a duty of the collector to account for and pay over to the treasurer, . . . and the excuse of loss by theft being unavailing, the sureties in the bond are liable equally with the principal." The tenor of all the cases holding the officer and his sureties to a strict liability is that the contract is absolute, neither the bond nor the statute providing any excuse for non-performance; that, at law, it can only be discharged by performance; that, therefore, any excuse for non-performance must be an equitable one; that the excuse of loss of the funds, unless by the act of God or the public enemy, will not be allowed in equity, because it would be dangerous

to the public interests and contrary to public policy. None of the cases, as I understand them, attempt, upon ground of public money or otherwise, to impose any liability upon the officer and his sureties other than that voluntarily assumed by them by their contract. There seems to be, however, some confusion or misconception upon this point, in some, at least, of the few courts dissenting from the prevailing doctrine. In *Healdsburg v. Mulligan*, 118 Cal. 205, 33 L. R. A. 401, the court, in concluding its discussion of the question of the application of the principles of public policy, says: "Justice does not require that the public shall be protected by enforcing against its servant, the officer, and his sureties, a liability the law has not imposed upon them and which they have not assumed." This language would seem very clearly to impute to the majority of the courts of the country a doctrine which is certainly not stated in their decisions, and would probably be very vigorously repudiated by all of them. Six courts, as I understand, are quoted as sustaining the minority view: Maine, in *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; Alabama, in *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; Tennessee, in *Peck v. James*, 3 Head, 75, and *State, Overton County v. Copeland*, 96 Tenn. 296, 31 L. R. A. 844; South Carolina, in *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; California, in *Healdsburg v. Mulligan*, 118 Cal. 205, 33 L. R. A. 461; and Montana, in *Livingston v. Woods* (Mont.) 49 Pac. 437. The Maine decision is the leading case, and, out of a court composed of seven judges, the chief justice and two of the justices dissented. There seems to be, in all of the decisions to which we have had access or been referred, but five in which the failure of a bank has been held to be a sufficient excuse for failure to pay over the moneys. Of these, in *Peck v. James*, 3 Head, 75, a school trustee had accepted bank notes of the Bank of East Tennessee, at that time supposed to be solvent, but which failed while its notes were in his hands. He tendered the specific bank notes to his successor in settlement. In *Livingston v. Woods* (Mont.) 49 Pac. 437, the suit was against a city treasurer, and both the law of the state and the ordinance of the city required the officer to deposit the money. In *State v. Houston*, 78 Ala. 581, 56 Am. Rep. 59, the defense of robbery was set up, and the court held that, while the responsibility of the officer under the statute fell short of an absolute liability, it was greater than that of an ordinary bailee for hire, the officer being held to the highest diligence; and the court says: "We purposely limit the decision to the case of irresistible force." The great mass of cases referred to, involving the liability of trustees of private property, executors, administrators, guardians, and the like, afford no parallel whatever and are valueless as authority. Such officers are in a great measure mere private agents. They must handle and manage the estates in their hands, often exercise their judgment and discretion, and incur the risk of loss of the trust property. If their bonds import contracts for absolute liability, courts of equity will nevertheless treat them as agents, and relieve from any greater liability. Probate courts

and those of like jurisdiction are amply endowed with equity powers to afford proper relief. These matters are too well understood to require any extended comment. In regard to the principle of public policy underlying the decisions, there is in my mind no question whatever of the propriety and necessity of its enforcement. While Alabama is quoted as one of the states sustaining the limited liability there is the later case from that state of *Alston v. State*, 92 Ala. 126, 13 L. R. A. 659, which is strongly persuasive of the other view, and somewhat applicable to the conditions under our laws. A judge of probate was sued for public moneys, and pleaded that he had deposited them in a certain bank which had failed, and there were the usual stipulations of perfect solvency at the time of the deposit, etc. By the statute he was prohibited from knowingly converting or applying any of the money to his own use, or to the use of any other person, or permitting another to use any of it. Applying this statute, the court says: "The money of the state was thus turned over to the bank on general deposit, and became a part of its funds and subject to its use, as any other of its property. This use of the public money by the probate judge was without warrant of law. He had no right to convert it to his own use, or permit anyone else to use it. The deposit was of like effect as a loan of the money. It was an unauthorized use thereof. The probate judge by that act voluntarily relinquished his custody and control of this public fund so that he could not reclaim it. When the state demands it his answer is that he no longer has it, but has a claim for the amount thereof against an insolvent bank. In view of the statutory provisions above referred to, we think this answer is wholly insufficient as a defense." So, under our laws, the banker becomes the owner of the money, and at liberty to use it for investment, speculation, or otherwise. The officer is forbidden by the Constitution to use for his own benefit, or make any profit from the public moneys, and he must give a heavy bond for their safe keeping. But of what use or benefit to the people is a bond, if he may immediately turn over the public funds to some other person, who may and does and is expected to use them for his own purposes, and that, too, without any security whatever? The bond is a meaningless form, if it is not to secure to the state repayment of its losses under such circumstances.

STATE of Wyoming, *ex rel.* Philip NOBLE,
v.
City of CHEYENNE.

(.....Wyo.....)

An ordinance may vest discretionary power in the council as to issuing licenses for the sale of intoxicating liquors within certain limits, where there is charter authority to enact ordinances to tax and regulate that business, but such discretion must be reasonably exercised.

NOTE.—As to discretion in granting liquor licenses, see note to *Sherlock v. Stuart* (Mich.) 21 L. R. A. 580.
40 L. R. A.

(April 29, 1898.)

QUESTIONS reserved by the District Court for Laramie County for the opinion of the Supreme Court which arose upon an application for a writ of mandamus to compel defendant to grant to relator a license to sell intoxicating liquors. *Answers returned favorable to defendant.*

The facts are stated in the opinion.

Mr. Walter R. Stoll, for relator:

The only power to prohibit and suppress with relation to any subject at all in any way connected with the matter of liquors is to the effect that the city is given power to restrain, prohibit, and suppress tippling shops. That a man may take out a retail license and not be guilty of keeping a tippling shop is too plain for argument.

A tippling house is a place where intoxicating drinks are sold in small quantities, to be drunk on the premises, and where men resort for drinking purposes.

2 Bouvier, Law Dict. p. 732; Black, *Intoxicating Liquors*, § 20; 26 Am. & Eng. Enc. Law, p. 18; *Emporia v. Volmer*, 12 Kan. 633.

There is an absolute silence on the part of the legislature of this state with reference to the matter of discretion vested in any body with relation to the giving of licenses.

If the legislature has not made any rules, regulations, or laws on the subject the legislature has not exercised any rights under the police power; and consequently there can be no discretion on the subject vested in any man or set of men, simply because the legislature has not spoken upon the subject.

The police power of any government is a power which resides in the law-making power of the government, and not something which resides in any particular individual, set of men, or body.

Tiedeman, Pol. Power, § 1, p. 4. § 2, p. 5, § 3, p. 10. § 101, p. 277; 18 Am. & Eng. Enc. Law, p. 746; Black, *Intoxicating Liquors*, chap. 2.

In the absence of a statute expressly or by implication giving to a particular body, board, or person a discretion in the matter of issuing or rejecting licenses, the applicant is entitled to his license if he brings himself within the conditions prescribed by the statute.

Miller v. Wade, 58 Ind. 91; *Zanone v. Monrovia City*, 11 Ill. App. 334; *State v. Morgan County, Inferior Ct. Justices*, 15 Ga. 408; *McLeal v. Scott*, 21 Or. 94; *Ampere v. Kalamazoo*, 39 Mich. 78; *Potter v. Homer*, 59 Mich. 8.

Where the applicant brings himself within the statutory requirements the license cannot be withheld, unless a clear discretion is granted by the statute to some board, court, or body to control the matter.

Jones v. Moore County Comrs. 106 N. C. 436; *Crouley v. Christensen*, 137 U. S. 86, 34 L. ed. 620; *Re Christensen*, 43 Fed. Rep. 243; *Martinez v. Robeson County Comrs.* 107 N. C. 335; *State v. Newcomb*, 107 N. C. 900; *Hills v. Comrs. v. Smith*, 110 N. C. 417; *People, O'Toole v. Brooklyn Excise Board*, 42 N. Y. S. R. 2; *Re Hoover*, 80 Fed. Rep. 51; *United States, Harer, v. Ronan*, 83 Fed. Rep. 117; *Pollard's Petition*, 127 Pa. 507; *Johnson's License*, 156 Pa. 322; *Prospect Brewing Co.'s Petition*, 127 Pa.

528; *Sherlock v. Stuart*, 96 Mich. 193, 21 L. R. A. 580.

The only authority for the power to license liquor sellers conferred in any sort of expressed terms is found only in the 3d paragraph of § 161 of the charter; and there the expression is "to levy and collect taxes on . . . dram shops, saloons, liquor sellers."

Mt. Carmel v. Wabash County, 50 Ill. 69; *Black, Intoxicating Liquors*, §§ 65, 108, 109; *State, Benson, v. Hoboken*, 83 N. J. L. 280; 1 Dill. Mun. Corp. §§ 357-361, and cases cited in notes; 18 Am. & Eng. Enc. Law, pp. 532-534.

It has been the policy of our legislature, when it was desired to confer power to regulate or prohibit or forbid the licensing of liquor sellers, to expressly grant that power in the charter.

A municipal corporation can exercise only such powers as are granted to it in express words, or those which are necessarily and fairly implied as incident to the powers expressly granted, or those essential to the declared objects and purposes of the corporation.

1 Dill. Mun. Corp. §§ 89, 90; 15 Am. & Eng. Enc. Law, pp. 1039-1042.

Where the charter has given specified powers, the provisions relating to these powers must govern.

15 Am. & Eng. Enc. Law, pp. 1187-1192; 13 Am. & Eng. Enc. Law, pp. 529-531; 1 Dill. Mun. Corp. §§ 315, 394-407, and cases cited in notes; *Chariton v. Barber*, 64 Iowa, 360, 87 Am. Rep. 209; *State v. Ferguson*, 33 N. H. 424.

The only powers which are delegated to a municipality by the legislature are powers which enable the municipality to enact ordinances. There is no arbitrary power granted to a municipality, but only the power for the municipality to enact ordinances; and ordinances enacted must be within the power conferred, and until such ordinances are enacted the municipality has no power in the premises.

People v. Crotty, 93 Ill. 180; 1 Dill. Mun. Corp. § 20, p. 307, and note 1, p. 321, § 308, note, p. 323, §§ 309, 315, 317, and notes; 17 Am. & Eng. Enc. Law, p. 235, ¶ 2, pp. 236, 237, ¶ 3; *Bull v. Quincy*, 9 Ill. App. 137; *East St. Louis v. Wehrung*, 50 Ill. 28.

The powers conferred upon a municipality, and the trusts, involved under the grant contained in its charter, do not permit the municipality to delegate its authority to others.

1 Dill. Mun. Corp. § 96; 15 Am. & Eng. Enc. Law, pp. 1042, 1043; 17 Am. & Eng. Enc. Law, p. 237; *Black, Intoxicating Liquors*, §§ 155, 228; *Kinnund v. Mahan*, 72 Ill. 462; *Darling v. St. Paul*, 19 Minn. 389; *East St. Louis v. Wehrung*, 50 Ill. 28; *State v. Garibaldi*, 44 La. Ann. 809.

In the absence of a provision in the charter giving a city the power to designate the portions of the city within which liquors may be sold, and further, giving to the city the power to determine the number of licenses that shall be issued within such district, the city has no authority to give a license to one in a particular district, and to refuse it to another in the same district, other things being equal.

Ex parte Levy, 48 Ark. 42, 51 Am. Rep. 550; 40 L. R. A.

Tugman v. Chicago, 78 Ill. 405; *Hudson v. Thorne*, 7 Paige, 261.

Under the licensing system it does not matter what steps may have been taken towards the procurement of the license, or what date the license bears, the license contemplated by law to be issued is a license which can take effect and be in force only from and after the date of its delivery.

State v. Hughes, 24 Mo. 147; *State v. Pate*, 67 Mo. 488; *Wiles v. State*, 33 Ind. 206; *Vannoy v. State*, 64 Ind. 447; *State v. Wilcox*, 66 Ind. 557; *Keiser v. State*, 78 Ind. 480; *State v. Brady*, 14 R. I. 508; *Bolduc v. Randall*, 107 Mass. 121; *Com. v. Welch*, 144 Mass. 356; *United States v. Angell*, 11 Fed. Rep. 84.

An ordinance passed by a city must comply with certain requirements: (1) They must be reasonable and lawful. (2) They must not be oppressive. (3) They must not contravene common right. (4) They must be impartial, fair, and general. (5) They must be consistent with public legislative policy.

1 Dill. Mun. Corp. §§ 319, 320, 322, 325, 329; *Moore v. St. Paul*, 48 Minn. 331.

A by-law to be good must be reasonable, and whether reasonable or not is a question of law for the court.

State v. Jersey City, 37 N. J. L. 348.

Mr. Edgar W. Mann, for respondent:

The relator must show a clear right to the writ of mandamus before the same will be granted by the court.

14 Am. & Eng. Enc. Law, p. 94; *State, Lord, v. Washington County Supers.* 2 Pinney, 552; *People, Besse, v. Crotty*, 93 Ill. 180; *People, Hempstead, v. Chicago & A. R. Co.* 55 Ill. 95, 8 Am. Rep. 631.

Mandamus is issued or withheld in the discretion of the court, and the court, in issuing it, will be governed by what seems to be necessary and proper to be done in the premises for the purpose of justice.

14 Am. & Eng. Enc. Law, p. 97; *Swift v. People, Powers*, 63 Ill. App. 453; 2 Beach, Pub. Corp. §§ 1548, 1574, 1578, 1579, 1589; 2 Dill. Mun. Corp. 4th ed. § 864, note 2.

The city of Cheyenne, under its charter, has discretion in the matter of issuing licenses for the sale of liquors, and if it chooses to do so it can refuse to issue such a license to any person who makes application therefor if in the judgment of the city council of said city it is not for the best interests of the city that such license should be issued.

Ailstock v. Page, 77 Va. 386; *Ex parte Yeager*, 11 Gratt. 655; *Hein v. Smith*, 13 W. Va. 358; *Atty. Gen., Gillaspie, v. Guilford County Justices*, 27 N. C. (5 Ired. L.) 815; *Muller v. Buncombe County Comrs.* 89 N. C. 171; *Nepp v. Com.* 2 Duv. 546; *Ex parte Whittington*, 34 Ark. 394; *Ex parte Levy*, 48 Ark. 42, 51 Am. Rep. 550; *State, Reynolds, v. Tippecanoe County Comrs.* 45 Ind. 501; *State, Kyger, v. Holt County Ct. Justices*, 39 Mo. 521; *Perry v. Salt Lake City*, 7 Utah, 143, 11 L. R. A. 446; *Perkins v. Ledbetter*, 68 Miss. 327; *Swift v. People, Powers*, 63 Ill. App. 453; *Sherlock v. Stuart*, 96 Mich. 193, 21 L. R. A. 580; 11 Am. & Eng. Enc. Law, pp. 649-651.

While the city of Cheyenne is permitted by its charter to issue licenses to retail liquor dealers, it is not compelled to do so.

State, Kelley, v. Bonnell, 119 Ind. 494; *Hillsboro Comrs. v. Smith*, 110 N. C. 417; *People, Wood, v. Randolph Excise Comrs.* 75 Hun. 224; *People, Decker, v. Waters*, 4 Misc. 1; *People, Jones, v. Bennett*, 4 Misc. 10; *People, Davis, v. Truman*, 4 Misc. 247; *People, Watkins, v. Warsaw Excise Comrs.* 4 Misc. 547.

Courts will not interfere by mandamus with the action of a board charged with the duty of issuing licenses for the sale of liquor when such board has discretion in the matter.

Wyo. Rev. Stat. § 3074; 14 Am. & Eng. Enc. Law, pp. 108-111, ¶¶ 1, 2, p. 170; 11 Am. & Eng. Enc. Law, p. 649; *State v. Crites*, 48 Ohio St. 480; *State, Ossenkop, v. Cass County Comrs.* 12 Neb. 54; *State, Silver, v. Kendall*, 15 Neb. 262; *Stanley v. Monnet*, 34 Kan. 708; *Eve v. Simon*, 78 Ga. 120.

The time for which the relator applied for a license for the sale of liquors has long since expired, and hence he is not entitled to have a writ of mandamus issued commanding the respondent to issue to him a license now.

State, Vereen, v. Marion County Comrs. 27 Fla. 488; *People, Hempstead, v. Chicago & A. R. Co.* 55 Ill. 95, 8 Am. Rep. 681; 2 Beach, Pub. Corp. § 1601; 14 Am. & Eng. Enc. Law, § 10, p. 104; *Aff v. Hopkins*, 57 Ill. App. 529.

The city council has the right to pass ordinances of the character mentioned, not only under the general welfare clause or clauses contained in the city charter, but also under the clause contained in subdivision 3 of chapter 161 of the city charter which provides that the city council may regulate certain occupations by ordinance.

Portland v. Schmidt, 13 Or. 17; *Piqua v. Zimmerlin*, 35 Ohio St. 507; *State v. Freeman*, 38 N. H. 426; 11 Am. & Eng. Enc. Law, p. 617; *Black, Intoxicating Liquors*, § 234.

Potter, Ch. J., delivered the opinion of the court:

On the 5th day of October, 1897, the relator applied to the city council of the city of Cheyenne for a license permitting him to open and conduct a retail liquor establishment for the selling of spirituous, vinous, fermented, and intoxicating liquors, in a building known as "606 and 608 West Eighteenth Street," in said city. In his application it was stated that the relator had his United States license for 1897, and also his county license running from May, 1897, to May, 1898. At the same time he submitted a bond in the amount prescribed by the city ordinances. The council, at a regular session of that body, refused to grant the application, the records of the council showing, in brief, that the application was referred to the police committee, who reported adversely thereon; that the report was adopted by the council, and the license fee which accompanied the application was ordered returned to the applicant. The relator thereupon obtained an alternative writ of mandamus from the district court. After the disposition of some preliminary matters of pleading, an answer and reply were filed, and the whole case submitted upon an agreed statement of facts, embodying therein the matters above stated with other facts upon which it was agreed the cause might be determined. The district court, upon its own motion, thereupon reserved certain

questions arising therein, deemed to be important and difficult, for the decision of this court.

The chief point of contention is the right of respondent to refuse to grant the license. The questions are fifteen in number, and present some matters which we do not conceive it necessary to decide in this cause. The answer alleged: That the place at which the relator desired to open and conduct a saloon under the license applied for had been for a long time known as the "Chicago Saloon;" and it had become a notorious resort for lewd, disreputable, and vicious people; was conducted in a disorderly manner, and so that constant surveillance on the part of the police force was required in that part of the city where the saloon was conducted, in order either to prevent the commission of crimes or violations of the city ordinances, or to arrest parties guilty of committing crimes or such violations; and, in consequence thereof, the locality in which said saloon was conducted acquired a reputation of such an evil character that it was deemed best by the council that no saloon should be maintained or kept in that particular locality. That, in pursuance of that determination, the ordinance of February 16, 1897, which will be adverted to in connection with other ordinances of the city, was adopted. These particular facts, although not denied by the reply, are not brought into the agreed statement of facts. Instead thereof, the entire proceedings of the council relating to the matter are made a part of the statement, together with the ordinances. From them it appears that on November 24, 1896, at a meeting of the council, "the mayor called the attention of the council to the recent developments in connection with a certain saloon in the western portion of the city, known as "Chicago Saloon." The mayor was of the opinion that such resort was one of a menacing nature to the city, and might sooner or later create trouble of a serious and expensive nature to the city. He further stated that, in his opinion, no license should be granted to such places; and, if it was in his power, he would refuse to issue same, but the matter was in the power of the council, and he therefore could do nothing, but suggested that the council take some action. At that meeting the council adopted a resolution that no license should be issued to any person for the sale of intoxicating liquors at any place in the city north of the center line of Seventeenth street, or west of the center line of Thomas street. On February 2, 1897, one Mollberg, who had theretofore conducted the saloon referred to, applied for a continuation of his license. The matter was held over until February 16, 1897, when, at his request he was allowed to withdraw his application. An ordinance was, on that date, adopted, regulating the subject, for the particular locality in question, in connection with other ordinances already existing. At that meeting, also, a license was ordered issued to one applicant for 620 West Eighteenth street; and on March 2, 1897, a license was ordered issued to another for 338 Bent street; and licenses were refused to two others, respectively, one of them desiring a license for the place specified in relator's application, and the other for a place directly op-

posite and in close proximity thereto. The two licenses granted were for places located within the limits mentioned in the aforesaid resolution, and in the ordinance of February 16. The places for which the said licenses were refused were also within said limits.

The ordinances of the city governing the subject of liquor licenses, with the exception of the one of February, 1897, were originally adopted prior to the taking effect of the present city charter, and when the municipal affairs were controlled by a board of trustees, one of whom was chosen as president. Such ordinances were continued in force by the new charter of 1877, until repealed or amended. Rev. Stat. p. 115, Cheyenne City Charter, § 174. Under the present charter, the corporate powers are exercised by a mayor and council, consisting of nine members, and the new corporation became the legal successor of the city which existed under the former charter. § 174, *supra*. The municipal ordinances conceded to affect the matter of liquor licenses are as follows: "The president or board of trustees are hereby authorized to grant licenses for the sale of spirituous, vinous, fermented, and intoxicating liquors, to any person who shall apply therefor, upon such person executing to the city of Cheyenne a bond, with at least two sureties to be approved by the president, in the penal sum of three hundred dollars, conditioned that the party so licensed shall faithfully observe and keep all ordinances heretofore passed or to be passed during the period of such license. On compliance with the foregoing requirements, a license shall be issued to the applicant, which shall authorize the person or persons therein named to sell, barter, give away and deliver wines and liquors, whether vinous, ardent, or fermented, in quantities less than one gallon in the place designated in the application; provided, that no license shall be granted or issued for a less sum than one hundred dollars a year, or twenty-five dollars for each quarter of a year, and all licenses shall be issued quarterly, payable in advance." City Ordinances, chap. 31, art. 6, § 1. Section 4 of the same article prohibits the sale of any liquors in the city without a license, except by druggists for medicinal, mechanical, or sacramental purposes, and penalties are imposed for a violation thereof. The above are found in a general ordinance concerning licenses adopted in 1870, which covers in separate chapters a number of occupations. The first chapter thereof regulates the issuance of licenses generally; and, in substance, it is provided thereby that all licenses which may be issued under any ordinance of the city shall be subject to the ordinances and regulations in force at the time of the issuance thereof; that all licenses shall be issued and signed by the clerk, under the city seal, pursuant to the order of the president or board of trustees upon the payment to the marshal of the sum assessed therefor, together with the appropriate fees; that no license shall be assignable or transferable without permission of the president or board of trustees; and that, in all cases where it is not otherwise expressly provided, the president or board of trustees shall have power to hear applications for, and to order the issuing of, licenses, upon the terms

specified by the city ordinances. Provision is also made for cancelation or revocation of a license for cause. In 1877, but prior to the existence of the present charter, another ordinance was adopted, entitled "An Ordinance Concerning Licenses and Good Order." Section 1 of that ordinance requires that all licenses for the sale of intoxicating liquors shall contain a stipulation against a violation of any of the city ordinances relating to the sale of liquors, and for a cancelation in case of such violation after hearing, and that, if so canceled, no other license shall issue to the same person or his agent for six months thereafter unless ordered by the board. Section 2 (as amended in 1891) increases the amount to be paid for liquor licenses to \$80 per quarter; and § 3 requires a bond in the sum of \$500, with certain stated conditions. Section 6, as amended in 1885, authorizes a cancelation of license for certain stated causes. Sections 2 and 6, as amended, were adopted during the life of the present charter. On February 16, 1897, the following ordinance was duly passed and approved: "That hereafter no license for the sale of spirituous, vinous, fermented, or intoxicating liquors of any kind shall be issued by any officer of the city of Cheyenne without special permission of the council for the sale of such liquors within that portion of the city of Cheyenne, bounded on the south by Seventeenth street, and on the east by Thomas street." The place named by relator in his application is located in the portion of the city covered by that ordinance. Persons engaged in selling liquors are also required by general law to obtain a county license therefor. Rev. Stat. title 26. If the business is licensed to be carried on in an incorporated town, city, or village, the license money is collected by the collecting officer of the municipality, although the license is issued by the county officers. Rev. Stat. § 1438, as amended by Laws 1888, chap. 44. And such license money is expressly authorized to be collected for the city in addition to the licenses issued by the city. *Ibid*. It is made a penal offense to sell liquors without a license. Rev. Stat. § 1442, as amended by Laws 1890-91, chap. 23; Rev. Stat. § 1455.

On behalf of the relator it is contended that, in the absence of a statute which either expressly or by implication gives to the licensing authorities a discretion in the matter of issuing licenses, an applicant who complies with all the prescribed conditions is entitled to his license; that no discretion is vested in the city council; and that the powers with which the council is clothed must be exercised by ordinance. It is then argued that the relator has complied with the law and ordinances in his application, and is entitled, as a matter of law, to the license applied for. Counsel says that the corporate authorities have adopted ordinances, and now refuse to comply with them. His contention in this respect seems to be based upon that provision of the ordinance of 1870, hereinbefore quoted, which says, "On compliance with the foregoing requirements, a license shall be issued to the applicant," and upon a construction of the ordinance of February, 1897, as neither adding to nor modifying the former ordinances. The position is taken that it was at all times the duty of the council

to order the issuance of each license, but that the ordinances on the subject must comprise a general rule applicable alike to the cases of all applicants. If the original ordinance should be held to have had the effect contended for, and as having made the issuing of a license imperative upon the council when an applicant had complied with its conditions, then we are not able to assent to the construction which counsel for relator places upon the ordinance of 1897. Its effect and clear meaning is, that as to all places within the specified locality, in addition to the applicant's compliance with the other municipal requirements, he must obtain the special permission of the city council. Unless such permission has been obtained, the applicant has failed to bring himself within the conditions prescribed by the ordinances. Whether the ordinance is one which may lawfully be adopted and executed depends upon the power conferred upon the city by the charter, and a consideration of the legality of such a discretion if it proceeds from legislative authority. The charter invests the city, in its corporate capacity, with authority and power to enact ordinances, to "levy and collect taxes on . . . dramshops, saloons, liquor sellers, . . . and regulate the same by ordinance." Rev. Stat. § 161. Several other occupations and kinds of business are specifically mentioned in the subdivision of the section quoted from. It is conceded, and indeed insisted, on behalf of relator that the power to tax as given by that particular section includes authority to license. The authority "to regulate the same by ordinance" counsel dismisses from consideration, apparently on the ground that it must be held to refer only to the occupation or business last named, viz., "shows, theaters, and all kinds of exhibitions for pay." This court did not take that view of it in the case of *Cheyenne v. O'Connell* (Wyo.) 46 Pac. 1088; and we do not now conceive such view to be the correct one. The clear intent and meaning of the provision is that, as to all the occupations and kinds of business mentioned in the subdivision, the city may enact ordinances, not only to tax, but to regulate. We agree that the power to license is included in the power to tax and regulate. Other provisions of the charter authorize the property employed in the several occupations to be taxed upon an assessed value for general revenue purposes, and the evident intent and force of this particular provision is to permit an occupation tax, or to require a license for the privilege of carrying on the same, and to otherwise regulate such occupations. The legislature has not attempted to regulate in any manner the matter of municipal licenses. The general law concerning county licenses does not affect the power which has been conferred upon various cities and towns to require a license for the sale of liquors within their respective limits. If a municipal license is provided for by any municipality in lawful pursuance of its charter powers, it is in addition to the county license. Where both are provided for, one must possess both to lawfully sell liquors within the corporate boundaries.

It is now well and conclusively settled that the legislature may not only regulate and restrain the sale of intoxicants, but may entirely

prohibit the same. It possesses the fullest and amplest powers in that respect. *Mugler v. Kansas*, 123 U. S. 628, 31 L. ed. 205; *Ex parte Levy*, 43 Ark. 43, 51 Am. Rep. 550; *Black, Intoxicating Liquors*, §§ 84, 87, 89. Authorities might be multiplied, but the principle is now too well established to require further reference to them. It is likewise settled law that such power may be delegated to municipal corporations, in the absence of constitutional restrictions, to be operative within their respective limits; and this is true notwithstanding that the subject has already been provided for by the general laws of the state. *Black, Intoxicating Liquors*, § 217; 1 Dill. Mun. Corp. 4th ed. § 308. The legislature may confer a lawful discretion upon boards and officers appointed to grant liquor licenses. This proposition is not denied, but it is urged that, unless such discretion is conferred, none exists. We need not dispute such contention. The question, however, may often arise whether the discretion in any case exists. It has been held to have been conferred in very many cases under varying forms of legislation, but a discussion of the cases at this time will hardly be useful. They may be found collated in *Black on Intoxicating Liquors*, in notes to §§ 170-172. The city of Cheyenne, by its ordinances, has retained or granted to the council a discretion, at least in respect to a certain locality. There can be no doubt but that, where a municipality has legislative authority for such purpose, it may restrict the localities within which intoxicating liquors may be sold, and that the character of persons to whom licenses for the sale thereof shall be issued may be prescribed. The city of Cheyenne, in its corporate capacity, has been given complete authority to enact ordinances to regulate the sale of liquors within its limits. The charter also authorizes the enactment of ordinances to prevent and remove nuisances (Rev. Stat. § 161, subd. 7); to prescribe limits within which "dangerous, obnoxious, or offensive business may be carried on" (subdiv. 18); to restrain, prohibit, and suppress tippling shops and other disorderly houses and all kinds of public indecencies (subdiv. 4), in addition to the power contained in what is generally known as the "general welfare clause." Although it is not necessary to resort to any other statutory authority than that contained in subdivision 8, the above provisions are referred to as exhibiting the very ample powers bestowed upon the municipality for the purpose of maintaining its internal peace and good order.

The entire argument on behalf of the relator is based upon the assumed absence of a discretion of any character in the municipal authorities. The assumption is erroneous. The legislature conferred upon the city the power to enact ordinances regulating the subject, to the same extent, possibly short of entire prohibition, as the legislature itself could have done by a direct and comprehensive statute. In pursuance of that power, the city has enacted ordinances which vest in the council a certain discretion as to a stated locality. The question, nevertheless, arises whether or not the regulations, so far as the nature of the discretion is concerned, are lawful, and whether such dis-

cretion has been lawfully exercised in the present instance. It is a fundamental principle that there is no inherent right in a citizen, or anyone, to sell intoxicating liquors by retail, and that there is not a vested right in any person to have a liquor license. *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620; *Ex parte Levy*, 43 Ark. 42, 51 Am. Rep. 550. "As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only." *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620.

The precise question arising in the case at bar has engaged the attention of the courts in a number of adjudicated cases, and they unite in upholding a law or municipal ordinance such as we have in this case, and a reasonable exercise of the authority and discretion granted or retained thereby, as applied to the sale of intoxicating liquors, unless the regulation comes in conflict with some general law, or the discretion is exercised arbitrarily and without any consideration or reason in an individual case.

The city and county of San Francisco possessed the power, under the Constitution, to make "all such local, police, sanitary, and other regulations as are not in conflict with general laws." An ordinance of that municipality provided that no liquor license should be issued unless the applicant should have obtained the consent of a majority of the board of police commissioners to carry on the business, or, in case of the refusal of such consent, then, upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which the business is desired to be carried on. No material distinction between that and the Cheyenne ordinance is to be observed upon principle. Said ordinance came before the supreme court of California and the Supreme Court of the United States. *Ex parte Christensen*, 85 Cal. 208; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620. The case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, relating to a laundry ordinance, was relied on in each case to defeat the liquor ordinance. The objection made was that the license depended upon the arbitrary will of the police board in the first instance, and of the twelve property owners in the second. The following was said in the opinion in *Ex parte Christensen*: "Whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life, which are not supposed to have any injurious tendency, it has no force in the present case." And Mr. Justice Field, in *Crowley v. Christensen*, in his opinion sustaining the ordinance, and a refusal to grant a license, distinguished the case from *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, by saying: "It will thus be seen that that case was essentially different from the one now under consideration; the ordinance

there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself, and useful to the community, and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe." The license was refused in the two cases just alluded to for the reason that larcenies had been committed in the place kept by the applicant.

An ordinance of the city of Grand Rapids, Michigan, required every applicant for a liquor license, in addition to other conditions, to obtain the consent of the common council. The charter authority was "to enact such ordinances, by-laws, and regulations as they deemed desirable . . . to restrain license and regulate saloons, and to regulate and prescribe the location thereof." This is not essentially different from a power to license and regulate; but, as has been seen, Cheyenne is empowered to prescribe limits within which an obnoxious or offensive business may be carried on. An application was refused on account of the objectionable locality; and the court declined to require by mandamus the city authorities to grant the license. *Sherlock v. Stuart*, 96 Mich. 198, 21 L. R. A. 580. An objection made to the ordinance in that case was that the regulation should have been made by a general ordinance fixing districts within which saloons may be kept, and that the council did not possess the power to hear and determine each individual case. It was held that the ordinance was authorized, and that the other conditions, such as giving a bond, presenting a petition, and kindred matters, did not limit the discretion, but prescribed merely a method of procedure. The cases cited in the dissenting opinions in that case do not, in my judgment, sustain their view. Some of them arose in respect to legitimate and useful avocations, such as dairies, slaughter houses, and the like, and others, like *Amperse v. Kalamazoo*, 59 Mich. 78, to a case of the arbitrary refusal of a village or town board to approve a bond where the board had nothing else to do under state law concerning licenses but to approve the bond, the license not being issued by or under authority of the board.

The mayor of Chicago refused a liquor license for a place in the midst of a dwelling-house district, and the appellate court sustained him, holding "that a court should not, by mandamus, compel the public officials to issue a license for the keeping of a saloon in a residence neighborhood, where a saloon will be a nuisance." *Swift v. People*, *Powers*, 63 Ill. App. 453. That decision was rendered notwithstanding the case of *Zanone v. Mound City*, which will be referred to.

The council of Salt Lake City, Utah, had power "to license, regulate, and tax" the sale of intoxicating liquors. A municipal ordinance required a petition by an applicant for liquor license to be presented, in which the place of business and some other minor matters of fact were required to be stated, and also a

bond. It was held that the council could, in its discretion, refuse a license, although the applicant had complied with the ordinance in respect to petition, bond, etc. *Perry v. Salt Lake City*, 7 Utah, 148, 11 L. R. A. 446.

The legality of a discretion which may be exercised in each individual case is also sustained in many other cases, but a citation of the following, the facts of which more closely approach those in the case at bar, will subserve all useful purposes: *Trageer v. Gray*, 73 Md. 250, 9 L. R. A. 780; *Perkins v. Ledbetter*, 68 Miss. 327; *Maxton Comrs. v. Robeson County Comrs.* 107 N. C. 385; *Hillsboro Comrs. v. Smith*, 110 N. C. 417; *Com. v. Moran*, 148 Mass. 453.

The case of *Ex parte Leroy*, 48 Ark. 43, 51 Am. Rep. 550, is also in point. It was held in that case that a law which would limit the number of dramshops, authorizing the selection of such limited number in some manner, would not be void as creating a monopoly in the sense of the constitutional prohibition, but would be rather a police regulation for the public good, in view, however, of the constitutional inhibition of that state against the granting to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. The court held that the discretion of the county court over liquor licenses extended only to determine whether the applicant had complied with all the requirements of the law, and is of good moral character, and that, upon a refusal to grant a license, the grounds should be shown, so that it might be seen whether or not the court had exercised a sound legal discretion in the matter. In that case the application was under a general law of the state, and no question of regulation under municipal charters or ordinances was involved. It is a well-considered case, and not in conflict with our conclusions herein. The discretion to determine the moral fitness of the applicant to receive a license was recognized as a proper one, and that a discrimination between those worthy and unworthy of receiving the privilege was not unlawful. The question of location did not arise in the case.

There are cases which announce the general doctrine that, where privileges are granted by law, they should be open to the enjoyment of all, upon the same terms and conditions. So far as that principle, when given its broadest significance, is held to forbid a municipal corporation to make any discrimination between applicants for license to conduct or carry on a particular business, it has usually been applied in the case of such industries or avocations which are necessary to the well-being of the community and harmless in themselves, but, by reason of the character of the employment, require municipal regulation. A clear distinction, however, is generally recognized between such occupations and the business of selling intoxicating liquors, the latter being one which, in the exercise of the police power of the state, may be entirely prohibited. We do not therefore conceive it either necessary or desirable to attempt any review of the decisions relating to the former class of employments.

A case which has denied the power of a municipality to refuse a liquor license to one who has complied with the procedure and con-

ditions prescribed by law is *Ex parte Theisen*, 30 Fla. 529. That case, however, is easily distinguishable from *Crowley v. Christensen*, and the others in harmony with it. The Florida court referred to those cases, and, as a feature which distinguished them from *Ex parte Theisen*, mentioned the fact that the statutes of the state contained specific regulations relating to the sale of liquors and the issuance of municipal licenses therefor, and the court said: "Our decision in the case at bar rests upon the conclusion that the grant to municipal corporations to regulate and restrain will not permit the enactment of an ordinance under which arbitrary discrimination may be made in respect to matters which are exclusively under statutory control and regulation. In the absence of an express declaration of intention to that effect, it must not be assumed that the legislature proposed by the grant of power to municipal corporations to regulate and restrain retail liquor dealing, to confer upon them the power to contravene and defeat state policy by ordinances inconsistent with the laws of the state on the subject."

The case of *Zanone v. Mound City*, 103 Ill. 552, is cited as authority against the validity of the refusal of the license to relator in the case at bar. In that case, however, the municipal authorities offered no sort of excuse, justification, or explanation of their action in refusing the license, but they rested upon what was contended to be their power of arbitrary discrimination. The ordinances did not provide for the previous consent of the board. All that the case decides is that the corporate authorities could not exercise an arbitrary discrimination, and could not refuse a license through mere caprice. It was not denied but that the city might limit the number of dramshop keepers to be licensed, or refuse licenses to "persons of such habits and character as render them unfit persons to be licensed," but the court says that the authorities had not decided that the applicant was an unfit man. It was said as to limiting the number of licenses that it should be done by ordinance, and in such a way as to avoid favoritism and monopoly. Three of the justices dissented in that case. The case of *Swift v. People, Powers*, 63 Ill. App. 453, was decided subsequently to that of *Zanone v. Mound City*; and the appellate court evidently did not consider the latter case as denying the principle that, for good reasons, the authorities of the city could refuse a license for a place which would be detrimental to the best interests of the municipality and its citizens. As good, if not stronger reasons, may exist for discrimination as to the place where liquor shall be permitted to be retailed in an incorporated town as for such a discrimination between individuals based upon personal fitness.

In the case at bar the council has not refused the license through mere caprice, nor have they attempted an exercise of mere arbitrary discrimination. Their answer to the alternative writ of mandamus disclosed at length the reasons for their action. Two other applicants had been refused who desired to carry on the same character of business in the same place or locality. They did not discriminate against the relator individually. He had selected a place which the council insists would, judging

from the past, endanger the peace and good order of the community. While the pleadings and statement of facts are not very definite as to the comparative location described with reference to the other business locations in the city, enough, perhaps, appears to indicate that the prescribed limits and the place selected by the applicant are not contiguous to the business districts. We conclude, therefore, that, under the charter authority to enact ordinances to tax and regulate, the city possesses the power to license saloons and liquor sellers, to regulate the same by ordinance by prescribing the locality or localities in which such business shall be permitted, and to provide by ordinance that the consent of the council shall be obtained before the issuance of a license for the sale of intoxicating liquors within certain limits, and that the ordinance of February, 1897, has that effect, and that the same is valid. We have not much, if any, doubt but that the discretion should be reasonably and soundly exercised. It should not be enforced merely as a matter of caprice, but the action of the council should appear to be based on reasons. It does so appear in the case at bar.

These considerations must necessarily dispose of the controversy, and must result in a denial of the writ prayed for. It should perhaps be mentioned that the county license,

which relator held, running from May, 1897, to May, 1898, did not permit him to sell within the city, but was issued for a place outside of the municipal limits. He had applied for, was willing and ready to acquire, but had not received, a license from the county authorities to operate within the city.

The following, in connection with what has been said, will sufficiently answer such of the reserved questions as are pertinent to the points we have considered, without returning specific answers to individual questions: The charter authorizes the city to enact ordinances regulating the matter of granting licenses for the selling at retail of intoxicating liquors, and, in pursuance of that authority, the ordinances may vest a discretionary power in the council the same to be reasonably exercised, as to the place or places where such sale, within the city, shall be permitted or denied, and may prescribe the locality or district within which said sales may be, and without which may not be, licensed, and that the council, upon the facts and circumstances set forth in the agreed statement of facts, had authority to refuse to issue a license to the relator, notwithstanding that he should give a sufficient bond conditioned as required by the ordinances.

Corn and Knight, JJ., concur.

RHODE ISLAND SUPREME COURT.

Alfred E. SHERMAN, Admr., etc., of John Baker, Deceased,
v.

Mary BAKER *et al.*

(..... R. I.)

1. A gift by will of a certain sum to a priest to say masses for the testator, being an outright gift to take effect at once, is valid.

NOTE.—Validity of bequests for masses.

There is some conflict of authority as to the validity of a bequest for masses. It seems that by the weight of American authority a bequest of — dollars to A. B., requesting him to say masses for the testator's soul, will be sustained as a valid gift. In some cases such a bequest has been sustained on the ground that it was a valid trust, in others it was held valid because not a trust, but a gift to the donee. In other cases it has been sustained as not contravening a statute prohibiting devises to charitable or religious societies of more than half of the testator's property.

In addition to the cases cited in *Festorazzi v. St. Joseph Roman Catholic Church* (Ala.) 25 L. R. A. 360, note, the following cases sustain the validity of a bequest or devise for the purpose of having masses said for the souls of the testator and others. *HARRISON v. BROPHY*, *HOEFFLER v. CLOGAN*, *SHERMAN v. BAKER*, *Moran v. Moran* (Iowa) 39 L. R. A. 204; *Emsley v. Madden*, 18 Grant, Ch. (N. C.) 386; *Brennan v. Brennan*, Ir. Rep. 2 Eq. 321; *Atty. Gen. v. Delaney*, Ir. Rep. 10 C. L. 104; *Re Backes*, 9 Misc. 504; *Re Zimmerman*, 22 Misc. 411; *Bradshaw v. Jackman*, Ir. L. R. 21 Eq. 12; *Pheban v. Slattey*, Ir. 40 L. R. A.

2. A bequest the income of which is to be used to ornament and keep in repair the burial lot of the testator is void because it is a gift in perpetuity for a private trust, and not for a charitable trust.

3. A bequest to the parish priest of a certain church to say masses for the testator goes to the priest who is in office when the will takes effect.

4. Clauses of a will giving specified

L. R. 19 Eq. 177; *Reichenbach v. Quin*, Ir. L. R. 21 Eq. 138; *Dillon v. Reilly*, Ir. Rep. 10 Eq. 152.

In *SHERMAN v. BAKER* it was held that a bequest to the parish priest of A. B. church of \$100 "to say masses for me," was evidently not intended to be a trust, as it was for the parish priest himself for his own service in saying masses, and was valid. It was further held that the legatee designated in this clause was intended to be the parish priest in office when this will should take effect.

So, in *HARRISON v. BROPHY*, a bequest of a sum of money to a priest of the Roman Catholic Church for the celebration of masses for the souls of the testator and another was construed as a gift direct to the donee, with an injunction to the performance of the ceremonial named, and was held not to be in trust for such purpose, and was not void because incapable of being enforced by beneficiaries in being. It was further held that the English common law, which avoided as being for superstitious uses bequests for masses, was not the law in Kansas.

In *HOEFFLER v. CLOGAN* it was held that a devise and bequest to a church in trust to expend the proceeds in saying masses for the repose of the souls of certain persons was not void as a mere private trust, but was a valid charitable trust aiding

portions of the residue are construed to refer to the residue mentioned near the beginning of the will after deducting the burial expenses, and not to the residue after deducting the legacies made in the intervening clauses, where the terms of the will are such that this construction makes a disposition of substantially all the estate, while the other construction would leave a considerable portion undisposed of, except by a final residuary clause tacked on to the will on a separate slip as an evident afterthought, to provide for a possible contingency.

5. The children of certain persons to whom a bequest is made, to take effect after the determination of a life estate, are those living at the death of the testator, and their interests vest upon his death rather than at the death of the life tenant.

6. A widow's election of dower and refusal to accept the gift of the income of certain property for life in lieu thereof, under a will which contemplates the conversion of the real estate into money and then a division, will entitle the administrator to divide the balance of the estate after setting off dower, without waiting for the death of the widow.

(April 5, 1898.)

BILL for the construction of the will of John Baker deceased.

The facts are stated in the opinion.

Mr. Herbert Almy, for complainant:

The renunciation of the wife of the provisions of the will in her favor "works an extinguishment of her life estate and acceleration of the rights of the second taker."

20 Am. & Eng. Enc. Law, p. 897, note; *Earestaff v. Austin*, 19 Beav. 591; *Re Schultz* (Mich.) 71 N. W. 1079.

All the legacies down to the fourteenth, with the exception of the thirteenth, vest at once on the death of the testator, the time of payment only being postponed to the time when all the real and personal estate should be converted into money.

1 Jarman, Wills, 6th ed. p. 811; *Chafee v. Maker*, 17 R. I. 741; *Williams v. Knight*, 18 R. I. 838.

to support the clergy and public worship, as it was presumed that the masses would be said in public. It was further held that a trustee would be appointed by the court if necessary to prevent the failure thereof.

So, in *Moran v. Moran* (Iowa) 39 L. R. A. 204, it was held that a bequest to the pastor of a specified church "that masses may be said for me," although not a charity, created a valid private trust.

And where a bequest was made of £100 to the Society of St. Vincent de Paul; £15 to be expended in paying for masses to be said for the soul of the testator, and the residue to be converted into cash and paid to the House of Providence, it was held that the bequest for masses was not void as a bequest for superstitious uses. It was further held that the fact that neither of the societies was a corporation did not render the gifts void, as gifts to voluntary charitable associations were valid. *Emsley v. Madden*, 18 Grant, Ch. (N. C.) 386.

In *Reichenbach v. Quin*, fr. L. R. 21 Eq. 188, where a testatrix directed her trustees to sell her interest in certain premises and out of the amount realized to apply £100 towards having masses offered up in public in Ireland for the repose of her soul and the souls of other persons mentioned, one of whom was then alive and survived her, it was 40 L. R. A.

As the thirteenth legacy is to a class, and is not to take effect until after the death of the wife, and as the gift is of one sixth of all the said residue of my estate to one class, and one sixth-part of all of my said estate to the other class, this legacy is also accelerated, and these children take vested interests.

Earestaff v. Austin, 19 Beav. 591; *Gillespie v. Schuman*, 62 Ga. 256.

Formerly a gift to say masses was held to be void as against the general policy of the law. See 1 Jarman, Wills, 6th ed. p. 199.

But latterly and in this country such bequests are upheld.

See 5 Am. & Eng. Enc. Law, 2d ed. p. 928, notes.

A bequest for the purpose of ornamenting and keeping in proper repair the burial lot is void.

Kelly v. Nichols, 17 R. I. 306.

Mr. James M. Gillrain also for complainant.

Messrs. David S. Baker, Charles E. Gorman, and Lewis A. Waterman for respondents.

Stiness, J., delivered the opinion of the court:

This is a bill for the construction of the will of John Baker. After providing for his burial and the erection of a monument, the testator at once goes on to say that all the residue of his estate, real and personal, shall be converted into money and disposed of according to the remaining clauses of the will. The tenth and eleventh clauses give to the parish priest of St. Patrick's Church at Valley Falls \$100 "to say masses for me," and \$100 "the income of which to be used in ornamenting and keeping in proper repair my burial lot in said St. Patrick's cemetery."

The strife of the time of the Reformation naturally found vent in statutes. Among them was that of 1 Edw. VI. chap. 14, for vesting in the Crown property, devoted to "superstition and errors in Christian religion," which specified "vain opinions of purgatory and masses satisfactory, to be done for them which

held without discussion not to create a perpetuity, and was not void for that cause.

In *Dillon v. Reilly*, Ir. Rep. 10 Eq. 152, where a testator directed a sum to be invested and the interest thereof to be paid to the Roman Catholic clergyman attached to the parish at the time of his death, from time to time forever thereafter, upon condition that "four masses each month shall be celebrated for the benefit of my soul and the souls of my relatives and the poor souls late of the parish of St. Peter, Drogheda, now suffering in purgatory," the bequest was held to be valid for the lives of the clergyman officiating in the parish at the time of the testator's death and the survivor of them, and that at the death of such survivor the principal invested formed a part of the residuary personal estate.

In *Small v. Torley*, Ir. L. R. 25 Eq. 388, it was said in regard to *Dillon v. Reilly*, Ir. Rep. 10 Eq. 152, that from the very unsatisfactory nature of the report of it, comment has frequently arisen. "It cannot be treated as a decision that in a case where words are used which purport to tie up property beyond legal limits, the court will from thence carve out a life estate, hold it good to that extent, and reject the rest. On the contrary it is plainly a decision on the peculiar words of a particular will."

were departed." From this came the English doctrine of superstitious uses, and even now, after the statute of 2 & 3 Wm. IV. chap. 115, which legalizes bequests for the support of the Roman Catholic religion, a legacy to priests and chapels for the benefit of their prayers and masses is held to be void on account of the superstitious purpose attached to them. *West v. Shuttleworth*, 2 Myl. & K. 684; *Heath v. Chapman*, 2 Drew, 417; *Re Blundell*, 80 Beav. 860.

In this country, where all forms of religious belief stand upon equal legal rights, the doctrine of superstitious uses has never been recognized, and bequests for masses are now generally admitted to be legal, but there is a diversity of opinion as to their execution. One class of cases holds that they are good as charitable trusts, being for religious services. Another class holds that they are private trusts which are void because there is no living beneficiary to enforce the trust. A third class holds that they are good as outright gifts for a specified legal object.

Of the first class is *Schouler, Petitioner*, 184 Mass. 426, in which the court says: "Masses are religious ceremonials or observances of the church, of which she [the testatrix] was a member, and come within the religious or pious uses which are upheld as public charities." In *Rhymer's Appeal*, 98 Pa. 142, 39 Am. Rep. 786, it was held that a gift for masses was a gift to a religious use, and so void under a statute declaring that no gift in trust for charitable or religious uses should be made, except it should be done at least one month before the testator's death. The opinion says that the mass is a prominent part of the religious service of the Catholic Church, and that the service is the same in kind, whether it be designed to promote the spiritual welfare of one or many. See also *Seibert's Appeal*, 18 W. N. C. 276; *Seda v. Huble*, 75 Iowa, 429.

Recent examples of the second class may be found in *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 25 L. R. A. 860; *Holland v. Alcock*, 108 N. Y. 312, and *McHugh v. McCole*, post, 724. In this last case the court

held a gift of this kind to be invalid because its form implies a trust, but, at the same time, it said this: "We know of no legal reason why any person of the Catholic faith, believing in the efficacy of masses, may not make a direct gift or bequest to any bishop or priest, of any sum out of his property or estate, for masses for the repose of his soul, or the souls of others, as he may choose. Such gifts or bequests, when made in clear, direct, and legal form, should be upheld; and they are not to be considered as impeachable or invalid, under the rule that prevailed in England, by which they were held void as gifts to superstitious uses."

The third class of cases is like those which this court referred to in *Williams v. Herrick*, 19 R. I. 197, relating to something to be done and ended, such as erecting a monument or a building, as to which we said that we made no question that a devise with such a simple direction would be good.

The essential distinction between these classes of cases is not the legality of the purpose of the gift, but the creation of a perpetuity. A charitable trust may be in perpetuity, but a private trust cannot be. If a gift is a charitable trust, it will be good, whenever it is to be executed. If it is not a charitable trust it will be good if it has the proper elements of a trust and is to be executed within the limit allowed by law; or it will be good if it is an outright gift for a specified legal object, although it may not have all the elements of a trust, but may be only what has been called an honorary trust,—an expression of a desired purpose rather than an imposed condition, for present execution, and not in perpetuity.

This will presents an example both of a gift in perpetuity for a private trust, *i. e.* for the care of the testator's burial lot, and an outright gift for masses. The former is invalid. *Kelly v. Nichols*, 17 R. I. 306; *Williams v. Herrick*, 19 R. I. 197. The latter, the gift for masses, is valid, as one which takes effect at once, like any personal bequest for a legal object. It is evidently not intended to be a trust, as it is for the parish priest himself, for his own service in saying masses. A gift to one for a mourn-

If we look to the terms of the bequest we find no mention of the 'successors' of the persons taking the gift: the only persons named are 'the clergymen attached to the parish of St. Peter, Drogheda, at the time of my death.' And the court, in *Small v. Torley*, further says: "If the gift was held to be a dedication of property forever, I should respectfully decline to follow the decision."

In *Brennan v. Brennan*, Ir. Rep. 2 Eq. 321, where a bequest was made in a will "of £50 to such person as shall at my death be the Roman Catholic priest . . . upon the following trust . . . to have one half thereof expended in procuring masses to be celebrated for the repose of," and by a subsequent will "£20 to the priest of the parish in which I die, for masses to be celebrated for the repose of," and both wills were admitted to probate,—it was held that the legacies for masses in both wills should be paid. The court does not discuss the question as to the validity of a devise for masses.

In *Re Backes*, 9 Misc. 504, where a will directed her executors "to cause masses to be read in a German Catholic Church in the city of Buffalo, for herself and her deceased husband, for any balance of cash money which might be left after the payment of her just debts, doctor bills, and funeral ex-

penses," it was held that the testator had the right to appropriate a reasonable amount of her money, in offering masses for the remission of her and her deceased husband's sins, and the direction to her executor to have the masses said in a German Catholic Church in Buffalo was not indefinite, as the deceased could not have intended any other than a German Roman Catholic Church, and the direction contained in the will for the masses was valid.

And a bequest of bank stock was sustained where it was made to J., provincial of the Franciscan missionaries of M. chapel in D., or to the provincial of said missionaries at the time of my death, for the offering up of masses for the souls of the testator and his late father, mother, brothers, and sisters, although it was held that J. could not be compelled to apply anything to the use of the Franciscan order. It was further held that the gift in the alternative did not affect its validity, as the money in the hands of such provincial would be bound by no trust for the order, but would be simply in trust for the celebration of masses. It was also held there was nothing in the will making it compulsory that the masses should be held by the Franciscan order. *Bradshaw v. Jackman*, Ir. L. R. 21 Eq. 12.

ing ring would not be a trust, and this is the same in principle. In each case the testator would seek a posthumous benefit,—a memorial of his personality in one case, and a benefit to his soul in the other. In both cases the substance of the gift would go to the legatee, and one is not a trustee for himself. It is not precisely like the gift for a monument, for that is not intended to go to the legatees, and is like a trust, except that it lacks a living beneficiary; but given a legal bequest, not personal to the legatee or to his use, and it is hard to see why it should not be enforced as a trust. The answer that there is no one in interest to have a standing in court is met by the rejoinder that an heir at law of the testator has a sufficient interest to see that the will is carried out. See article by Prof. James B. Ames on "Failure of Tilden Trust," 5 Harvard Law Rev. 389. But, however this may be, there can be no doubt that the bequest in the tenth clause of the will is good for the reasons we have stated. This view is supported by *Moran v. Moran* (Iowa) 89 L. R. A. 204; *Seda v. Huble*, 75 Iowa, 429; *Vanderveer v. McKane*, 25 Abb. N. C. 105; *Gilman v. McArdle*, 99 N. Y. 451, 52 Am. Rep. 41; *Reichenbach v. Quin*, Ir. L. R. 21 Eq. 188. The case is expressly put upon the ground that no perpetuity is created.

We are also of opinion that the legatee designated in the tenth clause was intended to be the parish priest in office when the will should take effect.

The second question is whether the gifts of the residue in the thirteenth and fourteenth clauses relate to the residue mentioned in the second clause or to the residue after taking out the legacies in the intervening clauses. The will is very crudely drawn. It starts out with a residue after the burial expenses; then refers again to a residue in these clauses; and, as though these were not residues enough, another residuary clause is added at the end of the will. We think that the testator must have meant the residue referred to in the second clause. That was the net remainder of his property to be divided. In the twelfth clause he gives the

income of one third of all his "said estate" to his wife for life, and in the next clause he gives two sixths to the children of her brother and the children of Thomas Murphy. But one sixth is described as a part "of all the said residue of my estate," and the other as "one sixth part of all of my said estate." Evidently he did not mean to make a distinction in these two gifts. They just made up the one third given to his wife for life, and which was to pass upon her death, and the indiscriminate use of the words "residue" and "estate" show that they meant the same thing. In clause 14 he gives one third "of all the said residue;" and here again we think that he must have had in mind the net remainder of his estate which he was dividing. This construction is supported by the scheme of the will. The final residuary clause has the phrase, "if any there should be;" which shows that, to his mind, about all of the property had been divided, and it was doubtful if any would remain. By the terms of the will, the pecuniary legacies were about one third of the value of his property, one third to his wife and one third to Catherine Baker. This would dispose, very nearly, of the whole estate. If the sale of the real estate should be favorable there might be a surplus in the third devoted to pecuniary legacies, and so, to be sure that nothing should be left over, the final residuary clause was tacked onto the will, on a separate slip, as an evident afterthought, to provide for a possible contingency. But under any other construction there must have been a residue; for if the residue, in clauses 13 and 14 refers to the remainder after the payment of the pecuniary legacies, the testator would only give away two thirds, and would leave one third of that residue not bequeathed. Upon this answer the third question becomes immaterial.

The fourth question is whether the bequests to the children of Thomas Keenan and of Thomas Murphy refer to children living at the death of the testator or at the death of his wife, when the legacies are payable, after the determination of the life estate. For the reasons given

So, where a testator left to the abbot of M. for the time being £100 for masses for the repose of his soul at a stipend of 5s. each, it was held to be a valid bequest as being immediately payable, the word "stipend" being used as meaning price, and not involving any attempt to create a perpetuity. *Phelan v. Slaterry*, Ir. L. R. 19 Eq. 177.

Where a will contained a bequest to the priest of St. Mary's Church of Lancaster, New York, of the sum of \$600, for which masses shall be said for the repose of my soul and that of my husband and all my relatives and benefactors, it was held to be valid under N. Y. Laws 1890, chap. 390, providing that no person having a husband, wife, parent, or child shall devise or bequeath to any benevolent, charitable, religious, or missionary society, in trust or otherwise, more than one half of his property after the payment of his debts, although another clause gave \$200 to St. Mary's Church of Lancaster, and another clause gave \$200 to the Seminary and College of Our Lady of Angels for the support of students for the priesthood, as it was held that the bequest to the priest was not to the church, and therefore not more than one half of the estate was bequeathed to corporations. *Re Zimmerman*, 22 Misc. 411.

So, under N. Y. Laws 1898, chap. 701, § 1, providing "that no gift, grant, bequest, or devise to religious,

educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest, or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised, or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court."—it was held that a bequest to the priest of St. Mary's Church of Lancaster, New York, of the sum of \$600 for which mass shall be said for, etc., was not a bequest to the church, and that he would be entitled to the same on the performance of such service. *Re Zimmerman*, 22 Misc. 411.

Where a testatrix domiciled in Ireland bequeathed of her personal estate in Ireland sums of money to Roman Catholic ecclesiastics in Ireland to offer up masses "for the repose of the soul of her brother and of her own," it was held that bequests were liable to legacy duty at the rate of 10 per cent. *Atty. Gen. v. Delaney*, Ir. Rep. 10 C. L. 104.

And where a legacy was left for masses to be said in a public church in Ireland "which church

in *Chafee v. Maker*, 17 R. I. 789, and *Pond v. Allen*, 15 R. I. 171, we think that the gifts took effect at the death of the testator. They were present gifts, although postponed in payment; and as there was no uncertainty in the happening of the event upon which the payment depended, but only as to the time of happening, the interest vested upon the death of the testator.

The fifth question is whether the refusal of the widow to accept the provisions of the will in lieu of her dower, and the setting off of a portion of the real estate as her dower, permit the administrator to divide the balance of the estate, which he has converted into cash, before the death of the widow. We think that there can be no doubt that the administrator has the right to pay legacies as far as he can before the death of the widow. The payment of only one third of the estate was to await her death, and that because she was to have the income for life. This she has refused by applying for and securing dower. There

is no reason now to hold that third of the estate until her death. But the will contemplated that all the real estate should be converted into money, and that the division should then be made; and, as all of the real estate cannot now be sold until after her dower interest has terminated, the question is made whether there can be any division at all until after her death. The parties interested need not and ought not to be kept out of what belongs to them. A state of affairs has come which the testator did not look for. The conversion of the whole estate cannot take place at once. But that is no reason why the legatees should not have as much of their legacies as can now be paid, waiting for the balance until the rest of the estate can be converted into money, according to the will. The election of the widow to take dower has effaced the life estate, and so advanced the interests in remainder. 20 Am. & Eng. Enc. Law, p. 897; *Re Schultz* (Mich.) 71 N. W. 1079; *Eavestaff v. Austin*, 19 Beav. 591.

KANSAS SUPREME COURT.

Abbie HARRISON, *Plff. in Err.*,

v.
Thomas BROPHY *et al.*

(.....Kan.....)

*1. A bequest of a sum of money, made in the will of a member of the Roman Catholic Church to a priest of such church, for the celebration of mass for the souls of the testator and another, will be construed as a gift direct to the donee, with an injunction to the performance of the ceremonial named, and not as made to him in trust for such purpose, and therefore void, because incapable of enforcement by beneficiaries in being.

2. The English common law, which avoided bequests of the kind above stated, as

*Headnotes by DOSTER, Ch. J.

shall be open to the public during the celebration of each and every of said masses, at which everyone who shall so desire shall be allowed to be present," it was held to be subject to legacy duty under 5 & 6 Vict. chap. 82, § 38, providing that nothing in this act shall extend or be construed to extend to charge with duty, in Ireland, any legacy for the education and maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable. *Perry v. Tuomey*, Ir. L. R. 21 Eq. 480.

But in other cases such bequests were held void on various grounds as that the will created a trust without a beneficiary; that the trust was indefinite; that it was in contravention of a statute forbidding bequests for pious or charitable uses within a certain time prior to the testator's death. In some cases it was held void as a gift to a superstitious use, and in others void as creating a perpetuity.

In the following cases a bequest for masses was held invalid and void: *McHUGH v. McCole*; *Boyle v. Boyle*, Ir. Rep. 11 Eq. 433; *Hart v. Brewer*, Cro. Eliz. pt. 1, p. 449; *West v. Shuttleworth*, 2 Myl. & K. 684, 4 L. J. Ch. N. S. 115; *Small v. Torley*, Ir. L. R. 25 Eq. 388; *Morrow v. McConville*, Ir. L. R. 11 Eq. 228; *Kehoe v. Wilson*, Ir. L. R. 70 Eq. 10; *Dillon v. Reilly*, Ir. Rep. 10 Eq. 162.

40 L. R. A.

being for superstitious uses, never became a part of the law of this country; and the validity of the gift for the purpose named is therefore upheld.

(January 8, 1898.)

ERROR to the District Court for Franklin County to review a judgment in favor of defendant in a proceeding brought to contest the validity of a bequest. *Affirmed*.

The facts are stated in the opinion.

Mr. John W. Deford, for plaintiff in error:

The bequest is void because it violates a doctrine of the common law, which has never been modified in this state by constitutional or statutory law, or judicial decision; and the condition and wants of our people, and of

In *McHUGH v. McCole* it was held that a bequest of a certain sum to a bishop, to be used and applied for masses for repose of the souls of certain persons specified, was void for the reason that there was no beneficiary who could enforce the performance of the trust. It was further held that a bequest to a certain person "to be used and applied as follows, for masses for the repose of" the souls of certain persons named, created a trust and not a gift to the donee, and was void. It was said: "Had the testator made a plain direct bequest of the sum in question to Bishop Messmer or to any bishop or priest, for masses for the repose of the souls of persons named in his will in that behalf, it would certainly be our duty to declare it valid." The court cited and adopted the argument in *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 25 L. R. A. 380.

Where a testator domiciled in Ireland devised and bequeathed his property situated in Ireland to his executors upon trust to apply the same to works of charity "such as masses for the repose of my soul and whatever else they may judge most charitable," and died within three months from the execution of the will, it was held that, the trust being indefinite, the gift totally failed. It was further held that the gift for masses was a pious

every people, call loudly for its stringent enforcement.

2 Kan. Rev. Stat. § 7281.

The laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may, with practices.

Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; *Mormon Church v. United States*, 136 U. S. 49, 50, 34 L. ed. 493; *Davis v. Beason*, 133 U. S. 333, 33 L. ed. 637.

The rules of the common law avoiding bequests for "superstitious uses" are in full force in Kansas. As to what these rules are, see—

1 Bacon, Abr. pp. 581, 582; 1 Jarman, Wills, *188, 189; *West v. Shuttleworth*, 2 Myl. & K. 684.

This bequest creates a clear trust in Rev. James Collins, "for mass" for certain souls, "if he performs her request well. If he fails no human power can compel performance," for the plain reason that the *cestuis que trust* are "disembodied souls," which cannot complain of breaches of trust to earthly courts, and over which such tribunals have no jurisdiction.

Holland v. Alcock, 108 N. Y. 312; *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 25 L. R. A. 360.

The trust is void for uncertainty. The Rev. James Collins has, or had, two grandfathers and two grandmothers.

How many masses are to be said for this

use, under 7 & 8 Vict. chap. 97, § 16, charitable donations and bequests act, providing that no donation, devise, or bequest for pious or charitable uses in Ireland shall be valid unless executed three calendar months at least before the death of the person executing the same. It was further held that the gift failed, although the will did not say in terms that the trust was to be executed and applied in Ireland. *Boyle v. Boyle*, Ir. Rep. 11 Eq. 433.

In *Boyle v. Boyle*, Ir. Rep. 11 Eq. 433, it was held that 7 & 8 Vict. chap. 97, § 16, charitable donations and bequests act, invalidated under the prescribed circumstances gifts of land whether for charitable purposes or for pious purposes.

Where a devise was made of two houses to the church wardens of — to these uses, first to find an obit and to bestow 2s. 4d. annually upon an obit in the church of St. Stephens, secondly to repair the same houses, thirdly to bestow the residue of the profits about reparations of the same church of St. Stephens and to provide ornaments in the same church, conditioned that if they failed in finding the obit then the estate should cease and the lands should be to the mayor and commonalty of London, and that they should find that obit and repair the tenements and bestow the residue of the profits upon London bridge,—it was held that the Queen should have no more but that which was appointed for the maintenance of the obit, under 1 Edw. VI. chap. 14, providing that the King shall have bequests given for obits. *Hart v. Brewer*, Cro. Eliz. pt. 1, p. 449.

In *West v. Shuttleworth*, 2 Myl. & K. 684, 4 L. J. Ch. N. S. 115, where a testatrix directed several sums to be paid to certain Roman Catholic priests and chapels, desiring that they be paid as soon as possible after her decease that she may have the benefit of their prayers and masses, and gave the residue of her property to the trustees upon trust to pay £10 each to the ministers of certain specified Roman Catholic chapels for the benefit of their prayers for the repose of her soul and that of her deceased husband, and to appropriate the re-

money? And if any particular number, why so many only? And if no particular number, why any at all? And to what court is the trustee to account?

Bristol v. Bristol, 58 Conn. 242; *Hess v. Murphy*, 40 Wis. 276, and cases cited.

Mr. William H. Clark for defendants in error.

Doster, Ch. J., delivered the opinion of the court:

Mary Brophy, a widow lady, was a member of the Roman Catholic Church, and a believer in its faith and doctrines. She was possessed of an estate consisting of personal property alone. She died after having executed a will in which specific legacies in money were given to her children and grandchildren. A residuary sum was bequeathed in the following language: "I give and bequeath to Rev. James Collins, for mass for his grandfather's and grandmother's soul." The legatee named was a priest of the Roman Catholic Church, and was the grandson of the testatrix and her deceased husband. The validity of the legacy made to him is denied by the heirs of Mary Brophy. The district court sustained the bequest, and error is now prosecuted from its decision. The claims of error are that the will undertakes to create a trust, the beneficiaries of which are disembodied spirits, in whose favor no trust can exist; that the trust, if other-

mainder in such a way as they may judge best calculated to promote the Catholic Christian Religion among, etc., it was held that the gifts to the priests and chapels were void, as the statute of Edw. VI. avoids certain superstitious gifts previously created; and such statute has been considered as establishing the illegality of such gifts. It was further held that the gift of the residue, and appropriating it in such a way as the trustee shall judge best calculated to promote the knowledge of the Catholic Christian Religion among the poor and ignorant inhabitants of A—, was not void.

In *Dillon v. Reilly*, Ir. Rep. 10 Eq. 152, a bequest to the Roman Catholic Primate of Ireland and his successors forever, upon condition to celebrate masses for the salvation of the testator's soul and those of his relatives, was held void.

And a bequest to A. B. or other the clergyman for the time being officiating in the parish of C. D. at the time of the testator's death, and his successors, of an annuity payable during a term of fifty years from the testator's death upon trust for the celebration of masses for the repose of the souls of the testator and others, was void as being an attempt to create a perpetuity. *Small v. Torley*, Ir. L. R. 25 Eq. 358.

A bequest of the testator's property to his wife for life, and after her death the property held on 999 years' lease to be let and one moiety to be given to the Roman Catholic clergy of the L. church to say masses for the repose of his soul and the soul of his wife, was void, not being a charitable gift, and was an attempt to create a perpetuity. *Morrow v. McConville*, Ir. L. R. 11 Eq. 236.

So, in *Kehoe v. Wilson*, Ir. L. R. 7 Eq. 10, it was held that the bequest of a sum to the superior of a body of laymen bound by religious vows, the income to be applied in masses for the benefit of the members of said order, was void as being a perpetual dedication of the income of the legacy to a purpose not charitable. As to the validity of four other gifts for masses the defendants consented to their being paid, and no opinion was expressed on their validity.

L. T.

wise valid, is void for uncertainty in the *cestui que trust*; and that the gift is void, because repugnant to the ancient common law against bequests for "superstitious uses." Of these in their order.

The will does not undertake to create a trust. The gift is absolute to the person named. The language in which it is made is advisory, persuasive, expressive of desire, "precatory," as called in the law of wills, but the passing of the gift is not conditioned upon the performance of the act enjoined. Upon the conscience of the donee alone is laid the duty of performing the sacred service named. The testatrix might have made the gift in the usual terms. That she coupled with it an injunction to the performance of a solemn religious ceremonial cannot avoid it. The case of *Holland v. Alcock*, 108 N. Y. 312, is not in point against this view. The bequest in that case was made to trustees *eo nomine*. It was not made direct as in this case. There can be, of course, no trustee without a beneficiary in being; and, inasmuch as in the case named there was no beneficiary, there could be no trustee, and consequently no trust. Moreover, the case of *Holland v. Alcock* recognized the distinction we draw. The court in its opinion says: "If the bequests had been of a sum of money to an incorporated Roman Catholic church or churches duly designated by the testator, and authorized by law to receive such bequests for the purpose of the solemnization of masses, a different question would arise. But such is not this case." Since the decision of that case, the subordinate courts of New York have upheld bequests of the character of the one in question. *Howard's Estate*, 5 Misc. 295; *Vanderreer v. McKane*, 25 Abb. N. C. 105.

The fact that the legacy was a gift direct, and was not bequeathed in trust, obviates the necessity of noticing the objection made by counsel for plaintiff in error that it is void for uncertainty as to the beneficiaries. Neither is it void because repugnant to the law against bequests for "superstitious uses." To properly interpret the part of the will in question, and to determine whether effect can be given to it, we must bear in mind the Catholic Church doctrine of Purgatory. Purgatory is defined by an authoritative expositor of the church's creed to be "a state of suffering after this life, in which those souls are for a time detained who depart this life, after their deadly sins have been remitted as to the stain and guilt, and as to the everlasting pain that was due to them, but who have, on account of those sins, still some debt of temporal punishment to pay; as also those souls which leave this world guilty only of venial sins. In Purgatory these souls are purified and rendered fit to enter into Heaven, where nothing defiled enters." Catholic Belief (Lambert's Am. ed.) 196. Devotees of this church also believe "that souls in Purgatory are relieved by the sacrifice of the mass, by prayer, and pious works and alms deeds." Id. 202. Scriptural authority, as it is recognized by Catholics, though by others regarded as apocryphal, exists for the practice of offering prayers for the dead, and for contributions to the church to enable it to perform its offices in their behalf. "And, making a gathering, he [Judas Maccabeus] sent 12,000

drachms of silver to Jerusalem for sacrifice, to be offered for the sins of the dead. (For, if he had not hoped that they that were slain should arise again, it would have seemed superfluous and vain to pray for the dead.) And because he considered that they who had fallen asleep with Godliness had great grace laid up for them. It is therefore a holy and wholesome thought to pray for the dead, that they may be loosed from sin." 2 Maccabees, xii., 43-46. In the light of these beliefs, the act of Mary Brophy in making the bequest is reasonable and consistent, and should be upheld unless it be prohibited by force of some positive rule of law.

In the reigns of Henry VIII. and Edward VI. statutes were enacted to prevent the devoting of property to what was termed "superstitious uses." This was anterior to the reign of James I., during which the common law, consisting of the statutes and legal customs and usages then in force, was imported into the colonies; and therefore, unless these statutes have been abrogated or modified by constitutional or statutory law, judicial decisions, and the condition and wants of the people, they are of binding force in this state. Gen. Stat. 1897, chap. 1, § 4. If, by proper construction, the statutes of Henry and Edward prohibit the making of bequests for the purposes named in the will under consideration, assuming them to be parts of our law, the gift in question must fail. It is said, however, that the English courts did not hold the making of such gifts to be repugnant to the terms of these statutes, but declared them void by analogy to the prohibitions of the statutes, and by the general policy of the common law. 1 Jarman, Wills, 6th ed. 197, 198. Be that as it may,—and for the purpose of the question before us, it can make no difference whether the prohibition was originally statutory or otherwise,—we have no hesitation in declaring the English common-law interdiction of bequests of the kind named to be without force in this state. It is opposed to the spirit of religious toleration which has always prevailed in this country, and which has found expression in the Federal Constitution and statutes, and in the Constitution and statutes of every state of the Union. That religious intolerance which infused itself through parliamentary enactments and judicial sentences, and which procured the law to anathematize different creeds as "superstition" or "heresy," according as Catholic or Protestant gained governmental ascendancy, was, more than anything else, what our ancestors fled from. It would be strange, indeed, had they carried to this country, and established here, the very laws of religious persecution from which they sought to escape. They brought here such of the common law as was adapted to the condition and wants of the people, and as was consistent with the spirit and genius of free political and religious institutions. What was not thus brought has since been made, and every addition to the ancient fabric which bears any relation to the subject of religious right has been a cumulative guaranty of religious freedom. It is not, however, meant that religious toleration, as it now exists, was from the beginning the rule of practice in the colonies. What is

meant is that the disabilities of the English law upon the rights of conscience and freedom of worship, though imposed in many instances, did not become established as a part of our legal polity. The fierce struggle between ancient bigotry and growing liberality, though renewed and continued here, was not a struggle between an established order and a revolutionary and protesting force. It was a struggle to prevent, and not to uproot, a legally authorized ecclesiastical system. In the sense, therefore, that the effort of many of the colonists to prescribe articles of faith and forms of worship, though partially and temporarily successful in parts of the country, finally and wholly failed, it may be said that the penalties of the English statutes and courts upon non-conformity of religious belief and practice never became incorporated into the common law of this country. The express provisions of our constitutional guaranties are to the contrary. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U. S. Const. Amend. art. 1. "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of, or interference with, the

rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief." Kan. Const. Bill of Rights, § 7. Many other provisions illustrative of the degree of religious toleration allowed to the people of this country might be quoted. The bequest of Mary Brophy is valid by the letter of many of them and by the spirit of them all. We may question the soundness of her belief, and may deride the claim of efficacy of the service she desired to have performed; but the law has no care for contrariety of faith as to spiritual things, and will therefore sanction the bequest she has made. The law interferes with no mere religious opinions, nor with religious practices, except such as tend to subvert the foundation of public morals and order. *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

The judgment of the court below is affirmed.

Allen, J., concurs. **Johnson, J.**, concurs with the result.

WISCONSIN SUPREME COURT.

James McHUGH *et al.*

v.

Patrick McCOLE, Exr., etc., of Owen McHugh, Deceased, *et al.*

(.....Wis.....)

1. The doctrine of *cy pres* is not in force in Wisconsin.
2. A bequest to the Bishop of Fond du Lac to be used by him for the benefit and behoof of the Protestant Episcopal Church of Fond du Lac, which is not shown to be a body corporate or legal entity, capable in law of taking or asserting any right in court to the fund, but which consists of several organizations, is void for uncertainty.
3. A bequest of property to be used by the Roman Catholic Bishop of the diocese of Green Bay "for the benefit and behoof of the Roman Catholic Church," there being several churches in the diocese, is void for uncertainty.
4. Conversion of realty into personality will not be affected by a will if the provisions which require it are void, but the property will descend to the heir at law as realty.
5. A bequest of a certain sum to a bishop to be used and applied for masses for the repose of the souls of certain persons specified is void for the reason that there is no beneficiary who may enforce performance of the trust.
6. Language of the will which is plain and unambiguous will not be wrested from its natural import, as creating an unenforceable trust, for the purpose of saving the provisions from condemnation.

7. A trust, and not an absolute gift, to the individual named as recipient of the gift, is effected by a bequest to a certain person "to be used and applied as follows: for masses for the repose of" the souls of certain persons named, etc.

8. A trust will result to the donor, his heirs or legal representatives, in case of a gift upon trusts that are void in whole or in part for illegality, if the property is not otherwise disposed of.

(October 22, 1897.)

CROSS-APPEALS from a judgment of the Circuit Court for Calumet County in an action brought to test the validity of certain provisions in the will of Owen McHugh, deceased; the plaintiff appealing from so much of the judgment as upheld certain bequests in trust for religious associations, and defendant appealing from so much as held void a bequest in trust for masses. *Reversed on plaintiff's appeal. Affirmed on defendant's appeal.*

Statement by Pinney, J.:

This action was brought by the heirs at law of one Owen McHugh, deceased, against Patrick McCole, executor of his last will and testament; S. G. Messmer, as bishop of the Roman Catholic diocese of Green Bay; Bridget Carney, John O'Rourke, and Frank McGrath, as trustees of the St. Augustine's Roman Catholic Church of Chilton, Calumet county, Wisconsin; C. C. Grafton, as the Protestant Episcopal bishop of Fond du Lac, Wisconsin, and the Catholic Orphan Asylum at Green Bay, Wisconsin,—to obtain the judgment of the court as to the intent, meaning,

NOTE.—See note to preceding cases.

40 L. R. A.

and legal effect of the will of said Owen McHugh, deceased, and especially with reference to the bequests and devises contained in paragraphs 4 to 7, inclusive; and to ascertain whether said provisions were void, and whether the persons named as legatees and devisees in said paragraphs take anything thereby, or are entitled to receive and take the several legacies and devises provided thereunder, and whether the executors of the deceased are entitled, under and by the terms of the will, to sell the lands of the deceased, and out of the proceeds thereof to pay said several sums to the persons therein named, as provided by the will, or whether said property should descend or pass to the heirs at law of the testator or his personal representatives for the benefit of his distributees. It appeared that the executor refused to bring an action for these purposes, or to participate therein; that one of the heirs at law, Bridget Carney, refused to join as plaintiff, and was therefore made a defendant. The plaintiffs assert several grounds of invalidity or illegality in respect to the provisions in paragraphs 4 to 7 of the will, inclusive. It was alleged that the testator left personal property sufficient to pay his debts, together with his funeral expenses, but that Patrick McCole, the executor, applied to the county court of Calumet county for an order or license authorizing and empowering him to sell the real estate of the testator, and to pay the proceeds over to the devisees and legatees mentioned in said will. There were answers put in by the defendants, raising substantially the same issues, in which it is conceded that the executor, Patrick McCole, applied to the county court of Calumet county for the purpose aforesaid, and insisted upon the validity of all the paragraphs of the will numbered 4 to 7, inclusive, but denied that the testator left personal property sufficient to pay his debts and the cost of administration, and, except as expressly admitted, denied each and every allegation of the complaint. The testator bequeathed \$1,000 to his daughter Bridget Carney, \$600 to his daughter Hannah Daugherty, and \$300 to his grandson Joseph Daugherty; and the provisions of the fourth to the seventh paragraphs of the will, inclusive, are as follows, namely: "(4) I do give and bequeath unto the Protestant Episcopal bishop of Fond du Lac, in the state of Wisconsin, the sum of \$300, 'to be used by him for the benefit and behoof of the Protestant Episcopal Church of said diocese of Fond du Lac, Wisconsin.' (5) I do give and bequeath unto the Roman Catholic bishop of the diocese of Green Bay, Wisconsin, the sum of \$4,150, the said sum 'to be used and applied as follows: For masses for the repose of my soul, \$2,000; for masses for the repose of the soul of my deceased wife, Mary McHugh, the sum of \$1,000; for the repose of the soul of my deceased son John McHugh, \$500; for the repose of the soul of my deceased daughter, Katie McHugh, the sum of \$100; for masses for the repose of the souls of my father and mother, Owen and Hannah McHugh, \$50; for the Catholic Orphan Asylum at Green Bay, Wisconsin, the sum of \$500.' (6) I do give and bequeath unto the trustees of the Roman Catholic Church at Chilton, Calumet county, Wisconsin, to wit,

St. Augustine Church, to be used for the benefit of said church, and in repairing the same, the sum of \$500. (7) I do give, grant, bequeath, and devise all the rest, residue, and remainder of my estate, real or personal, 'to the Roman Catholic bishop of Green Bay, Wisconsin, to be by him used for the benefit and behoof of the Roman Catholic Church.'" Upon trial by the court it was found that the testator made his will with the provisions stated, and that it had been admitted to probate; that the defendant C. C. Grafton is the Protestant Episcopal bishop of Fond du Lac, in the state of Wisconsin; that S. G. Messmer is the Roman Catholic bishop of the diocese of Green Bay, Wisconsin, which said diocese includes the county of Calumet; that St. Joseph's Orphan Asylum of Green Bay is and was duly incorporated under the laws of the state of Wisconsin at the time of the making and publishing of said will, and was and is the only Catholic orphan asylum in said city; that the Roman Catholic bishop, the vicar general of the diocese of Green Bay, the pastor of the congregation of St. Augustine, together with John O'Rourke and Frank McGrath, are the trustees of St. Augustine's Church, Roman Catholic Church of Chilton. The court, as conclusions of law, affirmed the validity of all the provisions of the will except the sixth paragraph and so much of the fifth paragraph as disposes of \$3,650, to be used and applied for masses for the repose of the souls of the persons therein named, and judgment was rendered accordingly. The plaintiffs appealed from that part of the judgment upholding the bequest to the Protestant Episcopal bishop of Fond du Lac of \$300, and the provisions sustaining the seventh or residuary clause of the will, and ordering and adjudging the rest, residue, and remainder of the testator's estate to be assigned to S. G. Messmer, the Roman Catholic bishop of the diocese of Green Bay, "for the benefit and behoof of the Roman Catholic Church of his diocese." There was a cross-appeal by the defendant Patrick McCole, the executor of the testator, from so much of the judgment as declared that part of the fifth paragraph of the will bequeathing \$3,650, "to be used and applied for masses" as therein specified, void for indefiniteness and uncertainty, and from the failure of the court to render judgment in accordance with said bequest.

Messrs. J. E. McMullen and L. J. Nash for plaintiffs.

Messrs. Wigman & Martin, for defendants.

The first essential inquiry is of the testator's intent, and, when this is ascertained, if it contravenes no law, it must be given effect.

Dodge v. Williams, 46 Wis. 70; *Cassoday, Will*, §§ 594-640.

The Catholic who gives money for masses trusts implicitly to the honor and conscience of the celebrant or donee, and to the rules and doctrine of the church, that his wishes shall be observed.

The testator does not use the term "trust," or "give in trust." He indicates no purpose to create a trust.

No trust is here created, and the bequest is valid.

Ruppel v. Schlegel, 55 Hun, 188; *Vandermeer v. McKane*, 25 Abb. N. C. 105; *Howard's Estate*, 5 Misc. 295; *Seda v. Huble*, 75 Iowa, 429; *Re Backes*, 9 Misc. 504; *Re Hagenmeyer*, 12 Abb. N. C. 432; 3 Am. & Eng. Enc. Law, p. 181, note 4; *Elmsley v. Madden*, 18 Grant, Ch. (U. C.) 386; *Charitable Donation & Bequest Comrs. v. Walsh*, 7 Ir. Eq. Rep. 34; *Atty Gen. v. Hall*, (1896) 2 I. R. 291; *Read v. Hodgins*, 7 Ir. Eq. Rep. 17; *Seibert's Appeal*, 18 W. N. C. 276; *Kehoe v. Kehoe*, Chicago Legal News, May 12, 1888.

The right of a person to devote his property to any purpose which he believes to be a religious purpose is just as necessary to the religious liberty guaranteed by the Constitution as is the right to believe and worship according to the dictates of one's own conscience.

The court should put itself in the position of the testator at the time he made the will, in order that it may determine, in the light of all the surrounding circumstances, his intent.

Lee v. Simpson, 134 U. S. 572, 33 L. ed. 1088; *Colton v. Colton*, 127 U. S. 300, 32 L. ed. 188; *Hess v. Singler*, 114 Mass. 56.

Whether or not the sacrifice of the mass is ever offered for deceased, or other designed person, living or dead, is within the sole knowledge of the celebrant.

If, then, upon inquiry to determine whether or not this service has been performed, the question is dependent in its ultimate upon the honor and integrity of the celebrant, why impute to testator an intent to create a trust, a purpose to invoke the aid of a court, where its service would be nugatory and its aid futile?

Seda v. Huble, 75 Iowa, 429; *Schouler, Petitioner*, 134 Mass. 426.

The right of the testator to make an absolute gift or donation to some designated priest or bishop of his church, coupled with the direction that masses be said for his soul, cannot be denied. Such purpose and intent is lawful. Why should not the testator be credited with the lawful rather than the unlawful intent?

Foose v. Whitmore, 82 N. Y. 405, 37 Am. Rep. 572; *Jarman, Wills*, p. 686.

It was competent to prove the nature of the diocesan organization, the relation of the bishop to this organization; how the property of the diocese, real and personal, is held, and what are diocesan purposes for which such property may be used, as well that this bequest was intended for the use of the Roman Catholic Church of the diocese of Green Bay.

And the decrees, rules, canons, etc., of the church are admissible in evidence, so far as might be necessary, to establish the facts.

Fadness v. Braunborg, 73 Wis. 257; *Heiss v. Vosburg*, 59 Wis. 532; *Mannix v. Purcell*, 46 Ohio St. 102, 2 L. R. A. 753; *Watson v. Jones*, 13 Wall. 723, 20 L. ed. 674.

The testator's will is, alike, simple and certain in its provisions, and his intent ascertained, must be given effect where it contravenes no law.

Dodge v. Williams, 40 Wis. 70; *Cassoday, Wills*, §§ 594-640; *Lee v. Simpson*, 134 U. S. 40 L. R. A.

572, 33 L. ed. 1038; *Colton v. Colton*, 127 U. S. 300, 32 L. ed. 188.

The will must be construed as one relating to personal property.

Chandler's Appeal, 84 Wis. 505; *Dodge v. Williams*, 46 Wis. 70; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106; *Scott v. West*, 63 Wis. 559; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278; *Ford v. Ford*, 70 Wis. 19; *Crowley v. Hicks*, 72 Wis. 539; *Cassoday, Wills*, §§ 659, 660.

The bishop in the case is trustee, *ex officio*, of diocesan property.

Sanborn & Berryman, Anno Stat. § 2001 (b), and subdiv. 9 (a); *Heiss v. Vosburg*, 59 Wis. 532; *Mannix v. Purcell*, 41 Ohio St. 102, 2 L. R. A. 753; *Re First Presby. Soc.* 106 N. Y. 251.

There is no limitation of the use and no trust fastened upon any property carried by the residuary clause, other or different from the limitation and trust attached to any other property now held or which may be hereafter held by the bishop, for the benefit and behoof of the church of his diocese. This is one founded solely upon the character of the donee.

Beater v. Beater, 117 N. Y. 421, 6 L. R. A. 403.

It was competent to prove that the testator intended the Roman Catholic Church of the diocese of Green Bay.

Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278; *Cassoday, Wills*, § 612.

This fact appearing, the will should be read as if the words, "of the diocese of Green Bay" or "of his diocese" were found in the will.

Baker v. McLeoth, 79 Wis. 534.

A voluntary association, religious or secular, may take hold and enjoy property, through its proper officers or trustees, and a court of equity will take cognizance of, and protect, the property rights of such association, against any breach of trust on the part of its officers or trustees.

Fadness v. Braunborg, 73 Wis. 257; *Heiss v. Vosburg*, 59 Wis. 532; *Mannix v. Purcell*, 46 Ohio St. 102, 2 L. R. A. 753; *Watson v. Jones*, 13 Wall. 723, 20 L. ed. 674; *Brown v. Storkie*, 74 Mich. 269, 3 L. R. A. 430; *Lafond v. Deane*, 81 N. Y. 507.

Lapsed and void legacies and devises go to the residuary legatee.

1 *Jarman, Wills*, p. 635; *Hawkins, Wills*, p. 44; *Sanborn & Berryman, Anno Stat. § 2279*; *Smith v. Curtis*, 29 N. J. L. 345; *Prescott v. Prescott*, 7 Met. 141; *Patterson v. Sallow*, 44 Pa. 487; *Stehman v. Stehman*, 1 Watts, 475; *Bayard v. Atkins*, 10 Pa. 18; *Drew v. Wakefield*, 54 Me. 291; *Brigham v. Shattuck*, 10 Pick. 306; *Hayden v. Sloughton*, 5 Pick. 528; *Thayer v. Wellington*, 9 Allen, 283, 85 Am. Dec. 753; *Youngs v. Youngs*, 45 N. Y. 254; *Cruikshank v. Home of the Friendless*, 113 N. Y. 337, 4 L. R. A. 140; *Re Pierce*, 56 Wis. 560; *Scott v. West*, 63 Wis. 570; *Neuman v. Waterman*, 63 Wis. 616, 53 Am. Rep. 310; *Hiles v. Atlee*, 90 Wis. 72.

Pinney, J., delivered the opinion of the court:

The record does not disclose how much of the testator's estate consisted of realty, or how

much of personal property. It may be fairly assumed from the seventh or residuary clause of the will, disposing of "all the rest, residue, and remainder of the testator's estate, real or personal," to the Roman Catholic bishop of Green Bay, Wis., "to be by him used for the benefit and behoof of the Roman Catholic Church," that the testator owned both real and personal estate, and that it was understood that there might be a residue or remainder of either real or personal estate not required for the payment of the legacies specified in the will. The will contemplates, as to the legacies therein named, that it should be executed in personality exclusively, and that any residue of real estate which it might not be necessary to sell in order to pay said legacies should pass under the residuary clause in the will. It was plainly the intent of the testator that, for the purpose of satisfying said legacies, his executor should convert, if need be, all his real estate into money. If the said provisions of the will are valid, the doctrine of equitable conversion would apply to the extent that the provisions of said will may be valid; and the court would deal with the estate as personality. *Dodge v. Williams*, 46 Wis. 97, and 104; *Webster v. Morris*, 66 Wis. 399, 57 Am. Rep. 278. It will be seen upon an examination of the record that if a residue of realty remained unsold, the sale of which was not necessary for the payment of such bequests, the validity of the will as a devise of such realty will be determined by principles involved in the determination of the validity of the bequests above stated. All the contested provisions of the will are essentially trust provisions, and appear to be void for uncertainty, and wholly incapable of being executed by a court of equity by virtue of its judicial jurisdiction over private trusts. Unless they can be so executed, they must necessarily fail; for it is settled that the doctrine of *cy près*, as it existed in England, and as it has been applied in some of the states of the American Union (whereby trust provisions are administered and executed as near to the presumed intention of the donor or founder as may be), is not recognized or acted upon by the courts of this state as a part of the judicial power of the state. The doctrine rests upon a prerogative or sovereign power, is not strictly judicial in its nature, and consequently the courts of the state cannot exercise it. *Fuller's Will*, 75 Wis. 435; *Heiss v. Murphey*, 40 Wis. 276; *Ruth v. Oberbrunner*, 40 Wis. 238. We are of opinion that the trust provisions in question are void for uncertainty, in that no certain and competent beneficiaries are named who may come into a court, and claim and establish their right to the fund and to the execution of the trusts of the will; and no method has been prescribed or pointed out for the administration of the several funds or their application to the purposes of the supposed trusts. The testator has not fully defined his trust purposes, but has left them so indefinite that it is impossible for the court, in the exercise of its judicial functions, to administer them after the manner of private trusts, without, in substance, making a new will for the testator, or, at least, new and effective provisions to carry his supposed intentions into effect. *Fuller's Will*, 75 Wis. 435. In order

that these trusts shall be sustained, they must be of such a clear and definite nature that the court can deal with them in the exercise of its ordinary judicial functions, and render them effective. *Webster v. Morris*, 66 Wis. 396, 57 Am. Rep. 278; *Heiss v. Murphey*, 40 Wis. 276; *Hoffen's Estate*, 70 Wis. 522. The position that the disputed trust provisions of this will are hopelessly indefinite and uncertain, for the reasons stated, is supported by very many recent and well-considered cases, and by arguments which we are compelled to regard as unanswerable. It was conceded by the learned counsel for the party seeking to maintain these several disputed provisions that, regarded as trusts, they must necessarily fail. That they are trust provisions, imposing active duties upon the trustee, does not, we think, upon a consideration of their terms, admit of doubt or question.

1. The bequest of \$300 to the bishop of Fond du Lac, Wisconsin, is "to be used by him for the benefit and behoof of the Protestant Episcopal Church of Fond du Lac, Wisconsin." The Protestant Episcopal Church of the diocese of Fond du Lac is not, so far as we are advised, a body corporate or legal entity, capable in law of taking, claiming, or asserting any right in court to this fund, and could not, as against the personal representatives and distributees of the testator or donor, apply for and have it paid over. It consists, as we understand, of several churches or organizations, and there has been no selection or provision as to which of said churches, or what members of either of them, are to take or participate in the donor's bounty, or to what extent, nor has there been authority conferred on anyone to make such selection. In the absence of such provision, the court will be powerless to make any such selection without any plan or scheme, *cy près*, for the distribution of the funds.

2. The seventh or residuary clause of the will is of like character, and subject to similar infirmities. The property to be affected by this provision is "to be used" by the Roman Catholic bishop of the diocese of Green Bay, "for the benefit and behoof of the Roman Catholic Church." What church or body is thus designated or intended? Is it the Roman Catholic Church in any particular city, state, or diocese? Certainly, no such church is specified. Or does this designation include the Roman Catholic Church throughout the entire world? The difficulty—indeed, the utter impossibility—of dealing with and executing this provision as a valid trust is, we think, obvious and insuperable; and, within the authorities, this clause of the will must be regarded, for these reasons, as void and inoperative for any purpose, and utterly ineffective to pass any interest or estate whatever to the bishop of the Roman Catholic Church of the diocese of Green Bay. Manifestly, he could not take or derive thereunder any trust estate or interest which a court of equity could execute, protect, or enforce, for want of certain, competent, and definite beneficiaries of the trust. It is evident that no one of these trust provisions affecting the testator's real estate can be sustained under the statute in relation to uses and trusts. No one of them is for any one of the purposes specified in § 2081, Rev. Stat. [San-

born & [B. Anno. Stat.], for which express trusts in real estate may be created; and neither of them is so framed that it can be sustained as being "for the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it." Whatever residue, therefore, of real estate, may remain after satisfying the valid bequests of the will, is undisposed of by it, and must go to the heirs-at-law of the testator. Failing the bequests in the fifth and seventh clauses in the will, the purpose of the conversion of real estate into personalty ceases, except as to the valid bequests. The case in this respect falls within the general principle that a power of sale, however preperemptory in form, does not operate as a conversion in aid of a particular purpose of the testator where the testator's plan or purpose fails by reason of illegality, lapse, or other cause. In such event an intention to convert realty into personalty will not be implied, and the property retains its original character, and goes to the heir or next of kin as real or personal estate, as the case may be. *Read v. Williams*, 125 N. Y. 571.

The bequest for the Catholic Orphan Asylum at Green Bay, Wisconsin, an incorporated body, was sustained, and is not in question on these appeals. That part of the judgment adjudging the bequest in the sixth clause of the will of \$500, to the trustees of the Roman Catholic Church at Chilton, Calumet county, to wit, St. Augustine Church (to be used for the benefit of said church, and in repairing the same), void, does not appear to have been appealed from, and its validity is not now in question.

The trust provision in the fifth paragraph of the will, bequeathing \$3,650, to be used and applied for masses as therein specified, is also void, for the reason that there is no beneficiary or beneficiaries of the trust who may come into equity and enforce performance. It is evident that such a trust is not capable of execution, and no court could take cognizance of any question in respect to it for want of a competent party to raise and litigate any question of abuse or perversion of the trust. Although the testator has used language ordinarily used for the declaration of a trust, it is argued that the court cannot impute to him the intention of creating a trust simply for the sake of subsequently condemning it. It is the duty of the court to declare the construction and meaning of this clause of the will, and then to determine whether it is in conformity with the law. Where the language is plain and unambiguous, we are not permitted to wrest it from its natural import, in order to save a provision from condemnation. *Cottman v. Grace*, 112 N. Y. 309, 3 L. R. A. 145. The court is still bound to give judgment upon the essential character of the instrument, according to its true legal effect and meaning. In *Ford v. Ford*, 70 Wis. 21, a trust was held to exist under the provisions of a will as a matter of construction, and yet the court declared it void as to a part of the property affected by it. It is a well-settled rule that, where a trust fails for indefiniteness or uncertainty, the representatives or distributees of the donor will prevail over the claimant under the trust. *Levy v. Levy*, 33 N. Y. 107; *Holland v. Alcock*, 108 N. Y. 313. In the

case last cited, the will of G. bequeathed his residuary estate, which consisted exclusively of personalty, to his executors, in trust for the purposes expressed therein, as follows: "To be applied by them for the purpose of having prayers offered in a Roman Catholic Church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory." It was held that the trust so attempted to be created was invalid; and that, as to such residuary estate, the testator died intestate, and the next of kin of the testator were entitled thereto, as there was no beneficiary in existence, or to come into existence, who was interested in or who could demand the execution of the trust. In *Holland v. Alcock*, 108 N. Y. 313, it was said that "when a trust is attempted to be created without any beneficiary entitled to demand its enforcement, the trustee would, if the trust property were in his possession, have the power to hold it to his own use, without accountability to anyone and contrary to the intention of the donor, but for the principle that in such a case a resulting trust attaches in favor of whoever would, but for the alleged trust, be equitably entitled to the property. This equitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. In such a case there is no 'trust' in the sense in which the term is used in jurisprudence. There is simply an honorary and imperfect obligation to carry out the wishes of the donor which the alleged trustee cannot be compelled to perform and which he has no right to perform, contrary to the wishes of those legally or equitably entitled to the property, or who have succeeded to the title of the original donor. The existence of a valid trust capable of enforcement is consequently essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor. A merely nominal trust in the performance of which no ascertainable person has any interest, and which is to be performed or not as the person to whom the money is given thinks fit, has never been held to be sufficient for that purpose." In *Levy v. Levy*, 33 N. Y. 107, Wright, J., said that, "if there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement, is void." *Priehard v. Thompson*, 95 N. Y. 76, 47 Am. Rep. 9. And in *Fodick v. Hempstead*, 125 N. Y. 589, 11 L. R. A. 715, it was held that, to constitute a valid testamentary trust, there must be a defined beneficiary either named or capable of being ascertained, within the rules of law applicable in such cases. The beneficiaries, under these disputed trust provisions, are neither named nor capable of being ascertained, within the rules of law applicable to such cases. The elaborate decision in the case of *Holland v. Alcock*, 108 N. Y. 312, would seem to be decisive of the trust for masses; nor is it supported by the case of *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550, as explained in *People v. Powers*, 147 N. Y. 104, 35 L. R. A. 502. In *Holland v. Alcock*, 108 N. Y. 312, it was contended that the disposition in question contained all the elements of a valid trust of personal

property; that there were definite and competent trustees; that the purpose of the trust was lawful, and it was sufficiently defined to be capable of being enforced by a court of equity, as the court could decree the payment of the legacies for the purposes directed by the will. But to this contention the court responded that, if all this should be conceded, there is still one more important element lacking. There is no beneficiary in existence, or to come into existence, who is interested in or can demand the execution of the trust. No defined or ascertainable living person has, or ever can have, any temporal interest in its performance; nor is any incorporated church designated, so as to entitle it to claim any portion of the fund. The absence of a defined beneficiary is, as a general rule, a fatal objection to any attempt to create a valid trust. In *Read v. Williams*, 125 N. Y. 560, the bequest was to such charitable institutions and in such proportions as the executors, by and with the advice of the testatrix's friend, Rev. John Hall, D. D., should choose and designate. After the death of the testatrix, the executors, with the advice and approval of Dr. Hall, made a written designation of certain incorporated charitable institutions; but it was held, under the language used, a charitable institution was not capable of taking, and that it was not such a trust as could be carried into execution by the court; and it was therefore held void. In *Fordick v. Hempstead* the bequest was to the town, to keep as a fund for the support of the poor of the town; and it was held that the bequest was indefinite and invalid, for the want of an ascertained beneficiary, the "poor of the town" being too general; and it was said that, applying the rule to these cases, it appears that the conclusion is inevitable that the trust attempted to be created is unenforceable, for the reason of a failure to designate the beneficiary, or to designate or describe a class or kind of beneficiary, to whom distribution is practicable, or that could with reasonable certainty be identified and ascertained. These considerations and authorities sustain as well the proposition that the residuary clause of the will relied on is clearly invalid and inoperative.

3. In support of the cross appeal of the executor from so much of the judgment as declares that part of the fifth paragraph of the will bequeathing \$3,650, to be used and applied for masses as therein specified, void for indefiniteness and uncertainty, it was contended that this provision was not in fact valid as a trust, but that it was a valid bequest of that sum personally to the bishop of the diocese, and that there was no limitation of this bequest in his hands; that it was his to use and enjoy as he chose; that he might burn it up the moment received, and his doing so would not impair in any degree his ability to execute the testator's wish; that it was not named as a consideration for the masses; and that the bishop could as well perform the service without as with it. It was also contended "that this gift was absolute to the church." We know of no legal reason why any person of the Catholic faith, believing in the efficacy of masses, may not make a direct gift or bequest to any bishop or priest of any sum out of his property or estate for masses for the repose of his soul or the souls

of others, as he may choose. Such gifts or bequests, when made in clear, direct, and legal form, should be upheld; and they are not to be considered as impeachable or invalid, under the rule that prevailed in England, by which they were there held void, as gifts to superstitious uses. No such rule or principle obtains here. Had the testator made a plain, direct bequest of the sum in question to Bishop Messmer, or to any bishop or priest, for masses for the repose of the souls of the persons named in his will in that behalf, it would certainly be our duty to declare it valid, and give full effect to it. It is a matter of regret when a will or other disposition of property is so framed that effect cannot be legally given to what may well be supposed to have been the intention of the testator or donor; but the law, for wise and just reasons of public policy, has established rules and has made provisions in these respects that may not be disregarded. The true interests of society are best subserved in all such cases by faithfully following the law made to regulate and protect the interests of all alike; and it is the duty of courts in all such cases to adhere to it, and uphold its salutary provisions and principles. As has already been said, we are clearly of the opinion that the fifth clause of the will is essentially a trust provision. There is no foundation in the language used for the contention that this clause operates as a bequest in favor of any church or person. We are to give full force and effect to the language of the testator, and this, in the strongest and clearest terms, excludes the contention of the counsel for the bishop. It does not give or bequeath to S. G. Messmer, in his personal right or individual capacity, any sum whatever for masses or other purpose. The position of the parties and the relations between them seem to repel any such intention to bestow the sum named as a personal bequest. The express language of the will is that it is given "to be used and applied as follows: For masses for the repose of," etc. This language is the proper and appropriate language quite universally used to create trust provisions of an active character in wills and other instruments. It excludes the idea of personal interest on the part of the donee of the fund, or any authority to make a personal use and application of it. It would be a most unwarranted construction, we think, to place upon this provision, to hold that language imposing a mere matter of duty—to use and apply a fund for a particular purpose—should operate by way of gift to the person upon whom the instrument imposed the duty. The bequest is not to any church, nor to Bishop Messmer. It was not designed to include him personally, because it could not be known that upon the occurrence of the death of the testator, by which the will would become operative, he would be bishop, so as to answer the description in the will. A similar contention—whether a trust provision, invalid as such, might be considered a direct bequest—was decided in *Festorazzi v. St. Joseph Roman Catholic Church*, 25 L. R. A. 360, 104 Ala. 327, and in the note to which the cases bearing upon this question appear to have been fully collected. The clauses of the will there in question were substantially the same as in the case at bar: "I give and bequeath to the Ro-

man Catholic Cathedral in the city of Mobile the sum of \$3,000, the same to be used in solemn masses for the repose of my soul;" and, "I give and bequeath to the Roman Catholic Church of St. Joseph in the city of Mobile the sum of \$2,000, also to be used in solemn masses for the repose of my soul." And it was held that the provisions could not be considered a direct bequest to the church for its general use, and that the form of the bequest repelled the idea that a gift to the church for its general use was intended. The court said: "The bequest is to the church, 'to be used in solemn masses for the repose of my soul.' Similar bequests have been many times before the courts in England and this country, and in all the cases, so far as our research extends, they were treated as having the form and nature of the declaration of a use or trust, and not as direct gifts to, and for the general uses of, the church. An application of the fund to other uses than securing masses to be said for the repose of the donor's soul would contravene the intent and purpose of the testator;" that the authorities, whether English or American, are potent to show that they partake of the nature of trusts, and cannot be treated as gifts to the churches themselves. And it was said that the trust was not valid as a private trust, for the want of a living beneficiary; that a trust in form of which no one could enjoy or enforce the use is no trust, and that argument was unnecessary to show that there was no imaginable being possessing power to enforce the use declared in the bequest; that the executor could not, because he succeeds only to the right of the testator; and if the church should receive this bequest, and apply it to paying its debts or supporting its priests, the purpose would be clearly violated. But what living person is authorized to call the trustee to account for the misuse of the fund? If a trust for a specific purpose fails by the failure of the pur-

pose, the property reverts to the donor or his heirs; and if the gift is made upon a trust insufficiently or ineffectually declared, as if it is too indefinite, vague, and uncertain to be carried into effect, the gift will revert to the settler, his heirs or representatives. And it seems to be well settled that, where a gift is made upon trusts that are void in whole or in part for illegality, a trust will result to the donor, his heirs or legal representatives, if the property is not otherwise disposed of; and the donee will take in trust for the donor or his heirs or representatives. The case of *Rhymer's Appeal*, 93 Pa. 142-145, 39 Am. Rep. 736, is an authority to show that the provision in question was a trust provision, and not a bequest by which the parties named were intended to take beneficially. We hold that the disputed trust provisions of the will of the testator are void trusts, and are not valid personal bequests.

It follows from these views that *so much of the judgment* appealed from by the plaintiffs as adjudges that the deceased, Owen McHugh, disposed of \$300 of his estate to the defendant C. C. Grafton, Protestant Episcopal bishop of Fond du Lac, and so much thereof as orders and adjudges that the rest, residue, and remainder of the estate of said deceased be assigned to S. G. Messmer, Roman Catholic bishop of Green Bay, for the benefit and behoof of the Roman Catholic Church of said diocese, *be reversed*; and that *so much of the judgment* appealed from by Patrick McCole, executor of the deceased, declaring that part of the fifth paragraph of the will of the testator bequeathing \$3,650, to be used for masses as therein specified, void for indefiniteness and uncertainty, *be affirmed*. The costs of the respective parties, to be allowed and adjusted by the judge of the county court, are to be paid out of the estate of the testator. It is ordered accordingly.

ILLINOIS SUPREME COURT.

James F. K. HOEFFER *et al.*, *Appts.*, v.

Patrick CLOGAN *et al.*

(171 Ill. 462.)

- 1. Trustees representing a religious society** to which a devise was made in trust to expend the proceeds in saying masses are proper parties to appeal from a decision against the devise.
- 2. A devise and bequest to a church in trust to expend the proceeds in saying masses** for the repose of the souls of certain persons is not void as a mere private trust, but is a valid, charitable gift, aiding to support the clergy and public worship, as it is presumed that the masses will be said in public.
- 3. A trustee or trustees will be appointed** by the court to take gifts and apply

them to the purposes of the trust, when necessary to prevent the failure thereof.

(February 14, 1898.)

A PPEAL by defendants Hoeffer *et al.* from a decree of the Circuit Court for Cook County declaring void certain bequests in the will of Andrew Clogan, deceased. *Reversed*. The facts are stated in the opinion.

Mr. William Dillon for appellants.

Messrs. A. J. Redmond and Avery R. Hayes for appellees.

Cartwright, J., delivered the opinion of the court:

Andrew Clogan, of Chicago, died June 6, 1892, leaving a last will and testament, which was admitted to probate, and letters testamentary were issued to the executor, James Clogan. The fourth and fifth clauses of the will are as follows: "Fourth, I give and devise unto the Holy Family Church (on West Twelfth street), its successors and assigns, lot

† NOTE.—See note to cases preceding.

56 in Sharp & Smith's subdivision of block 42, in the Canal Trustees' subdivision of the west one half (W. $\frac{1}{2}$) of the west one half (W. $\frac{1}{4}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section seventeen (17), town thirty-nine (39), north, range fourteen (14) east of the third principal meridian, in Chicago, Cook county, Illinois, together with the building and improvements thereon, in trust for the following purposes: To sell the same, and expend the proceeds of said sale in saying masses for the repose of my soul, and the souls of my deceased wife, Margaret Clogan, my mother-in-law, Ellen Hurley, and my brother-in-law, James Hurley. Fifth, I give and bequeath unto the Holy Family Church (on West Twelfth street), the sum of \$1,000, in trust to be expended in saying masses for the repose of my soul and the soul of my deceased father, Patrick Clogan, mother, Julia Clogan, and sister, Margaret Clogan." By the will the testator also directed the expenditure of \$250 in erecting a monument on his lot in Calvary Cemetery, bequeathed \$500 to his sister Mary Daly, and devised certain real estate to his brother, Patrick Clogan, and his nephew, the executor, James Clogan, and by the seventh clause said James Clogan was made residuary devisee. On March 17, 1896, said Patrick Clogan purchased from said James Clogan all his interest as residuary devisee in the property mentioned in the fourth clause of the will, and afterwards filed the bill in this case, alleging the above facts, and averring that there was no society or corporation in Chicago, on West Twelfth street, known as the Holy Family Church, but that there was an unincorporated religious society known as the Holy Family Parish, which had a church on West Twelfth street, and that the title to said church was in the appellants, clergymen, who are, respectively, rector, assistant rector, and treasurer of said Holy Family Parish, and their successors, as such, in trust for the purposes of the Society of Jesus, including the maintenance of the church for the benefit of the Holy Family Parish. The Holy Family Church, James Clogan, in his own right and as executor, Mary Daly and appellants were made defendants. The prayer of the bill was that the will should be construed, and the validity of the devise and bequest to be expended in saying masses for the repose of souls should be determined. James Clogan and Mary Daly answered, admitting the allegations of the bill. The amended answer of appellants admitted the facts alleged in the bill, and averred that the church referred to therein was commonly known as the Holy Family Church, and was the only one in Chicago of that name; that the mass was a solemn act of worship according to the belief and practice of the Roman Catholic Church; that mass was celebrated several times each day at the said Holy Family Church, and that whenever mass was so celebrated the doors of the church were open, and such of the public as might desire to worship at such celebration of mass were admitted to do so. The cause was heard on the bill and answers so filed, and the court decreed the fourth and fifth clauses of the will null and void; that the title to the lot therein described was vested in Patrick Clogan, as grantee of the residuary devisee; and that the \$1,000 mentioned in the

fifth clause should be paid to the residuary legatee, James Clogan, in due course of administration. An appeal to this court was prayed by appellants and allowed by the court.

Appellee Patrick Clogan has moved to dismiss the appeal for want of jurisdiction, and because appellants have no interest in the cause. The purpose of the bill was to settle the question whether the fee-simple title to the lot described in the fourth clause of the will passed under that clause, or whether the attempted devise was void, and the title passed to the residuary devisee under the seventh clause. The decree of the circuit court held the devise of the freehold by the fourth clause void, and established title in Patrick Clogan. A freehold is involved in the appeal from that decree. Appellants are the officers of the Holy Family Parish, and trustees representing the religious society to which the devise was made. They were made defendants to the bill as representing such society, and their official relation to the parish and church makes them proper parties to represent it in the question of the true construction of the will, and the validity of the devise and bequest. The motion to dismiss the appeal is denied.

The devise and bequest were made to the Holy Family Church, in trust for a specific purpose, which was that the church expend the proceeds of the sale of the real estate and the amount of the bequests in masses for the repose of the souls of the persons named. They were not intended as gifts to the church for its general uses, and any other application than that specified in the will would contravene the purpose of the testator. This being so, it is claimed that the trust is void, because it is a private trust, with the souls of particular deceased persons as beneficiaries, none of whom can come into court and call the trustees to account or enforce its execution, and also for want of a trustee capable of taking legal title to the property. On the other hand, it is claimed that the devise and legacy are for a charitable use, within the meaning and spirit of the doctrine on that subject, and if this position is correct, the rules of law which would invalidate them as an express private trust will not affect their validity. The doctrine of charitable uses has been repeatedly held to be a part of the law of this state. The equitable jurisdiction over such trusts was not derived from the statute of charitable uses (43 Eliz. chap. 4), but prior to and independent of that statute charities were sustained, irrespective of indefiniteness of the beneficiaries, or the lack of trustees, or the fact that the trustees appointed were not competent to take (*Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205; *Heuser v. Harris*, 42 Ill. 425). The statute, however, became a part of the common law of this state. *Heuser v. Harris*, 42 Ill. 425; *Andrews v. Andrews*, 110 Ill. 223; *Hunt v. Fowler*, 121 Ill. 269. The statute of charitable uses of Elizabeth has, since its passage, been considered as showing the general spirit and intent of the term "charitable," and the objects which come within such general spirit and intent are to be so regarded. The definition given by Mr. Justice Gray in the case of *Jackson v. Phillips*, 14 Allen, 589, was adopted and approved by this court in the case

of *Crerar v. Williams*, 145 Ill. 625, 21 L. R. A. 454. It is as follows: "A charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." Any trust coming within this definition for the benefit of an indefinite class of persons sufficiently designated to indicate the intention of the donor, and constituting some portion or class of the public, is a charitable trust. Among such objects are the support and propagation of religion, and the maintenance of religious services (*Andrews v. Andrews*, 110 Ill. 223), to pay the expense of preaching and salary of rectors (*Alden v. St. Peter's Parish*, 158 Ill. 631, 30 L. R. A. 232), or the preaching of an annual sermon in memory of the testator (*Duror v. Motteux*, 1 Ves. Sr. 320). The doctrine of superstitious uses arising from the statute (1 Edw. VI. chap. 14), under which devises for procuring masses were held to be void, is of no force in this state, and has never obtained in the United States. In this country there is absolute religious equality, and no discrimination, in law, is made between different religious creeds or forms of worship. It cannot be denied that bequests for the general advancement of the Roman Catholic religion, the support of its forms of worship, or the benefit of its clergy, are charitable, equally with those for the support or propagation of any other form of religious belief or worship. The nature of the mass, like preaching, prayer, the communion, and other forms of worship, is well understood. It is intended as a repetition of the sacrifice on the cross, Christ offering Himself again through the hands of the priest, and asking pardon for sinners as He did on the cross; and it is the chief and central act of worship in the Roman Catholic Church. It is a public and external form of worship,—a ceremonial which constitutes a visible action. It may be said for any special purpose, but from a liturgical point of view every mass is practically the same. The Roman Catholic Church believes that Christians who leave this world without having sufficiently expiated their sins are obliged to suffer a temporary penalty in the other, and among the special purposes for which masses may be said is the remission of this penalty. A bequest for which special purpose merely adds a particular remembrance to the mass, and does not, in our opinion, change the character of the religious service, and render it a mere private benefit. While the testator may have a belief that it will benefit his soul or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was also a special memorial of some person, or because special prayers should be included in the

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services for particular persons. Memorial services are often held in churches, but they are not less public acts of worship because of their memorial character; and in *Duror v. Motteux*, *supra*, the trust for the preaching of an annual sermon in memory of the testator was held to be a charitable use. The mere fact that the bequest was given with the intention of obtaining some benefit, or from some personal motive, does not rob it of its character as charitable. The masses said in the Holy Family Church were public, and the presumption would be that the public would be admitted, the same as at any other act of worship of any other Christian sect. The bequest is not only for an act of religious worship, but it is an aid to the support of the clergy. Although the money paid is not regarded as a purchase of the mass, yet it is retained by the clergy, and, of course, aids in the maintenance of the priesthood.

In the case of *Schouler. Petitioner*, 134 Mass. 426, it was held that a bequest of money for masses was a good, charitable bequest of the testatrix, and the court said: "Masses are religious ceremonials or observances of the church of which she was a member, and come within the religious or pious uses which are upheld as public charities." So, in Pennsylvania, it has been held that a bequest to be expended in masses for the repose of souls is a religious or charitable bequest under the statute. *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736; *Seibert's Appeal*, 18 W. N. C. 276. A recent case, decided in the Irish courts January 24, 1897, is *Atty. Gen. v. Hall*. It was held unanimously, both in the exchequer and the court of appeals, that a bequest for saying masses for the soul of a deceased person was a good charitable bequest. In New York and Wisconsin it has been held that a trust of this character is void for the want of a definite beneficiary to enforce its execution. *Holland v. Alcock*, 108 N. Y. 312; *McHugh v. McCole*, *ante*, 724. But the decisions in those states are readily distinguishable from the rule in this state. In New York charitable uses were abolished by legislation, and in all valid trusts there must be a definite and certain beneficiary to take the equitable title, unless the act of 1893, which is said to have resulted from the decision in *Tilden v. Green*, 130 N. Y. 29, 14 L. R. A. 33, has enlarged or relaxed the rule as to a definite beneficiary. In Wisconsin all trusts are abolished by statute, except certain specific trusts, where there is certainty in the beneficiaries, and in that state bequests have been held to be void which have been uniformly sustained in this court as for charitable purposes. The decision in *McHugh v. McCole*, *ante*, 724, was upon the ground that the doctrine of charitable uses was not in force in that state, and that a trust, to be sustained, must be of a clear and definite nature, and the beneficiary interest to every person therein must be fully expressed and clearly defined upon the face of the instrument. The will in that case gave a certain sum of money to the Roman Catholic bishop of the diocese of Green Bay, Wisconsin, to be used and applied in specified amounts for masses for the repose of testator's soul and the souls of certain named persons. It was held invalid solely on the ground that

the provision amounted to a trust which, under the statutes of that state, was invalid. It was said that, if the testator had made a direct bequest of the sum in question to Bishop Messmer, or to any bishop or priest, for masses for the repose of the souls of persons named in his will, it would be valid, and the court said: "We know of no legal reason why any person of the Catholic faith, believing in the efficacy of masses, may not make a direct gift or bequest to any bishop or priest of any sum out of his property or estate for masses for the repose of his soul or the souls of others, as he may choose." The court expressed regret that the intention of the testator could not be given effect because he had put it in the form of a trust provision. So, also, in New York it has been held in several cases that a bequest to a named priest for the saying of masses for the repose of the souls of specified persons is valid. *Ruppel v. Schlegel*, 55 Hun, 188; *Howard's Estate*, 5 Misc. 295; *Vanderveer v. McKane*, 25 Abb. N. C. 105. The case of *Festorazzi v. St. Joseph's Roman Catholic Church*, 104 Ala. 327, 25 L. R. A. 880, holds that a bequest to that church in the city of Mobile, to be used in solemn mass for the repose of testator's soul, could not be supported as a charitable bequest.

The decision seems to be on the ground that the testator's own soul was the exclusive object and beneficiary of the trust, and that no public benefit was to be derived from it, and no living person was able to call the trustee to account. We are not able to agree with the conclusion that there is no benefit to the church or public in such case, and, as we have seen, the ceremonial of the mass is a public action, which can be seen and taken cognizance of, so that there is no more difficulty in procuring a mass to be said than there is in securing the public delivery of a sermon or a lecture. A bequest for the erection of a public statue or monument to a distinguished person is a good charitable bequest, and yet such person, if deceased, could not enforce its execution, but the courts could and would do it. We think the devise and legacy charitable, and a rule applicable to trusts is that they will not be allowed to fail for want of a competent trustee. The court will appoint a trustee or trustees, to take the gifts and apply them to the purposes of the trust. *Heuser v. Harris*, 42 Ill. 425.

The decree of the Circuit Court is reversed, and the cause is remanded, with directions to proceed in conformity with the views herein expressed.

WISCONSIN SUPREME COURT.

Eva ARON, *Appt.*,
v.
City of WAUSAU, *Respt.*
(.....Wis.....)

1. A demurrer admits issuable facts alleged in the complaint, and not mere conclusions of law from such facts.
2. It is of common knowledge that, in a city, crowds assemble in the streets and on the sidewalks on the 4th of July, and explode fire-crackers and cannon crackers and other combustible materials.
3. A person injured by the explosion of a cannon cracker on a city street on the 4th of July in violation of an ordinance, while persons assembled there are exploding fire-crackers without any common purpose to injure anyone, cannot recover from the city for the damages under Sanb. & B. Anno. Stat. § 938, making a city liable for injury done by a mob or a riot, and under Rev. Stat. § 451, providing that three or more persons shall be guilty of a riot if they assemble in a violent or tumultuous manner to do an unlawful act, or, being together, attempt to act in a violent, unlawful, or tumultuous manner.

(March 1, 1898.)

APPEAL by plaintiff from an order of the Circuit Court for Marathon County sus-

NOTE.—As to the liability of a city for fireworks, see note to *Scanlon v. Wedger* (Mass.) 16 L. R. A. 306; *Fifield v. Phoenix* (Ariz.) 24 L. R. A. 430.

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taining a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by an unlawful assemblage negligently permitted by defendant. *Affirmed*.

The facts are stated in the opinion.

Messrs. Silverthorn, Hurley, Ryan, & Jones, for appellant:

The common purpose of the crowd was to do acts which were in violation of law and in disturbance of the public peace by exciting fear, alarm, and consternation among the people. Such common purpose is unmistakably implied by the conduct of the crowd, and the riot consisted in actually carrying out that purpose.

Bonnerville v. State, 53 Wis. 680; *State v. Snow*, 18 Me. 346; *Solomon v. Kingston*, 24 Hun, 562; *State v. Straw*, 33 Me. 554; *State v. Boies*, 34 Me. 235; *Higgins v. Minaghan*, 78 Wis. 602, 11 L. R. A. 138; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605; *Allegheny County v. Gibson*, 90 Pa. 397, 85 Am. Dec. 670; *Gianfortone v. New Orleans* (C. C. E. D. La.) 24 L. R. A. 592, and annotations; 22 Enc. Brit. p. 564, note.

Messrs. Mylrea, Marchette, & Bird, for respondent:

The statutes generally were intended to provide compensation for damages resulting from local insurrections and disturbances, popular uprisings and excesses, beyond the control of local authorities, evidencing an intention of the populace to take the law into their own hands, and exceeding ordinary violations of law, breaches of the peace, etc. It is to such

occurrences that similar statutes have been applied.

Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670; *Gianfortone v. New Orleans*, 61 Fed. Rep. 64, 24 L. R. A. 592, and cases in note.

The obvious intention of the legislature in the light of the result intended must govern.

Haentze v. Howe, 28 Wis. 298; *Duryea v. New York*, 10 Daly, 300.

The word "unlawful" must be construed in connection with the other adjectives used, otherwise any breach of the peace, or assault by three or more persons, would be a riot. These words were intended as synonyms, the better to express the real meaning.

Bonnerville v. State, 53 Wis. 680.

The complaint alleges the conclusion of law that the acts were done in a "violent, unlawful, and tumultuous manner, to the terror and disturbance of others," but as no facts are pleaded to justify the conclusion it must go for naught.

Stedman v. Berlin (Wis.) 73 N. W. 57, 60.

An essential element of this crime is "some sort of resistance to lawful authority."

Queen v. Hunt, 1 Cox, C. C. 177; 1 Hawk. P. C. chap. 28, § 4, p. 513; 4 Stephen, Com. 9th ed. 215; 2 Roscoe, Crim. Ev. 7th ed. 901; *United States v. Peaco*, 4 Cranch, C. C. 601; *Duryea v. New York*, 10 Daly, 300.

Cassoday, Ch. J., delivered the opinion of the court:

This is an appeal from an order sustaining a demurrer to the complaint upon the ground of insufficiency. Of course the demurrer admits the issuable facts alleged in the complaint, but does not admit mere conclusions of law from the facts so alleged. *Pratt v. Lincoln County*, 61 Wis. 62; *Williams v. Williams*, 63 Wis. 72, 53 Am. Rep. 253; *Stone v. Oconomowoc*, 71 Wis. 159; *Brown v. Phillips*, 71 Wis. 239; *Palmer v. Hawes*, 73 Wis. 50; *Meggett v. Eau Claire*, 81 Wis. 329; *Peake v. Buell*, 90 Wis. 508. The issuable facts so alleged and admitted are to the effect that July 4, 1896, between 6 and 7 o'clock in the evening, the sidewalk along the west side of Third street, and in and along Third street, between Scott street and McClellan street, in Wausau, was occupied by a crowd of thirty or more persons, then and there being and blocking up and obstructing the sidewalk and street, and unlawfully hindering and preventing the plaintiff and others from freely passing along the sidewalk and street, and unnecessarily and unlawfully, and contrary to the city ordinance and the statutes, engaged in exploding, and who did unnecessarily and unlawfully explode, firecrackers and other fireworks, and did unnecessarily and unlawfully throw in the street squibs and other articles containing powder and other explosives, such as giant powder, dynamite, nitro-glycerine, and gun cotton inclosed in strong, heavy pasteboard and strong paper with cement, constituting what is called and known as "cannon crackers" or "American firecrackers,"—in fact, dynamite bombs,—which were dangerous to human life and safety, unless handled with extreme care; that such explosions took place without restraint, in a violent, unlawful, and tumultuous manner, to the terror and disturbance of others and this plaintiff; that while this plaintiff, an unmarried woman, was riding with her brother, in a one-horse buggy, in a quiet manner, at the time and place mentioned, among the persons so assembled without knowing of the danger, and without any negligence on her part, she was struck upon her head and face by one of the cannon crackers or explosive articles or bombs thrown and exploded by someone in the crowd, to the plaintiff unknown, and severely injured by wholly destroying one of her eyes, and greatly impairing her other eye, to her damage in the sum of \$20,000, for which she prayed judgment. Thus stripped of allegations and conclusions of law, and of arguments and exaggerations, the facts alleged in the complaint are few and simple. The city contained more than 10,000 inhabitants. It is of common knowledge that, in such a city, crowds assemble in the streets and on the sidewalks on the 4th of July, and explode firecrackers, cannon crackers, and other combustible materials. In the instant case the explosion was violent and in a tumultuous manner, to the terror of the plaintiff and others. The unknown person who so recklessly threw and exploded the cannon cracker which so cruelly injured the plaintiff is not a party to this action, and, of course, his liability is not before us for consideration. The only question here for consideration, upon the merits, is whether the city is liable. The explosion was in violation of an ordinance of the city, which, by its terms, the mayor and common council had power to suspend on the 4th of July, but which had not been suspended. The complaint alleged that the crowd was an unlawful assemblage,—a riot and a mob,—and in violation, not only of the ordinance, but of the statute. The statute gives a remedy against the city for any bodily harm or injury sustained in consequence of any mob or riot, by any person not implicated therein, and whose act or negligence in no way contributed thereto. *Sanborn & Berryman*, Anno. Stat. § 938. The statute also provides that "any three or more persons, who shall assemble in a violent or tumultuous manner to do an unlawful act, or, being together, shall make any attempt or motion towards doing a lawful or unlawful act, in a violent, unlawful, or tumultuous manner, to the terror or disturbance of others, shall be deemed an unlawful assembly; and if they commit such acts in the manner and with the effect aforesaid, they shall be deemed guilty of a riot." Rev. Stat. § 4511. It will be observed that the "three or more persons" must be so assembled "to do an unlawful act," or being so assembled, shall attempt to do "a lawful or unlawful act, in a violent, unlawful, or tumultuous manner, to the terror or disturbance of others," in order to constitute an unlawful assembly; and then, "if they commit such acts in the manner and with the effect aforesaid, they shall be deemed guilty of a riot." In other words, to constitute such unlawful assembly, the three or more persons must have a common purpose to do the act complained of, and, if they commit such act with such common purpose or intent, then they are to be deemed guilty of a riot. A distinguished text-writer, adopting the defini-

dition taken from the Draft Report of the English Commissioners of 1879, says: "An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble, in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously." 2 Whart. Crim. L. 10th ed. § 1535. "A riot is the tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object. . . . If it be to resist a statute, but not to overthrow government, then, in the United States, . . .

the offense is not treason, though it may be riot or a high misdemeanor." *Id.* § 1537. There is nothing in the complaint to indicate that the crowd in the street, or on the sidewalk, or any three or more persons in the crowd, had any common intent or purpose to injure the plaintiff or any other person by the explosion of the cannon cracker in question. It was thrown and exploded by someone unknown to the plaintiff. Others were throwing and exploding firecrackers, but each person was, apparently, the sole manipulator of his own firecracker, and there was no common intent or purpose, of any three or more persons, to explode any particular firecracker, much less to injure the plaintiff or any other person by such explosion. It is equally apparent that it was not a mob.

The order of the Circuit Court is affirmed.

RHODE ISLAND SUPREME COURT.

John DOLAN

r.

Patrick HUGHES,

Riverside Worsted Mills, Garnishee.

(.....R. I.....)

1. **Fraud in an assignment of wages by a debtor** is not shown by the fact that the assignee never drew the wages, but they were drawn on his orders by the assignor, and immediately paid over to him.
2. **An assignment of wages for the period of one year**, made by a person then working under a contract, whether it was for work by the day, by the week, or otherwise, is valid, under Gen. Laws, chap. 254, § 28, when made and recorded as the statute provides.

(May 5, 1896.)

EXCEPTIONS to rulings of the Court of Common Pleas for Providence County charging the garnishee for wages alleged to be due the defendant in a proceeding to collect money alleged to be due by defendant to plaintiff. *Sustained.*

The facts are stated in the opinion.

Mr. William C. Barry, for defendant:

The assignment of defendant's wages to the assignee for the space of one year was valid and in accordance with § 28, chap. 254, Gen. Laws.

Thayer v. Kelley, 28 Vt. 19, 65 Am. Dec. 220; *Tiernay v. McGarity*, 14 R. I. 231; *Kennedy v. Tiernay*, 14 R. I. 528; *Hartley v. Tapley*, 2 Gray, 565; *Brackett v. Blake*, 7 Met. 335, 41 Am. Dec. 442; *Emery v. Lawrence*, 8 Cush. 151; *Chase v. Duby*, 20 R. I. —.

The title to future earnings belonged of right to assignee, and his delegating another, even the defendant, to obtain said wages, was not

of itself fraudulent, as the said assignee might for convenience, or any other way best suited to himself, secure another to obtain same.

Privity of contract and interest must in general combine to justify charging the garnishee. *Drake*, Attachm. § 612.

Mr. C. Slocum Smith for plaintiff.

Tillinghast, J., delivered the opinion of the court:

This case is before us on exceptions to the rulings of the common pleas division whereby the Riverside Woolen Mills was charged as garnishee. The record shows that the defendant was in the employ of said Riverside Mills at the time of the attachment of his wages, on November 5, 1897, and that the sum of \$13.02 of his earnings was then in its hands. It also shows that prior to said attachment, *viz.*, on the 24th day of November, 1896, the defendant for a valuable consideration, had assigned his wages to one John F. Fogarty for the period of one year, and that said assignment was duly recorded; that at the time of the making of the assignment the defendant was indebted to said Fogarty, and continued to be, and still is, indebted to him, for groceries and other necessities furnished to him and his family; and that he was so indebted at the time of the service of the writ in this case. It further appears that said Fogarty, assignee, never personally drew the defendant's wages, but that the same were drawn by the defendant upon orders given by the assignee for that purpose, and that all of the moneys so collected were immediately paid over by the defendant to the assignee. In view of these facts, the common pleas division held that, as the assignee did not personally draw the defendant's wages, but permitted the defendant to draw the same, the assignment was fraudulent and void. The court also held that, there being no evidence of any time contract between the defendant and the garnishee, the defendant is presumed to have been hired by the day, and hence had nothing assignable to set over to the claimant.

NOTE.—As to the assignment of future earnings, see also *Sandwich Mfg. Co. v. Robinson* (Iowa) 14 L. R. A. 128, and *note*.

We think the court erred in its decision. The mere fact that the wages were drawn or collected by the defendant in the manner aforesaid, did not, in our opinion, render the assignment fraudulent and void. In thus drawing his wages the defendant was simply acting as the agent or messenger of the assignee. That the latter could have authorized any other person than the defendant to draw the wages for him will not be questioned. Why could he not as well confer this power on the defendant as upon any other person? If it be answered that to do so would furnish opportunity for fraud, as between the assignor and assignee, by enabling a debtor to prevent other creditors from attaching the money, we reply that while this may be so, and while we might perhaps be inclined to hold that, where the assignor is allowed to draw wages thus assigned without explanation as to the disposition thereof, it would afford prima facie evidence of collusion and fraud, yet when it appears, as it does in this case, that the wages drawn by the assignor were immediately and fully paid over to the assignee, we fail to see that fraud can properly be inferred. The presumption of law is in favor of the validity of the assignment and of the good faith of the transactions thereunder, and they must be proved to have been fraudulently made before the court can decide against them. *Johnson v. Thayer*, 17 Me. 408; *Adams v. Robinson*, 1 Pick. 561; *Drake, Attachm.* § 615; *Shinn, Attachm.* § 114. The case is different from that of *Hickey v. Ryan*, 19 R. I. 399, cited by plaintiff, where it appeared that the assignee returned to the defendant about one half of the wages earned by him each week, which conduct was held to be fraudulent, as against other creditors.

As to the second ground upon which the common pleas division held that the assignment was invalid, we are of opinion that it is not tenable. R. I. Gen. Laws, chap. 254, § 28, recognizes the validity of an assignment of future earnings when made and recorded in accordance therewith, and this court has repeatedly held such an assignment to be good. *Tiernay v. McGarity*, 14 R. I. 281; *Kennedy v. Tiernay*, 14 R. I. 528; *Chase v. Duby*, 20 R. I. —. It is true that in the case at bar the record does not show the terms of the hiring, but

it does show that the defendant was in the employ of the garnishee, and had been for a considerable period of time, and that his wages were payable weekly. In other words it appears that there was a present subsisting contract between the defendant and the garnishee at the time of the making of the assignment, and that out of that contract an indebtedness did in fact arise upon which the assignment could operate. It is not the case of a mere possibility of future indebtedness without any subsisting engagement upon which it shall accrue (see assignment in *Kennedy v. Tiernay*, 14 R. I. 528), but the case of both an actual and a possible debt arising, and contingently to arise, out of a subsisting contract; and, this being so, we do not see that it is material whether it was a contract to work by the day, by the week, or otherwise. If it was a hiring by the day, as the common pleas division decided, then it was evidently not for a single day, but was a continuous hiring by the day, so long as the contract of hiring continued. In *McConnell on Trustee Process* (§ 209), the law is summarized as follows: "The contract of employment need not cover a fixed time. A hiring is all that is necessary, even though the employee may leave, or the employer may discharge, at any time. Nor need the hiring be for a regular salary. A hiring by the piece will be sufficient, although the wages vary in amount from month to month. And the same rule applies where the assignor works by the day, but his wages are paid monthly. And so the contract may be defeasible or avoidable. In such case it will be valid until defeated by some act of the parties. And although wages may be conditional or uncertain as to amount, or contingent, still they may be assigned." *Garland v. Harrington*, 51 N. H. 409, and *Lannan v. Smith*, 7 Gray, 150, were cases where the hiring was by the day, and it was held in each of them that the wages were assignable.

We therefore decide that the assignment in question was effectual to convey the wages of the defendant to said Fogarty, and hence that the garnishee should be discharged. The case is remitted to the common pleas division for further proceedings in accordance with this opinion.

NORTH CAROLINA SUPREME COURT.

Nancy E. SIMS, by Her Guardian, W. R. Sprinkle,

v.

W. M. SIMS, Appt.

(121 N. C. 297.)

1. A marriage with a person who has, in appropriate proceedings, been found to be men-

- NOTE.—*Marriage of person when insane.*
- I. Invalidity of.
 - II. Degree of incapacity which will affect.
 - III. Test of capacity to contract.
 - IV. Test of capacity to know the nature of the act.
 - V. Incapacity combined with fraud.
 - VI. Incapacity as a ground for divorce.
 - VII. Ratification and waiver of right to attack.
 - VIII. Evidence of incapacity.
 - a. Presumption and burden of proof.
 - b. Sufficiency, weight, and admissibility.
 - c. Effect of inquisition.
 - IX. The annulment.
 - a. Necessity of decree for.
 - b. Jurisdiction; procedure.
 - c. Effect.

I. Invalidity of.

By the common law an idiot might contract marriage, and the marriage of an idiot or lunatic was considered valid. *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641, *dictum*; *Stiles v. West*, cited in *Sid. 112*.

But the universal rule now is that the marriage of parties either of whom lacks the mental capacity to consent, not during a lucid interval, is ineffectual and void *ab initio*. *Waymire v. Jetmore*, 22 Ohio St. 274; *Rawdon v. Rawdon*, 28 Ala. 565; *Unity v. Belgrade*, 76 Me. 419; *Smith v. Smith*, 47 Miss. 211; *Gathings v. Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49; *Foster v. Means*, Speers, Eq. 569, 42 Am. Dec. 832; *Browning v. Reane*, 2 Phillim. Eccl. Rep. 69; *Ash's Case*, 2 Freem. Ch. 259; *Greno's Case*, cited in 2 Freem. Ch. 268; *Smart v. Taylor*, 9 Mod. 98; *Morrison's Case*, cited in 1 Bl. Com. p. 439; 1 Collinson, *Lunacy*, 574; *Legeyt v. O'Brien*, Millward, 325.

Though the insanity was only temporary. *Legeyt v. O'Brien*, Millward, 325.

Idiocy or lunacy is an insuperable impediment to the contracting of marriage, as it is to the entering into of any other contract. *Johnson v. Kincaid*, 37 N. C. (2 Ired. Eq.) 470.

And a marriage of an insane person is absolutely void by reason of the want of capacity of such person to contract. *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Smith v. Smith*, 47 Miss. 211.

Marriage is a civil contract, and will be invalidated by want of consent of capable persons. *Turner v. Meyers*, 1 Hagg. Consist. Rep. 414; *Jenkins v. Jenkins*, 2 Dana, 102, 26 Am. Dec. 437; *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Jaques v. Public Adm.*, 1 Bradf. 490.

And may be avoided, like any other contract, for want of sufficient mental capacity in the parties, if the mind was unsound at the time or incapable of consent, that being an essential element in all contracts. *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275.

And the court, in an action for the annulment of a marriage on the ground of lunacy, has no discretion to refuse a decree, where it is legally demanded, on the ground that such refusal would be best for all the parties under existing circumstances. *Crump v. Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447.

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tally imbecile, is absolutely void *ab initio*, and can be at any time so declared by the court.

2. A guardian of a lunatic cannot be removed in an *ex parte* proceeding in which no notice is served on him.

3. A marriage void on account of lunacy cannot be cured merely by cohabitation after restoration.

4. The guardian of a lunatic may bring

So, the marriage of a lunatic does not determine the right to her custody. *Ash's Case*, 2 Freem. Ch. 259.

And the marriage of a man to a woman who was before and at the time of the marriage a lunatic, incapable of entering into a valid marriage contract, does not confer the settlement of the husband on the wife where the marriage had been decreed to be a nullity, on that ground. *Reading v. Ludlow*, 43 Vt. 623.

But a woman may gain a settlement by residence in the house of her husband, if she has property and sufficient intellect to choose a home, though she was insane at the time of her marriage, and afterwards, and her marriage was decreed to be null and void for that cause. *Concord v. Rumney*, 45 N. H. 423.

So, administration of the effects of a deceased person will be refused to the man who married her where the marriage is null and void on the ground of her mental imbecility. *Browning v. Reane*, 2 Phillim. Eccl. Rep. 60.

And a marriage ceremony performed while the man was upon his deathbed, *in extremis* and helpless, and surrounded by the woman married and her friends, when he was apparently oblivious to his former wife and children, affords no presumption against the validity of his previous marriage. *Christy v. Clarke*, 45 Barb. 529.

Nor will the performance of a marriage ceremony, and continued cohabitation, with a person whose mind had remained constantly unsound until death, constitute a legal marriage which will give claim to dower or curtesy in his or her estate. *Jenkins v. Jenkins*, 2 Dana, 102, 26 Am. Dec. 437.

In *Wiser v. Lockwood*, 43 Vt. 720, however, it was held that though a marriage be one which can be avoided on the ground of the lunacy of a party, it is still a marriage in fact, and on the death of the husband the wife is entitled to a distributive share of his estate.

But while a lunatic, during his lunacy, is not capable of marriage, he may marry during a lucid interval. *Ash's Case*, 2 Freem. Ch. 259; *Rawdon v. Rawdon*, 28 Ala. 565.

And where one is rational at the time of his marriage, subsequent unsoundness will not invalidate it. *Banker v. Banker*, 63 N. Y. 409.

To warrant the annulment of a marriage on the ground that the defendant was a lunatic, it must appear that such cause existed at the time of the marriage. *Forman v. Forman*, 53 N. Y. S. R. 689.

And where a woman marries a man of sufficient mental ability to comprehend the obligations assumed and the functions of the marriage, and cohabits with him, and they have children, and misfortune overtakes him, and he grows worse and has to be confined in an asylum for the insane, the subsequent affliction furnishes her with no ground for the annulment of the marriage. *Forman v. Forman*, 53 N. Y. S. R. 689.

Nor can an action be maintained for the annulment of the marriage of an insane person where at the time of the marriage he was fully competent to enter into the marriage relation, which he

an action to have her marriage, solemnized after she was declared insane, set aside.

5. Receipt and confirmation of the report of a jury finding lunacy as required by

statute will be presumed if the clerk acts on it by appointing a guardian.

(December 7, 1897.)

did understandingly, and the parties to the marriage lived together as husband and wife for more than a year, and until his death, without objection from his guardian or anyone else, or any proceeding being taken to annul the marriage. *McCleary v. Barcalow*, 6 Ohio C. C. 481.

Neither insanity nor idiocy of a party at the time of marriage, however, is a sufficient ground for divorce, or a decree of nullity, unless the other party was ignorant of such disability at the time of the marriage. *Smith v. Smith*, 47 Miss. 211.

One who enters into, and consummates, a contract of marriage with full knowledge of the insanity of the person married, is estopped from denying the validity of the marriage on the ground of such insanity, the contract being invalid only at the election of the insane party. *Keyes v. Keyes*, 22 N. H. 558, *dictum*.

But the fact that the nephew of an alleged insane person opposed his marriage, to the knowledge of the person about to marry him, is not notice to her that her intended husband was insane, which will sustain the claim that she did not become a party to the marriage contract in good faith, and therefore that she is not entitled to compensation by virtue of Iowa Code, § 2238, providing that, in case either party enters into a contract of marriage in good faith, supposing the other party to be capable of contracting, and the marriage is declared a nullity, the court may decree such innocent person compensation as in case of divorce, where she knew of his doing business and managing large property interests, and supposed him to be of sound mind, and he exhibited no indications of mental unsoundness. *Barber v. Barber*, 74 Iowa, 801.

II. Degree of incapacity which will affect.

While the rule is generally laid down as above stated, there are different degrees of mental incapacity, and it is not every mental defect which will invalidate a marriage.

Thus, mere weakness of mind on the part of a party to a marriage will not avoid it, unless it amounts to derangement. *Rawdon v. Rawdon*, 23 Ala. 566; *Ward v. Dulaney*, 23 Miss. 410; *Baughman v. Baughman*, 32 Kan. 538; *Nonnemacher v. Nonnemacher*, 150 Pa. 634.

And mere imbecility or weakness of mind, caused by disease, is not sufficient ground for avoiding a marriage when unaccompanied by circumstances showing that it was taken advantage of. *Baughman v. Baughman*, 32 Kan. 538.

Nor will great eccentricity of conduct be sufficient ground, unless it reaches a point that evinces inability to comprehend the subject-matter of the contract. *Ward v. Dulaney*, 23 Miss. 410; *Nonnemacher v. Nonnemacher*, 150 Pa. 634.

Nor will mere proof of defection, or singularity of conduct. *Anonymous*, 4 Pick. 32.

And dullness of intellect, coupled with deafness and dumbness, is not alone sufficient to render a person incompetent to marry. *Harrod v. Harrod*, 1 Kay & J. 4, 18 Jur. 858.

And inability upon the part of a deaf and dumb person to understand others in general, especially strangers, and an occasional, and not infrequent, inability to appreciate simple mathematical calculations, are insufficient to show incapacity to contract marriage, or to warrant the granting of an issue as to the validity of the marriage. *Harrod v. Harrod*, 1 Kay & J. 4, 18 Jur. 858.

So, mere proof of the fact of insanity, without more, is not sufficient to warrant a decree of nullity.

lity of a marriage. Concord v. Rumney, 45 N. H. 423.

In annulling a marriage on the ground of lunacy, the law proceeds upon the ground that the party was in fact incapable of making such a contract for want of the proper understanding necessary to yield an intelligent assent to the obligation. *Forman v. Forman*, 53 N. Y. S. R. 639.

And a marriage contract can be declared void on the ground of insanity, only for such want of understanding as to render the party incapable of assenting thereto. *Lewis v. Lewis*, 44 Minn. 124, 9 L. R. A. 506.

And the fact that a party to a marriage is subject to some vice or uncontrollable impulse or propensity will not justify setting it aside as void, where he was otherwise sound and able to understand the nature and obligations of the marriage contract. *Lewis v. Lewis*, 44 Minn. 124, 9 L. R. A. 506.

The terms "non compos mentis," and "of unsound mind," as used with reference to capacity to marry, mean the same thing, and have a determinate legal signification importing, not weakness of understanding, but a total deprivation of sense, and are alike applicable to idiots and lunatics. *Foster v. Means*, Speers, Eq. 669, 42 Am. Dec. 332.

In *Hancock v. Peaty*, L. R. 1 Prob. & Div. 338, 35 L. J. Prob. N. S. 57, however, it was held that the question to be considered on an issue whether a person had sufficient mental capacity to contract a marriage is whether his mind was diseased or not at the time of the contract, and if the evidence established that his mind was diseased at that time, the court will not consider the extent of the derangement.

III. Test of capacity to contract.

Under Ga. Code, § 1702, a marriage of persons unable to contract is void. *Bell v. Bennett*, 73 Ga. 784.

And some of the cases lay down the rule, without reference to statute, that a marriage is invalid where one of the parties to it was so imbecile as not to understand the nature of the contract. *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *Middleborough v. Rochester*, 12 Mass. 383.

And that persons not having the regular use of their understanding sufficient to deal with discretion in the common affairs of life, or whose weakness is so considerable as to amount to derangement, are incapable of contracting a valid marriage. *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 276; *Foster v. Means*, Speers, Eq. 669, 42 Am. Dec. 332.

And a marriage between such a person and a female pauper will not change the place of her settlement from that of her nativity. *Middleborough v. Rochester*, 12 Mass. 383.

And to justify a divorce upon the ground of insanity of the wife at the time of the marriage, within this rule, such evidence of insanity must be given as would justify a jury in a civil action in finding a party incapable of making a contract. *Anonymous*, 4 Pick. 32.

But no greater, if as much, mental capacity is required to make a matrimonial contract, than is required for ordinary business contracts, or a valid testamentary disposition of one's estate. *Kern v. Kern*, 51 N. J. Eq. 574.

And a marriage will not be set aside on the ground of mental incapacity of a party on less proof than would suffice to annul contracts less sacred and important in their nature. *Ward v. Dulaney*, 23 Miss. 410.

APPEAL by defendant from a judgment of the Superior Court for Wilkes County adjudging void a marriage which had been entered into between plaintiff and defendant after

plaintiff had been found to be mentally imbecile. *Affirmed.*

The facts sufficiently appear in the opinion.

And an instruction in an action attacking the legality of a marriage because of the alleged insanity of the husband at the time, that a degree of mind sufficient to enable one to enter into a valid contract or make a valid will or deed is sufficient to enable him to contract matrimony, is sufficiently favorable to the party contesting such marriage. *Atkinson v. Medford*, 48 Me. 510.

Upon the other hand, however, it has been held that the marriage of one who has an intelligent understanding of the nature of the act in which he was engaged, and the contract and relation into which he was entering, is valid, though he was not capable of making business contracts and carrying on business generally. *Nonnemacher v. Nonnemacher*, 159 Pa. 634.

IV. Test of capacity to know the nature of the act.

The rule held by a great majority of the cases makes capacity to know the nature of the act the test of capacity to marry.

Thus, to avoid a contract of marriage on the ground of mental unsoundness within this rule, there must be an inability to know the nature of the act, and to intelligently will to do it. *Baughman v. Baughman*, 32 Kan. 538; *Nonnemacher v. Nonnemacher*, 159 Pa. 634.

Insanity which will disable one to contract marriage must be of such a nature, or of such severity, that the person is incapable of exercising a rational judgment upon the subject. *Concord v. Rumney*, 45 N. H. 423.

The evidence must show that there was such imbecility or unsoundness of mind at the time that the party did not, and could not, have an intelligent understanding of the contract and relation of marriage. *Nonnemacher v. Nonnemacher*, 159 Pa. 634.

The marriage of a woman who was eccentric, and whose mind was affected, is valid where she had mind enough to know what she did, and memory enough to remember it afterwards, and judgment enough to recollect and comment upon the manner and character of the act she had committed. *Ward v. Dulaney*, 23 Miss. 410.

Nor will a marriage be decreed invalid under a statute authorizing the court to decree marriages null and void where either of the parties was at the time insane, where the party alleged to be insane knew his father and uncle at the time, and his trustee, and the nature of the trustee's office, and displayed shrewdness and intelligence when speaking on the subject of the legal relation which he bore him, though his mind was weak and he could not learn to count. *Elzey v. Elzey*, 1 Houst. (Del.) 309.

So, a marriage will not be annulled on the ground that a party thereto was afflicted with a morbid propensity to steal, commonly denominated kleptomania, where it is not proved that she was not otherwise sane, or that her mind was so affected by such propensity as to be incapable of understanding or assenting to the marriage contract. *Lewis v. Lewis*, 44 Minn. 124, 9 L. R. A. 505.

And it will not be set aside upon the ground of the insanity or imbecility of a party thereto, because he was a person of weak intellect, who at times did not express himself coherently, and who was unable to reason from cause to effect, and who had been judicially determined to be unfit to take care of himself and his property, where, until he was thirty-five years of age he had been permitted by his family to care for himself and property, and had so taken care of his estate that it had been preserved if not increased, and his memory was

good, and he manifested shrewdness and judgment in making a bargain, and conducted himself with reference to the marriage without impropriety or peculiarity, and seemed to have a proper conception of the ceremony and to understand the rights, duties, and responsibilities which attach to the marriage relation. *Kern v. Kern*, 51 N. J. Eq. 574.

A marriage contract will be declared null and void, however, where either party from imbecility of mind or deranged intellect is incapable of volition, or unable to comprehend the nature of the engagement entered into. *Ward v. Dulaney*, 23 Miss. 410.

Where the incapacity of a person is such that he is incapable of understanding the nature of the contract of marriage, and incapable from mental imbecility of taking care of his person and property, he cannot dispose of his person or property by a matrimonial contract, any more than by any other contract. *Crump v. Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447; *St. George v. Biddeford*, 78 Me. 568; *Browning v. Reane*, 2 Phillim. Ecol. Rep. 69.

The question in an action for the annulment of a marriage on the ground of the infirmity of mind of a party is, Had he sufficient mental capacity to understand the marriage contract? *Kern v. Kern*, 51 N. J. Eq. 574.

Whether he had possession of his reason at the time of the alleged marriage ceremony, so as to know the effect of the act he was about to perform and be capable of intelligently consenting thereto. *Baughman v. Baughman*, 32 Kan. 538.

The court, in an action to annul a marriage on the ground of lunacy, must determine whether the alleged lunatic was capable of understanding the nature of the contract and the duties and responsibilities which it creates, and was free from the influence of morbid delusions upon the subject. *Durham v. Durham*, L. R. 10 Prob. Div. 80.

The question of the capacity of a party to a marriage to comprehend the nature and consequences of her acts, however, is not to be put generally, but with reference to the very act in question. *Doe v. Roe*, 1 Edm. Sel. Cas. 344.

To render a marriage valid there ought to be enough of capacity on the part of the parties to comprehend the subject, and the duties and responsibilities of the marital relation. *Smith v. Smith*, 47 Miss. 211.

And to avoid a contract of marriage on the ground of mental unsoundness the party alleged to be insane or *non compos mentis* must be incapable of understanding the nature of the contract itself. *Baughman v. Baughman*, 32 Kan. 538.

One who contracts marriage should be held bound thereby, where he had an appreciation of the condition of the marriage state, and understood the rights and responsibilities which attach thereto, and regarded the marriage ceremony as the incident which effected the marriage, though he was a person of weak mind. *Kern v. Kern*, 51 N. J. Eq. 574.

A marriage is not invalid for want of understanding of either of the parties, where they were sufficiently intelligent to understand at the time of the ceremony that they had thereby agreed to cohabit solely together. *Harrod v. Harrod*, 1 Kay & J. 4, 18 Jur. 858.

But a marriage is void if at the time it was contracted and solemnized the husband had not sufficient mental capacity to understand the nature of the marriage contract, and that by it he assumed all the duties, obligations, and responsibilities, and all the rights, growing out of the relations; he need

Mr. W. W. Barber for appellant.
Messrs. Glenn & Manly for appellee.

Clark, J., delivered the opinion of the court:

On November 11, 1893, Nancy E. Sims,

not have understood such duties, obligations, and responsibilities, but should have understood that he took them all upon himself whatever they might be. *St. George v. Biddeford*, 76 Me. 593.

The question in an action to annul a marriage upon the ground of the insanity of a party is not whether she was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusion upon the subject. *Hunter v. Edney*, L. R. 10 Prob. Div. 93.

And an instruction in an action involving the validity of a marriage, given by way of illustrating and enforcing the theory already presented, that the husband must have sufficient mental capacity to understand the nature of the marriage contract, that the same rule would apply to the contract of marriage that would apply to other contracts, is not erroneous. *St. George v. Biddeford*, 76 Me. 593.

Nor is one given in illustration of the rule previously stated, that the husband must have been of sufficient mental capacity to understand the nature of the marriage contract,—that he would be considered incompetent if he had not mental capacity enough to be able to provide a support for a family, when he was possessed of sufficient means for that purpose. *St. George v. Biddeford*, 76 Me. 593.

And a marriage contract is null and void where the prevailing characteristic of the mind of one of the parties is the absence of the reasoning faculties, accompanied by only occasional manifestations of sense, and where only in rare instances the reasoning powers can be detected at all, and the evidence tends to the conclusion that the individual is incapable of transacting the ordinary affairs of life. *Foster v. Means*, 1 Speers, Eq. 569, 42 Am. Dec. 332.

And one who, while in her childhood, was sent to school, but does not seem to have ever been able to read or write, and who was apprenticed, but never learned the business so as to earn her livelihood, and whose brother always supplied her with common necessities by paying other persons to take care of her, and who never has had the use or possession of her property, and who is washed and cleaned and put to bed by others, is not competent to enter into a contract of marriage. *Browning v. Beane*, 2 Phillim. Eccl. Rep. 69.

So, in *Rex v. Kelly*, cited in *Shelford on Lunatics*, 399, it was held that a woman who married while she had no conception whatever of the meaning of the transaction, and expressed various doubts as to its nature, and was perfectly indifferent and frivolously careless as to whom she lived with, and manifested much indecision of character, and her intellect was so weak as to render her an easy victim to artful designs, was not the wife of the party who married her.

The question whether a person contracting marriage had sufficient understanding to comprehend the nature and consequences of the act is one of fact for the jury. *Doe v. Roe*, 1 Edm. Sel. Cas. 344.

And the real point in issue is whether, at the precise time of the marriage, the party had sufficient understanding to comprehend the nature of the contract and relation into which he was entering. *Nonnemacher v. Nonnemacher*, 150 Pa. 634.

So, the marriage of a person who at the time of entering into it was so intoxicated as to be non com-

pos mente, and as not to know what he was doing, and was for the time deprived of reason, is invalid, but not so if the intoxication was of a less degree. *Prine v. Prine*, 36 Fla. 676, 34 L. R. A. 87.

But to render a marriage void on the ground that the man was intoxicated at the time, it must appear that the intoxication was such as to deprive him of all sense and volition, and to render him incapable of knowing what he was about. *Roblin v. Roblin*, 28 Grant, Ch. (U. C.) 430.

And the marriage of a man while suffering from attacks of delirium tremens is valid, where it took place during a lucid interval, and he was able to discuss and arrange the terms of the marriage agreement. *Scott v. Paquitt*, 17 Lower Can. Rep. 233.

Insanity from delirium tremens will avoid a contract of marriage, but the question whether the party was really insane or only intoxicated is a matter of fact for the jury. *Clement v. Mattleon*, 3 Rich. L. 93.

V. Incapacity combined with fraud.

A less degree of incapacity may serve to invalidate a marriage when combined with fraud than that required when taken alone.

Thus, a marriage clandestinely solemnized, accompanied by circumstances of fraud and circumvention, between a person of weak and deranged mind and the daughter of his trustee and solicitor, who had great influence over him, and by whom he was clearly considered and treated as of unsound mind, is null and void, where he was the mere instrument in their hands to go through with the necessary forms. *Countess Portsmouth v. Earl Portsmouth*, 1 Hagg. Eccl. Rep. 350.

And a marriage and conveyance secured by a disolute and designing woman of middle age with and from an old man who firmly believed in spiritualism, who sought his acquaintance for that purpose and secured it by pretending to be a medium and to have received communications from spirits commanding their marriage and the conveyance to her of valuable property, claiming to be a clairvoyant physician and able to cure his deafness, and by other fraudulent devices, will be set aside as having been procured by fraud and undue influence, though mere belief in spiritualism is not per se sufficient ground for setting aside a marriage and conveyance. *Hides v. Hides*, 65 How. Pr. 17.

And the marriage of a person to one of the daughters of his solicitor and trustee, and a settlement obtained from him while visiting the solicitor's family, will be pronounced null and void where his reason was defective, and, though he was capable of making a few observations on the state of the weather or on horses and gaming, and attended public meetings, races, and country balls, and behaved with ordinary propriety at parties in the company of persons who commanded his respect, but on being left to himself and unrestrained indulged in practices so irrational and unnatural as to be in some instances bordering on idiocy, and in others attended with actual delusions and fancies, believing in the existence of things which no rational being endowed with powers of reasoning could believe to exist. *Foster v. Means*, Speers, Eq. 569, 42 Am. Dec. 332.

So, a marriage is null and void, and will be so declared, where the husband is led to enter into it by fraud and imposition, with one who was well

ab initio, and can be at any time so declared by the courts. *Crump v. Morgan*, 88 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447, which has been often cited and approved (Womack's Dig. No. 2,005); and of late years in *Webber v. Webber*, 79 N. C. at page 576, and *Batty v. Cranfill*, 91

N. C. at page 298, 49 Am. Rep. 641. The power of the courts to declare a marriage a nullity for incapacity of one of the parties, though not an adjudged lunatic at the time of the marriage, is also upheld in *Johnson v. Kincaide*, 87 N. C. (2 Ired. Eq.) 470; *State, Setzer*,

known to her friends to be wholly unfit and legally incapacitated to contract marriage, that fact being concealed by her friends with whom she resided, and he being ignorant thereof. *Keyes v. Keyes*, 22 N. H. 553, *dictum*.

The concealment upon the part of a party to a marriage, that she was afflicted with a morbid propensity to steal, commonly denominated kleptomania, however, is not such a fraud as will afford ground for the annulment of the marriage. *Lewis v. Lewis*, 44 Minn. 124, 9 L. R. A. 505.

And occasional paroxysms of hereditary insanity upon the part of a wife before marriage, unknown to the husband at the time of and for some time after marriage, affords no ground for rescinding the marriage contract on account of fraud, mistake, or inadvertence, where, in the interval, she was capable of all the duties of a citizen or a wife. *Hamaker v. Hamaker*, 18 Ill. 137, 65 Am. Dec. 705.

VI. Incapacity as a ground for divorce.

Mental incapacity at the time of marriage is a ground for divorce in some states. *Brown v. Westbrook*, 27 Ga. 102.

And a proceeding to declare a marriage a nullity on the ground of the mental incapacity of one of the parties to consent to the contract, at the time it was entered into, is unauthorized and unknown under the judicial system of the state of Georgia. *Brown v. Westbrook*, 27 Ga. 102.

But imbecility of mind is not a sufficient ground for divorce under the Delaware statute unless it amounts to idiocy or insanity. *Elzey v. Elzey*, 1 Houst. (Del.) 306.

And occasional spells of insanity before marriage, and ultimate permanent insanity several years after, together with evidence of hereditary taint in the family, do not warrant a divorce under a statute making insanity at the time of the marriage a ground therefor. *Smith v. Smith*, 47 Miss. 211.

In *Smith v. Smith*, 47 Miss. 211, *Ward v. Dulaney*, 23 Miss. 414, *supra*, III., IV., was distinguished on the ground that it arose prior to the revision of the statute, and was decided under the common law.

VII. Ratification and waiver of right to attack.

A lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane. *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Goodheart v. Ramsley*, 28 Ohio L. J. 227; *Prine v. Prine*, 38 Fla. 678, 34 L. R. A. 87; *Durie v. Norris*, 1 U. S. Law Mag. (Monthly) 49; *Ash's Case*, 2 Freem. Ch. 259; 1 Eq. Cas. Abr. 278, pl. 6.

And it may be affirmed by any acts or conduct which amount to a recognition of it. *Prine v. Prine*, 38 Fla. 678, 34 L. R. A. 87.

Thus, the validity of a marriage cannot be impugned on the ground that the husband was out of his mind when the marriage ceremony was performed, where the couple had lived together as man and wife until the husband's death,—so as to impair the claim of the widow to a sum allowed by law to widows in necessitous circumstances. *Sabalot v. Populus*, 81 La. Ann. 854.

And the fact that two deaf and dumb persons had lived together thirty years, during which a suit had been compromised in which the husband and wife were plaintiffs, and that they had otherwise recognized their marriage as legal and sufficient, is strong evidence against a claim that it was

invalid for want of capacity of the parties. *Harrod v. Harrod*, 1 Kay & J. 4, 18 Jur. 853.

And where a woman marries a man who subsequently has to be confined in an asylum for insanity, and continues to cohabit with him until he is so confined, having children by him, it sufficiently establishes, either that he was not insane at the time of the marriage, or that she had nevertheless elected to treat the contract as a valid and subsisting one. *Forman v. Forman*, 53 N. Y. S. R. 639.

So, the appellate court will not reverse a decree of the circuit court in an action for the annulment of a marriage upon the ground of incapacity, as being against evidence, where the evidence is conflicting upon the subject of mental capacity, and there is sufficient evidence, if believed, to show that the party was not deprived of the use of his reasoning faculties at such time, and it appears that he had repeatedly, since the marriage, ratified the same by cohabitation with the other party thereto. *Prine v. Prine*, 38 Fla. 678, 34 L. R. A. 87.

But one who was married while insane and under guardianship, but who was subsequently declared sane, and the guardian discharged, after which he was again declared insane and placed in an asylum, will not be deemed to have ratified the marriage by acts performed after he was declared sane and before he was the second time declared insane, in the absence of evidence of actual cohabitation, where he was afflicted with progressive paresis, and the disease had been of at least a year's standing, and he subsequently became a confirmed lunatic, and the evidence is overwhelming that he was at all times insane. *Goodhart v. Speer*, 7 Ohio Dec. 47; *Goodheart v. Ransley*, 28 Ohio L. J. 237.

And an instruction, in an action to annul a marriage on the ground of the lunacy of one of the parties, that the plaintiff must show unsoundness of mind at the time of the marriage continuing beyond question to the time of the husband's death, without lucid intervals, if erroneous, is obviated by a finding of sanity at the time of the marriage. *Banker v. Banker*, 68 N. Y. 409.

It has been held, however, that where a marriage is void because of the insanity of one of the parties it is not ratified and rendered valid by their subsequent cohabitation after the insane person becomes sane. *Ward v. Dulaney*, 23 Miss. 410.

And that a marriage by a person totally deprived of reason is void, and that the performance of a marriage ceremony between such a person and another and their continued cohabitation until death, do not constitute a legal marriage or give claim to dower or curtesy in his or her estate. *Jenkins v. Jenkins*, 2 Dana, 108, 26 Am. Dec. 437.

So, a wife who waits twenty-two years after obtaining knowledge that her husband was insane when they were married before filing a bill to avoid the marriage on that ground is barred, by the lapse of time, from obtaining the relief sought. *Rawdon v. Rawdon*, 28 Ala. 665.

And where a man who has been adjudged of unsound mind, afterwards marries a woman, with whom he lives for thirty years, the presumption of continued insanity will not prevail as against the presumption in favor of the legality of the marriage. *Castor v. Davis*, 120 Ind. 231.

And a marriage will not be disturbed upon the ground that previous thereto the wife had been afflicted, without the knowledge of the husband, with periodical attacks of insanity, and that such

v. *Setzer*, 97 N. C. 252; *Lea v. Lea*, 104 N. C. 603. This might be done even after the death of parties (*Gathings v. Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49)—though issue could not be bastardized; but it must be done in a direct proceeding, as in this case, and not

incidentally (*Williamson v. Williams*, 56 N. C. (8 Jones, Eq.) 446). Such action is for a divorce (*Lea v. Lea*, 104 N. C. 603), and all actions for a lunatic can be brought either in the name of the guardian or in the name of the lunatic by the guardian (*Crump v. Morgan*, 38

attacks had continued ever since, lasting for months together, and often rendering it dangerous for him to live with her, after the lapse of more than thirty years, and the birth of a family, all of which have reached the age of maturity. *Secor v. Secor*, 1 MacArth. 630.

VIII. Evidence of incapacity.

a. Presumption and burden of proof.

Every man is presumed to be sane until the contrary is shown, and the burden of proof rests with the person alleging a marriage contract to be void by reason of the incapacity or mental unsoundness of a party thereto. *Baughman v. Baughman*, 32 Kan. 538; *Rawdon v. Rawdon*, 28 Ala. 565; *Nonnemacher v. Nonnemacher*, 159 Pa. 634.

And if the proofs in the case on this question are of equal weight and reliability the presumption of sanity must prevail. *Nonnemacher v. Nonnemacher*, 159 Pa. 634.

And refusal to charge that the jury should start with the presumption that a person was of unsound mind is not error, in an action for the annulment of his marriage on the ground of unsoundness of mind, where a finding was made in an inquisition two days after the marriage that he was then insane, and had been for six months previous thereto. *Banker v. Banker*, 63 N. Y. 400.

But where the existence of insanity is once established in an action to annul a marriage, the onus is cast upon the party seeking to sustain the marriage, to prove by testimony as clearly convincing as that required to establish insanity, that the particular contract was entered into during a lucid interval. *Rawdon v. Rawdon*, 28 Ala. 565.

And the burden of proof rests with the party asserting the validity of a marriage entered into by a person under a decree of lunacy and guardianship, to establish that it was entered into during a lucid interval. *Goodheart v. Ransley*, 28 Ohio L. J. 227.

As to presumption and burden of proof of sanity and insanity generally, see *notes* to *State v. Scott* (La. Ann.) 36 L. R. A. 721, and *Ford v. State* (Miss.) 35 L. R. A. 117.

b. Sufficiency, weight, and admissibility.

Proof of insanity to invalidate a marriage on an application for its annulment must be clear and unquestionable. *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Ward v. Dulaney*, 23 Miss. 410; *Powell v. Powell*, 27 Miss. 783.

Especially after the death of one of the parties. *Powell v. Powell*, 27 Miss. 783.

Thus, proof of the insanity of a wife both before and after marriage will not invalidate the marriage where it appears that she was sane at the time it took place. *Ward v. Dulaney*, 23 Miss. 410.

And going through the marriage ceremony with propriety and decorum is of itself prima facie evidence of sufficient understanding of the contract making it valid. *Anonymous*, 4 Pick. 32.

And evidence that a marriage was solemnized in an unusual manner, by the wife going to the house of the husband and both parties dispensing with the ceremony generally used on such occasions, but agreeing to become man and wife, establishes perfect indifference to the customs of society, and does not overcome the presumption of sanity, or tend to show mental incapacity of either party amounting to incompetency to contract the marriage. *Powell v. Powell*, 27 Miss. 783.

40 L. R. A.

So, evidence that a woman performed her usual duties until the day before her marriage, but was at times dull and reticent, and that she was very quiet on the day of the wedding, and after the ceremony stated that she was not worthy of her husband, and remained reticent, and after a few days could not be gotten to take interest in anything, and shortly afterwards tried to strangle herself and set fire to a toilet mat, and was afterwards sent to an asylum, where she became violent and had delusions to the effect that she was not married, and afterwards improved and again passed into violent mania, with the testimony of an expert that there was melancholia in her mental condition at the time of the marriage, but that to a certain extent she understood what she was doing, though she did not fully understand the marriage relation,—is not sufficient to warrant a decree of nullity. *Cannon v. Smally*, L. R. 10 Prob. Div. 2.

And evidence in an action to annul a marriage, the parties to which had been previously divorced and remarried, showing that the mind of the wife was ill-balanced at times, and that she was of an eccentric and irritable disposition and afterwards became positively insane, and that upon the second marriage she agreed to quit complaining and scolding and not bring up old troubles, and that on the day of the marriage she began making the same old charges as badly as ever, is not sufficient to warrant relief. *Slais v. Slais*, 9 Mo. App. 34.

So, administration of her husband's effects will not be refused to a widow upon the ground that he was a lunatic at the time of the marriage and incapable of consenting to marriage, though he had a very weak understanding from his infancy and by hard drinking was at times a lunatic, and did many mad and frantic acts, where no commission had issued against him, and it appeared that he married with deliberation and intention after procuring the license himself and declaring that he was going to be married, and went through the ceremony with propriety, and lived with his wife as such during the remainder of his life. *Parker v. Parker*, 2 Lee, Ecol. Rep. 382.

Evidence that a party to a marriage was ignorant of the most common things in life, such as the parts of a dollar that are current, seed and harvest time of the usual crops in the locality in which he lived, and the days of the week, and the opinions of witnesses that he had been a fool or an idiot from birth, however, are sufficient to warrant a finding of incapacity to contract marriage. *Johnson v. Kincaide*, 37 N. C. (2 Ired. Eq.) 470.

And the fact that a person had attacks of insanity which became more frequent in their visitations, more especially in the spring and autumn, and that his father did not trust him with any business and he was entirely unfit to be employed, is sufficient to throw the onus on the other party, in an action to annul a marriage, to establish his sanity or a lucid interval at the time of the marriage. *Turner v. Meyers*, 1 Hag. Const. Rep. 414.

So, evidence that a woman immediately after her marriage, and upon the next morning, requested her husband to cut her throat, declaring herself a weak person who had committed crimes for which she was liable to be taken to prison, and that she was an unfit person to be united to so good a man, and that she attempted to commit suicide, it appearing that she had always been a well-conducted and virtuous young woman, is sufficient to show that at the time of the marriage she was not able to un-

N. C. (8 Ired. Eq.) 91, 40 Am. Dec. 447; *Shaw v. Burney*, 36 N. C. (1 Ired. Eq.) 149). W. R. Sprinkle, son of Nancy E. Sims, was duly appointed her guardian after the aforesaid inquisition of lunacy, and such proceedings and orders are "valid until reversed or superseded."

derstand and appreciate the act she was doing. *Hunter v. Edney*, L. R. 10 Prob. Div. 93.

And a marriage with a woman, secretly solemnized, will be set aside on the ground of her inability to understand the nature and obligation of the contract, where she could not wash or dress herself properly or decently, knit or sew, or take care of her clothes, or distinguish colors or cotton from flannel, and could not be taught to cook or do the simplest house work, and could hardly read, though she went to school until twenty, and could not spell, add, or count twenty, or state the number of Sabbaths in a year, and could be taught nothing of geography or tell the time of day by watch, or distinguish one piece of money from another, and had no idea of the value of property, and could not be trusted to do errands, and played with children and their toys, and did not appreciate the properties of life. *True v. Ranney*, 21 N. H. 62, 63 Am. Dec. 164.

So, evidence that a person afflicted with inflammation of the lungs, which frequently affects the mind, suddenly sat up in bed in the night and called to the person nursing him and asked her if she would be his wife, to which she assented, and he declared before God and man that she was his wife, does not establish a valid marriage, where shortly before and after the event he was in a state of stupor with occasional fits of delirium, and a few minutes afterwards he jumped out of bed and became so ungovernable that assistance had to be sent for, and there was no previous deliberation or conversation on the subject, and he afterwards died without appearing to know anything about the marriage claimed. *Jaques v. Public Administrator*, 1 Bradf. 499.

And in *Doe v. Roe*, 1 Edm. Sel. Cas. 344, which was a feigned issue sent down from the court of chancery to try the validity of a marriage, it was found invalid on evidence that the woman married was wayward, wilful, and difficult to govern in childhood and that with all the advantages of education she had learned less at sixteen than her brothers at eight, and had never been able to learn the multiplication table, and that when fully grown she was more fond of association with little children than with persons of her own age, and was more prone to being with the servants than with the family, and that she was slovenly and untidy in her room and dress and had a passion for collecting old rags, and was subject to paroxysms of violent passion, and would use profane and obscene language and be insolent to her parents, and was habitually cruel, and took pleasure in the sufferings of animals, and was greatly addicted to falsehood, and when detected would only laugh, and that her memory was bad and her judgment weak and her passions violent, and that she had no affection, but rather hatred, for her parents and brothers and sisters, and the opinions of witnesses that she was an imbecile.

So, the question of soundness or unsoundness of mind depends upon the general frame and habit of the mind, and cannot be determined from particular actions. *Foster v. Means*, 1 Speers, Eq. 559, 42 Am. Dec. 332.

And the question, in an action for the annulment of a marriage, whether the party alleged to be insane had sufficient capacity to understand the marriage contract, is not to be solved by the mere opinions of persons who may have been brought in contact with him, but each case must be decided

Bethea v. McLennon, 23 N. C. (1 Ired. L.) 527. The *ex parte* proceedings brought by the husband in 1895, to have the wife declared sane, were without any notice or service upon the guardian, to whom the law had confided the protection of her rights, and hence were a nul-

on its own circumstances; and his ability can be ascertained in no more satisfactory way than by referring to his conduct in other transactions. *Kern v. Kern*, 51 N. J. Eq. 574.

And the court will form its opinion as to the mental condition of a party alleged to be incapable of contracting marriage by reason of insanity, from the testimony of witnesses who have been long acquainted with him, and that of medical experts, in preference to any personal examination. *Thayer v. Thayer*, 9 R. I. 577.

So, evidence as to the condition and conduct of a husband, both before and after marriage, is competent, and may be taken into account in judging as to his mental capacity at that time. *St. George v. Biddeford*, 76 Me. 598; *Nonnemacher v. Nonnemacher*, 159 Pa. 634.

And an expert witness may be permitted to testify, in an action in which the validity of a marriage is at issue, to his opinion that a party to the marriage, alleged to be imbecile, was not capable of understanding his duties toward his wife arising out of the matrimonial union. *St. George v. Biddeford*, 76 Me. 598.

But the sane party cannot be admitted as a witness against the insane party when the statute provides that if one party is insane the other shall not be permitted to testify in his own favor. *Little v. Little*, 13 Gray, 264.

So, where a marriage is sought to be invalidated upon the ground that the alleged husband was so paralyzed at the time of the marriage that he could not comprehend what was passing at the time, his written and oral declarations, made prior to and repeated up to within a short time of the ceremony, showing that the relations of the parties were affectionate, and that he had stated that he could not live happily without the party married, and that he intended that she should have his property as she had helped to make it, and the fact that they had corresponded several months, and that the marriage engagement had been previously made, may be given on her behalf to sustain the marriage. *Baughman v. Baughman*, 32 Kan. 538.

c. Effect of inquisition.

An adjudication that a person was a lunatic, and incapable of taking care of himself or his property by reason of intemperance or habitual drunkenness or otherwise, and the appointment of a guardian of his person and property, which was never vacated or set aside, but continued in force until his death, is only *prima facie*, and not conclusive, evidence that he was incompetent, for want of mental capacity, to enter into and consummate a legal marriage. *McCleary v. Barcoalow*, 6 Ohio C. C. 481.

Though *prima facie* it is not conclusive evidence of incapacity. *Keys v. Norris*, 6 Rich. Eq. 388.

And a finding that a person was of unsound mind, and that he had been so for six months previous, upon an inquisition in lunacy made two days after his marriage, is presumptive evidence of incompetency to marry only, and the fact that the wife had notice of the pendency of the inquisition at the time of the marriage does not render the marriage invalid, as by going on with it she took the hazard of a finding which would render the marriage presumptively void, and nothing more. *Banker v. Banker*, 63 N. Y. 409.

So, a marriage contract during a lucid interval, by one who had been found to be a lunatic, is bind-

lity (Code, § 217, subd. 3), as was also the subsequent order, founded thereon, removing him without notice. Indeed, the marriage, at the time, of a legally declared lunatic, being a nullity, could only have been remedied by proceedings to set aside the inquisition of lunacy

for fraud or other good ground, or by a new marriage, if the lunatic is since found to be restored. The void marriage on account of lunacy could not be cured merely by cohabitation after restoration. Marriages entered into by parties under the legal age, however, being

ing on him where the proof of the existence of the lucid interval in which it was done is clear. *Re Gangwere*, 14 Pa. 417, 53 Am. Dec. 564.

And a marriage will not be declared invalid without an issue directed to try the fact, though the husband was found a lunatic from a period antecedent thereto, where a son, the issue of the marriage, had enjoyed an estate devised to the lunatic and his children as a legitimate child. *Ellis v. Bowman*, 17 L. T. 11.

And a marriage voluntarily contracted by a person of full age and sufficient mental capacity to understand and carry it out, after a guardian had been appointed for him, which guardianship continued until his death, the parties living together as husband and wife for sixteen months and until his death without objection, and with the consent of the guardian, is valid and binding where no proceedings were ever taken to invalidate it. *McCleary v. Barcalow*, 6 Ohio C. C. 487.

But a judgment in an action in equity brought by the committee of an alleged lunatic against his wife to declare the marriage contract null and void, whereby it was adjudged that at the time of his marriage he was not a person of unsound mind, merely establishes his ability to enter into the marriage contract, and not that he must be regarded as a person of sound mind, fully capable of managing his affairs and disposing of his property, in an action brought by the wife against a bank, asserting her right to money of the husband deposited therein, arising out of an antenuptial contract with him, where the bank had in good faith paid the money to his legal representatives previously appointed in a proceeding adjudging him a lunatic. *Veits v. Union Nat. Bank*, 101 N. Y. 568, 54 Am. Rep. 748.

So, the appointment of a guardian *ad litem* for a respondent in an action to annul a marriage on the ground of insanity is *prima facie* evidence of her insanity in any subsequent stage of the case. *Little v. Little*, 18 Gray, 264.

And the fact that a husband was under guardianship, as a person of unsound mind, at the time of his marriage, should be averred in an action for its annulment, and not left to mere inference. *Penoe v. Aughe*, 101 Ind. 317.

And an inquisition finding a woman to be neither an idiot nor a lunatic, but of weak understanding, obtained with a view to set aside her marriage, will not be set aside and a new one ordered for a mere irregularity, where the court is satisfied that substantial justice has been done. *Ex parte Glen*, 4 Desaus. Eq. 546.

In England, in the ecclesiastical courts, an inquisition finding idiocy or lunacy is regarded as only part of the requisite proof of unsoundness of mind to warrant a decree of nullity of a marriage. *Johnson v. Kincaide*, 37 N. C. (2 Ired. Eq.) 470, *dictum*.

For the North Carolina rule on this question, see *SIMS v. SIMS*.

IX. The annulment.

a. Necessity of decree for.

The marriage of a lunatic is void, and must be so pronounced by every court to which and in every form in which the subject can be presented. *Crump v. Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447.

And a marriage which is void at its inception because of the insanity of a party thereto is a mere

nullity from the beginning to the end, and does not require a sentence, decree, or judgment of any court to restore the parties to their original rights. *Bell v. Bennett*, 73 Ga. 784; *Hawdon v. Rawdon*, 28 Ala. 565; *Unity v. Belgrade*, 76 Me. 419; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Jenkins v. Jenkins*, 2 Dana, 103, 26 Am. Dec. 487.

The invalidity may be shown in any proceeding in any court whenever the question arises collaterally. *Unity v. Belgrade*, 76 Me. 419; *Gathings v. Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49.

Thus, the question may be decided in a collateral action, as a suit for dower for distribution, or the like. *Jenkins v. Jenkins*, 2 Dana, 103, 26 Am. Dec. 487; *Keys v. Norris*, 6 Rich. Eq. 388.

And the question as to the competency of a party to a marriage to enter into the marriage contract may be raised and decided in a proceeding by the widow, after the death of her husband, to obtain a year's support. An objection may be made to granting such support on the ground that he was of unsound mind and incapable of contracting marriage. *Bell v. Bennett*, 73 Ga. 784.

So, in *Gathings v. Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49, it was held that the question whether a marriage was void or not may be inquired into by any court in which rights are asserted under it, although the parties to a marriage are dead; but the question in the case was not one of mental capacity to contract marriage.

It is within the power of the legislature, however, to prohibit the questioning of the validity of existing marriages in a trial of collateral issue on the ground of the insanity or idiocy of the other party. *Goshen v. Richmond*, 4 Allen, 458.

And Mass. Stat. 1845, chap. 222, providing that the validity of a marriage shall not be questioned on the trial of a collateral issue on account of the insanity or death of either party applies to marriages existing at the time of its passage, and it cannot be shown, in an action to recover for the support of a pauper, against a town in which a settlement is sought to be established by reason of a marriage performed before the passage of that act, that the marriage was invalid by reason of the insanity of the party. *Goshen v. Richmond*, 4 Allen, 458.

And while a marriage with a lunatic is absolutely void, for the sake of the good order of society, as well as the quiet and relief of the party, its nullity should be declared by the decision of some court of competent jurisdiction. *Wightman v. Wightman*, 4 Johns. Ch. 343; *Rawdon v. Rawdon*, 28 Ala. 565; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Johnson v. Kincaide*, 37 N. C. (2 Ired. Eq.) 470.

In *Wightman v. Wightman*, 4 Johns. Ch. 343, it was presumed that all that could have been intended by the common-law judges in *Stiles v. West*, cited in 8id. 112, *supra*, I., where it was said that if an idiot contracted marriage it is good, was that though such marriages are *ipso facto* void, yet that it is proper that there should be a judicial decision to that effect by some court of competent jurisdiction.

So it has been held that though a marriage by a lunatic is declared void by statute, sentence of nullity of the ecclesiastical court is necessary. *Ex parte Turing*, 1 Ves. & B. 140.

And a court of equity will not entertain the question of nullity of marriage on account of imbecility incidentally in North Carolina, but will stay proceedings in the suit in which such issue is made, so

not void, but voidable, can be validated by cohabitation after arrival at the marriageable age. *State v. Parker*, 106 N. C. 711; *Koonce v. Wallace*, 52 N. C. 194. His honor correctly adjudged that W. R. Sprinkle was authorized to bring this action. There is no other excep-

tion. As to the argument that the record does not affirmatively show that the report of the jury had been "received and confirmed." It is not required. Code, § 1670, only requires the clerk to "file and record" it. But if it had been a case in which the court was empowered

that it may be determined by a direct sentence in either a superior court of law or a court of equity. *Williamson v. Williams*, 56 N. C. (3 Jones, Eq.) 446.

And in Vermont it has been held that a decree of nullity of a marriage cannot be attacked in a proceeding for the removal of the woman concerned as a pauper. *Reading v. Ludlow*, 43 Vt. 623.

And that where the existence of a marriage as a fact is established the probate court has no jurisdiction to try its validity or power to treat it as a nullity. *Wiser v. Lockwood*, 42 Vt. 720.

So, in *Stuckey v. Mathes*, 24 Hun. 461, it was held that an action upon an account for necessities furnished a wife cannot be resisted upon the ground that the marriage between her and her supposed husband was solemnized while he was a lunatic without lucid intervals, and was therefore void.

A private contract of marriage, or present words, with a lunatic, without any proceeding or succeeding act indicating the entrance into the marriage state, is not such a marriage as is contemplated by the New York act of legislature providing that a marriage shall be valid until pronounced null by a court of equity. *Jaques v. Public Administrator*, 1 Bradf. 499.

b. Jurisdiction; procedure.

A court of equity has authority to pronounce a marriage null and void from the beginning for want of capacity in one of the parties. *Johnson v. Kincaid*, 37 N. C. (2 Ired. Eq.) 470.

While congenital or other mental imbecility is not among the statutory causes of divorce, a court of equity, in the exercise of its ordinary power, will entertain jurisdiction, at the suit of the imbecile's guardian, to declare his marriage a nullity on the ground that social order and public decency, and questions of legitimacy and succession of property, demand that the parties to a meretricious relation, in which the forms of marriage apparently legal seem to bind them, should be judicially relieved therefrom. *Waymire v. Jetmore*, 22 Ohio St. 274; *Wightman v. Wightman*, 4 Johns. Ch. 343.

And where a person insane at the time of her marriage refuses to ratify or consummate it after her return to a lucid interval, and files her bill to annul it, the court of chancery will decree the marriage null and void, and the parties absolved from its obligation. *Wightman v. Wightman*, 4 Johns. Ch. 343.

The court of chancery, possessing exclusive jurisdiction over cases of lunacy and matrimonial causes, is the proper tribunal to afford relief in a suit for the annulment of a marriage on the ground of the lunacy of a party. *Wightman v. Wightman*, 4 Johns. Ch. 343.

And the reference of a suit for the annulment of a marriage confers no greater jurisdiction on the referee over the subject-matter of the suit than the court itself had. *Wiser v. Lockwood*, 42 Vt. 720.

So, a husband may maintain an action to annul his marriage upon the ground of his insanity after recovery. *Turner v. Meyers*, 1 Hagg. Consist. Rep. 414.

And an action for the annulment of a marriage of a supposed lunatic on the ground of lunacy may be maintained in the name of the supposed lunatic, by her committee, and need not be in the name of the committee alone. *Crump v. Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447.

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And under 2 N. Y. Rev. Stat. p. 302, § 23, a marriage sought to be annulled on the ground of the lunacy of one of the parties may be declared void at any time during the continuance of the lunacy or after the death of the lunatic, in that state, during the lifetime of the other party to the marriage, on the application of near relatives of a lunatic interested to avoid the marriage. *Jaques v. Public Administrator*, 1 Bradf. 499.

But an action for the annulment of a marriage under Ind. Rev. Stat. 1881, § 1025, providing therefor when either of the parties to a marriage is incapable, from unsoundness of mind or want of understanding, to contract the same, must be brought in the name of the incapable party, and cannot be maintained by his guardian in his own name. *Pence v. Aughe*, 101 Ind. 317.

And an application to postpone the pronouncing of a decree in an action to annul a marriage, on the ground that the party had become sane and was so at the time of the marriage, and not of any subsequent recovery, will be denied where the court is satisfied by the evidence that he was not of sound mind at that time, and a physician makes affidavit that he could not be produced in court without suffering injury. *Thayer v. Thayer*, 9 R. I. 377.

And the application for an order requiring the next friend of a husband, who applies for a divorce in his behalf alleging his insanity, to produce such husband in court at the time of the trial, will be refused, at least until the court can determine upon the trial of the petition whether his presence is desirable or necessary. *Thayer v. Thayer*, 9 R. I. 377.

So, a finding of a trial court, in an action to annul a marriage on the ground of lunacy of a party, that he was of sound mind when the marriage took place, which is sustained by the evidence and affirmed by the general term, is conclusive on appeal to the court of appeals. *Banker v. Banker*, 63 N. Y. 406.

And in *Hancock v. Peaty*, L. R. 1 Prob. & Div. 335, 38 L. J. Prob. N. S. 57, the court declined to adjourn the case, in an action for the annulment of a marriage on the application of the respondent, where a guardian *ad litem* had been duly assigned to the petitioner, on a suggestion of recovery and of a desire for discontinuance of the suit for the appointment of medical men to examine her, but, being satisfied by evidence that she was insane at the time of the marriage, postponed the pronouncement of its decree to give opportunity to establish recovery, intimating that if satisfied of recovery it would not pronounce a decree except at her instance.

When the question arises collaterally in an action in equity, an issue at law is a proper mode of trying it. *Keys v. Norris*, 6 Rich. Eq. 383.

An action prosecuted, tried, and decided as a divorce suit under the provisions of the Code, however, cannot be considered as one prosecuted to have a void marriage pronounced a nullity. *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774.

But a libel to dissolve a marriage on the ground of mental incapacity at the time of the marriage, under the Georgia statute, is to be filed and tried, and is subject to all the incidents regulating the practice in divorce cases. *Brown v. Westbrook*, 27 Ga. 102.

And while the Florida statute with reference to alimony to a wife refers exclusively to divorce cases, where the suit is brought by the alleged hus-

to confirm the report, as the clerk acted on it by appointing the guardian, the confirmation would have been presumed, in the absence of evidence to the contrary, on the maxim, *Omnia præsuntur rite acta*. The jury found, further, that Nancy E. Sims did not have mental capacity to enter into the marriage with the

defendant on the 14th of November, 1898; but this was unnecessary, as the marriage with a declared lunatic was *ipso facto* void. *Craup v. Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447.

Affirmed.

band to obtain a decree declaring the marriage void on the ground of his incompetency at the time it was had, a court of chancery has power to grant alimony to the alleged wife independent of the statute, and as an incident of its jurisdiction in such case. *Prine v. Prine*, 36 Fla. 676, 34 L. R. A. 87.

And where a suit is brought by a husband against a putative wife to annul the marriage relation on the ground of his incapacity at the time it was entered into, and the fact of marriage is *prima facie* established, and the husband has means wherewith to live and litigate, and the wife is destitute, he will be required to furnish her the means of subsistence while the action is pending, to enable her to maintain her defense. *Prine v. Prine*, 36 Fla. 676, 34 L. R. A. 87.

And the allowance to a wife in an action by her husband for the annulment of their marriage upon the ground of his incapacity at the time it was entered into, upon proper showing, of temporary alimony, counsel fees, and suit money while the suit is pending in the appellate court, is not an exercise of original jurisdiction, but is essential to the proper and impartial administration of justice in the exercise of appellate jurisdiction. *Prine v. Prine*, 36 Fla. 676, 34 L. R. A. 87.

So, in *Lea v. Lea*, 104 N. C. 603, which was an action for the annulment of a marriage on the ground that the husband had a wife living at the time of the pretended marriage, it was held that such an action is an action for divorce, and alimony *pendente lite* may be allowed.

As to procedure in divorce cases when husband or wife becomes insane, see *note* to *Mohler v. Shank* (Iowa) 34 L. R. A. 161.

c. Effect.

Where a man marries a woman the relation of husband and wife is *prima facie* established, and so long as he voluntarily continues such a relation he subjects himself to the continued obligation of providing her with suitable support; and where the marriage is subsequently declared void because of

her insanity at the time, he cannot make the cost of her support while living and cohabiting with her a charge upon her separate estate. *Gerhold v. Wyss*, 18 Neb. 90.

And proof that a woman married an alleged lunatic, and continued to live and cohabit with him until he was declared a lunatic, when without fault on her part she was obliged to seek board and the necessities of life apart from him because of a committee having been appointed of his personal estate, no fraud or duress having been practised by her to bring about the marriage, does not establish that she was not his wife at the time the necessities were furnished her so as to defeat an action therefor. *Stuckey v. Matheis*, 24 Hun. 461.

Under Maine Rev. Stat. chap. 60, § 18, when a marriage is annulled on the ground of insanity the issue is the legitimate issue of the parent capable of contracting marriage. *Unity v. Belgrade*, 73 Me. 419.

And the determination of a jury that an intestate had not mental capacity to make an effectual marriage contract at the time of its solemnization cannot detract from the rights of his son to share in his estate on the ground that the marriage was absolutely void and their only child was therefore illegitimate, under N. C. Rev. Stat. chap. 30, § 1, providing that the marriage of an insane person is null and void, but that nothing therein contained shall be construed to affect or render illegitimate any child or children of the marriage. *State, Setzer v. Setzer*, 97 N. C. 252.

In *Packer v. Windham*, 2 Eq. Cas. Abr. 138, in which a man got a lunatic under inquisition whose person and estate were committed to the charge of another, and married her without making any settlement upon her, the husband and others concerned in the act were committed to the fleet, and all deeds and securities relating to her fortune and her jewels were ordered to be lodged with the master to secure some provision for her, if she should survive her husband, and for the children, if any, of the marriage. F. H. R.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

SOUTHERN RAILWAY COMPANY, *Plff.*
in Err.,

v.

Perry C. SMITH.

(86 Fed. Rep. 292.)

1. One holding a mileage ticket, who, with intent to board a train standing on a siding near the station, without going to the station, is compelled to cross the main line, is not a passenger to whom the railroad company owes extraordinary care or diligence, but is entitled only to ordinary care as one of the general public, if he has done nothing to notify any of the officers or agents of the defendant company that he is a prospective passenger.

2. It is erroneous to give a charge, in an action for personal injuries to one struck by a train while attempting to board another train, assuming that the train was running at 8 or 10 miles an hour, and suggesting that it usually ran into the station among the passengers at that rate of speed.

3. Punitive damages cannot be recovered for injuries to one attempting to board a railroad train from being struck by another train upon the main track, which he was obliged to cross, where whistles were sounded and the bell was rung and the fireman called to such person to look out, and there was nothing to prevent him from seeing the train.

4. Recovery for injuries to one struck by a train upon a track which he was obliged

NOTE.—As to when a person who has started for a train becomes a passenger, see *note* to *Webster v. Fitchburg R. Co.* (Mass.) 24 L. R. A. 521; *Wood v.* 40 L. R. A.

Pennsylvania R. Co. (Pa.) 35 L. R. A. 199; *Western & A. R. Co. v. Voils* (Ga.) 35 L. R. A. 655; also *Illinois C. R. Co. v. O'Keefe* (Ill.) 39 L. R. A. 148.

to cross to reach the train which he desired to take is barred, under Ga. Code, § 3880, providing that if the plaintiff by ordinary care could have avoided the consequence to himself caused by defendant's negligence he is not entitled to recover, if such person failed to use his senses to ascertain the approach of the train, and could have avoided the consequence of the company's negligence by the exercise of ordinary care.

5. A verdict for defendant should be directed in an action against a railroad company for personal injuries to one struck by a train, where the accident occurred in the daytime, and the injured person was in possession of sight and hearing, and the undisputed testimony is that the train could have been seen from 20 yards to $\frac{1}{2}$ of a mile before it reached the place of the accident, notwithstanding his testimony that he looked for the train and did not see it.

(March 29, 1898.)

ERROR to the Circuit Court of the United States for the Southern District of Georgia, Western Division, to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

On September 16, 1895, a train was standing on a siding near the depot in the town of Eastman, Georgia, waiting for the schedule time to arrive for its departure. Plaintiff having a mileage ticket, after having placed his baggage on the train and gone to a store near by, attempted to get on board of the train. In order to do so he was compelled to cross the main track and walk along the railroad a short distance. While he was so engaged he was struck by the engine of a train coming from the opposite direction and injured.

Further facts appear in the opinions.

Before *Purdee* and *McCormick*, Circuit Judges, and *Snayne*, District Judge.

Messrs. DeLacy & Bishop, for plaintiff in error:

When the evidence demands a verdict for defendant, and no other verdict could properly be rendered under the evidence and under the law applicable in the case, it is the duty of the court to direct and instruct such a verdict.

Elliott v. Chicago, M. & St. P. R. Co. 150 U. S. 245, 87 L. ed. 1068; *Chicago, R. I. & P. R. Co. v. Pounds*, 49 U. S. App. 476, 82 Fed. Rep. 217, 27 C. C. A. 112.

The doctrine of contributory negligence does not apply to cases where the plaintiff's own negligence is the sole cause of the injury, or where, by the exercise of ordinary care, he could have avoided the consequences to himself caused by the defendant's negligence.

Butterfield v. Forrester, 11 East, 60; *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 618; *Blitch v. Central R. Co.* 76 Ga. 335.

If plaintiff was crossing the street, and the bell was not ringing so as to warn him, yet if he saw the approach of the engine in time to get away, he could by ordinary care have prevented the effect of defendant's negligence. Section 2972 of the Code applies, and he cannot recover.

Central R. Co. v. Harris, 76 Ga. 508; *Smith v. Central R. & Bkg. Co.* 82 Ga. 804.

40 L. R. A.

A passenger owes it to himself, and to the railroad company, not to expose himself to danger, and an injury resulting from an attempt to alight from a rapidly moving train will afford no cause of action, because the passenger could avoid such injury by ordinary care.

McLarin v. Atlanta & W. P. R. Co. 85 Ga. 504.

Where it affirmatively appears from the evidence that the defendant company was not, relatively to the plaintiff, guilty of any negligence, and also that the latter, by the use of ordinary care, might have avoided the injury he received, the court was right in granting a nonsuit.

Martin v. Georgia R. & Bkg. Co. 95 Ga. 361.

Without regard to the question of the defendant's negligence, the evidence introduced by the plaintiff showed that by the exercise of ordinary care he might have avoided injury, he cannot recover, and it is a proper case for a nonsuit.

Ashworth v. East Tennessee, V. & G. R. Co. 97 Ga. 807.

The denying of probative force, even to direct and affirmative testimony, when such testimony is plainly at war with the physical facts and surroundings, has passed into precedent.

Payne v. Chicago & A. R. Co. 136 Mo. 562; *Arts v. Chicago, R. I. & P. R. Co.* 34 Iowa, 153; *Chicago, R. I. & P. R. Co. v. Pounds*, 49 U. S. App. 476, 82 Fed. Rep. 217, 27 C. C. A. 112.

Negligence of a railroad company in not ringing the bell or sounding the whistle near the crossing of a highway does not relieve a person who is about to pass over the highway from the obligation to employ his sense of hearing and seeing in order to ascertain if a train is approaching.

Wilcox v. Rome, W. & O. R. Co. 89 N. Y. 358, 100 Am. Dec. 440; *Pyle v. Clark*, 75 Fed. Rep. 644; *Chicago, R. I. & P. R. Co. v. Pounds*, 49 U. S. App. 476, 82 Fed. Rep. 217, 27 C. C. A. 112; *Childress v. Chesapeake & O. R. Co.* 94 Va. 186; *Markham v. Raleigh & G. R. Co.* 119 N. C. 715.

It is the duty of the pedestrian at the street crossing of a railway to look carefully for an approaching train, and, if the view is obstructed, to listen before attempting to cross the track; otherwise, he will himself be guilty of negligence, which will prevent his recovery for an injury received at the crossing.

Berkeley v. Chesapeake & O. R. Co. 43 W. Va. 11; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224.

Every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of negligence unless he approaches it as if it were dangerous.

2 Thomp. Trials, pp. 1299, 1300; *Baker v. Western & A. R. Co.* 68 Ga. 744; *Central R. Co. v. Brinson*, 70 Ga. 227; *Parker v. Wilmington & W. R. Co.* 86 N. C. 221; *Americus, P. & L. R. Co. v. Luckie*, 87 Ga. 7; *Pennsylvania Co. v. Sinclair*, 62 Ind. 801, 30 Am. Rep. 185.

No person shall recover from a railroad

company for an injury to himself caused by his own negligence.

Central R. Co. v. Brinson, 70 Ga. 208; *Central R. Co. v. Thompson*, 76 Ga. 781; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97; 41 Cent. L. J. 312.

Messrs. A. O. Bacon, A. L. Miller, and William Brunson for defendant in error.

Swayne, District Judge, delivered the opinion of the court:

The case comes to this court upon writ of error containing twenty-one separate specifications founded upon fifteen special requests by defendant to charge, which the court refused, and upon exceptions to the charge as given by the court. The first error we would notice upon the record is that in which the court treated the plaintiff below as a passenger, and charged the jury that the defendant below owed him extraordinary care and diligence as such passenger. We think plaintiff below was not a passenger in the contemplation of law. He was not upon the train, had not been to the depot recently, nor purchased a ticket, and did nothing to notify any of the officers or agents of the defendant company that he was even a prospective passenger. The company did not owe him extraordinary care or diligence as such passenger, but only ordinary care as to the general public.

We think the court erred in charging the jury, as recited in the eighteenth specification of error, in which it assumed to be a fact that the train was running at 8 or 10 miles per hour, when it injured the plaintiff below, and further suggested to the jury that it usually ran into the station among the passengers at that rate of speed.

We think the requests contained in twelfth and thirteenth assignments of error, that there was no allegation or proof to justify or uphold a verdict for punitive damages, were erroneously refused, and that this was error.

Another question arising out of many of the assignments of error, and embodied in many of the special requests to charge by defendant below, is the question whether the injury to plaintiff below was caused by his negligence; that if, by the exercise of ordinary care, the plaintiff could have avoided the consequence caused by defendant's negligence, if defendant was negligent, then he could not recover. This request to charge the law long established both by the statutes and decisions of the state of Georgia as well as the decisions of courts generally was repeatedly requested by the defendant below, and was as repeatedly refused by the court. This doctrine is so well established, and is of such long standing, and upon which the courts of the country are so unanimous, that we should not stop to make any citations to sustain it if it was not so pointedly questioned by the record. First, § 8830 (2972) of the Code of Georgia reads as follows: "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."

In such cases the doctrine of contributory

negligence does not apply. In *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 604, Branham, J., indorses this doctrine; and, after quoting from several Georgia as well as noted English decisions to sustain it, adds: "These cases were followed and made the basis of the opinion of this court in *Branan v. May*, 17 Ga. 136, and doubtless that case, as well as its citations, were duly considered by our codifiers in drafting §§ 2972 and 3034 of the Code."

In *Blitch v. Central R. Co.* 76 Ga. 335, Blandford, J., indorses the above doctrine, and adds: "So it appears that the plaintiff, in trying to make out his case, made out a full and perfect defense for the defendant, rebutting all presumption of negligence against it." See also *Central R. Co. v. Harris*, 76 Ga. 508, by Jackson, Ch. J.

In *Enright v. Atlanta*, 78 Ga. 297, Jackson, Ch. J., correctly states the law as follows: "Our view of the law is that to prevent his recovery, he must have been not only lacking in ordinary care and diligence to avoid injury, but that by that ordinary care and diligence, had he used them, he could have avoided the injury."

In *Smith v. Central R. & Bkg. Co.* (a case in which the facts are similar in many respects to those at bar, except it was established that the company was negligent) 82 Ga. 804, Bleckley, Ch. J., announces the law of Georgia and the construction of § 2972 of the Code as follows: "It is beyond dispute that the railroad company was negligent. It failed to give the signals, to check the train at public crossings, and was running at a speed altogether too high. Enough and more than enough appears to fix liability upon the company if only its negligence were involved. But the evidence makes the plaintiff's negligence quite as apparent as that of the company: not only so, but it shows in the fullest and clearest light that by the use of ordinary care he could have avoided the consequences to himself of the company's negligence; and that being so, the Code, § 2972, declares in express terms that he is not entitled to recover. This rule of law it is that bars him, and renders a recovery impossible. It is idle to try to evade the rule by dwelling upon the negligence of the company, for unless there is negligence of the company which would otherwise render it liable, the rule we are considering would have no place in the law. It is only where there is negligence the consequences of which are to be shunned, that the plaintiff is charged with the duty of shunning them if he can do so by the exercise of ordinary care. His failure in this respect does not stop with reducing the amount of his damages, but defeats a recovery altogether. *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 604, and cases cited in the able opinion of Branham, J. Nor is this mere Georgia law dependent on a local statute, but the principle prevails elsewhere."

This rule applies to a passenger as well as to the general public at railroad crossings. See *McLarin v. Atlanta & W. P. R. Co.* 85 Ga. 504; see also *Ashworth v. East Tennessee, V. & G. R. Co.* 97 Ga. 307. The above doctrine is fully supported by *Markham v. Raleigh & G. R. Co.* 119 N. C. 715, and by *Berkeley v. Chesapeake & O. R. Co.* 43 W. Va. 11, and in *Chi-*

Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542, in which Mr. Justice Field, after commenting upon the charge of the court below as misleading, and upon facts not before it, indorses the above doctrine in the following language: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant." See also *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224.

The only remaining error we have to notice is that raised by the first assignment of the request of defendant's counsel at the conclusion of all the evidence to direct and instruct a verdict in favor of the defendant on the grounds that the evidence demanded such a verdict, and that no other verdict could properly be rendered under the evidence and under the law applicable in this case. There can be no doubt of the right and duty of the court to do so when the evidence introduced shows that by the exercise of ordinary care he might have avoided the injury. It is the undisputed testimony in the case that the approaching train could be seen from 200 yards to $\frac{1}{2}$ of a mile before it reached the point where the accident occurred. It was daytime, and the plaintiff below was in possession of sight and hearing. All other witnesses saw it approaching, and most of them heard the bell. It is true that when plaintiff below was asked by counsel to state in his own way the circumstances of the injury, in his answer thereto he states no less than four times in the first paragraph that he looked for the train; but this was not and cannot be true. It never should have been submitted to the jury, and it is too much to ask this court to affirm a judgment upon a statement so evidently false. The train was in sight, and he either did not look, or, if he did, he saw it; he would be obliged to see it.

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When there is any question to leave to the jury, they should determine it; but when the testimony of a witness is so absolutely incredible as to be impossible of belief, the court should so determine. This was done in *Ashworth v. East Tennessee, V. & G. R. Co.* 97 Ga. 307, and in *Payne v. Chicago & A. R. Co.* 186 Mo. 562, and was approved by Thayer, J., in *Chicago, R. I. & P. R. Co. v. Pounds*, 49 U. S. App. 476, 82 Fed. Rep. 217, 27 C. C. A. 112. The comments of the court in the *Payne Case* seem so appropriate to the facts of this case that we conclude the opinion by an extract therefrom:

"But in this instance it is plainly proved beyond peradventure that this statement of plaintiff 'that he did all in his power to ascertain whether there were any trains approaching,' etc., was not, and indeed could not be, true. This matter of denying probative force, even to direct and affirmative testimony, when such testimony is plainly at war with the physical facts and surroundings, has passed into precedent. Thus, in the leading case of *Arts v. Chicago, R. I. & P. R. Co.* 34 Iowa, 158, it is said: 'But it is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory negligence, or, at the very least, it made that a question of fact for the jury. The difficulty, however, with the position is that, the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness, having good eyes, should testify that at the time he looked and did not see it shine. Could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look and did not see the sun shine; he may have thought of it with a desire that it should have been so: he may have made himself first believe that it was so, and this belief may have ripened into a conviction of its verity, and, possibly, he even may testify to it in the self-consciousness of integrity. But, after all, in the very nature of things, it cannot be true, and hence cannot, in the law, form any basis for a conflict upon which to rest a verdict. A man may possibly think he sees an object, which has no existence in fact, but which it may be difficult, if not impossible, to prove did not exist or was not seen. But an object and power of sight being conceded, the one may not negative the other. In this case the plaintiff had good eyes; the train was approaching him in the night, with the engine's headlight burning brightly; if the plaintiff looked he must have seen it, or he must have looked very negligently and carelessly—in either case he was necessarily, in the eyes of the law, guilty of contributory negligence, precluding his right to recover.'"

The judgment is reversed, and the cause remanded, with instructions to the court below to award a new trial.

McCormick, Circuit Judge, dissenting:

I cannot concur with my brethren in the decision of this case. I do not draw from the

testimony the same conclusions that they announce. I think there was a substantial conflict in the testimony as to the rate of speed of the incoming train, and as to the distance to the point at which the train came into plain view, and that these matters are not so well established by the proof as requires or permits the court to find, as matter of law, that the testimony of the defendant in error to the effect that he did look, and did not see the train, "is not and cannot be true." And, in my judgment, the state of the proof in the case requires that it should be submitted to the jury. I say nothing about the manner in which it was submitted to the jury, because this court, as I understand it, reverses the case on the ground that it should have been withdrawn from the jury, holding that the proof conclusively shows that want of care upon the part of defendant in error, which would bar him from recovery, without regard to the negligence of the plaintiff in error. My understanding of the proof is that it shows that the defendant in error had placed his baggage on the outgoing train, upon which he intended to take passage, and, as that the train was stopped for dinner,

he stepped across the way, to some business house, while his train was waiting, and he was returning to his train at the time he received the injury. I do not understand the force of the suggestion that he had not been to the depot, nor purchased a ticket, nor notified any of the officers or agents of the defendant company that he was even a prospective passenger. He had a ticket. Therefore he did not need to purchase another. He put his baggage upon the train. I cannot see what occasion he had to go to the depot, unless it is intended to hold that a man cannot be a passenger on a road until he notifies some officer or agent of the carrier that he is a passenger, which I presume the court does not intend to hold. My view being that the defendant in error was a passenger within the meaning of the law applicable to the diligence that devolves upon such carriers, and that there was such a conflict in the testimony with reference to the speed of the train, and the distance at which it could have been seen, it was proper to submit the issues to the jury, and let them weigh the testimony, and pass on the questions of negligence.

ARKANSAS SUPREME COURT.

Irene DUFFY, *Appt.*,

v.

Mary J. HARRIS.

(.....Ark.....)

A married woman does not, by abandoning her husband and living apart from him in another state, even though in adultery, forfeit her right to his homestead, under Const. 1874, art. 9, § 6, providing that if the owner of a homestead die leaving a "widow" the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life.

(April 23, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Lee County in favor of plaintiff in an action brought to recover possession of certain real estate as the homestead of Dan Harris, deceased. *Affirmed.*

Statement by **Hughes, J.:**

To an action of ejectment brought by the appellee, the widow of Dan Harris, deceased, against the appellant, the daughter of the said Dan Harris, to recover possession of the homestead of the deceased, the appellant answered, in substance, that the appellee had, before the death of said Dan Harris, wilfully deserted and abandoned her husband, the said Dan Harris, and the homestead in suit, wholly without provocation, and removed, against his protest and earnest entreaties, to the state of Tennessee, where she continuously resided, until after the death of said Dan Harris on said homestead; that plaintiff, as the defendant believed, had, while so absent,

lived in adultery; that, though earnestly and persistently persuaded by her husband to return to her home, she persistently refused and failed to do so, until after the death of the said Dan Harris; that she, the appellee, by such conduct, had forfeited her right to the homestead. Upon motion, so much of the answer as set up an abandonment and desertion of Dan Harris, and her alleged immoral and unchaste conduct, was stricken out, over the protest of the defendant, to which she excepted. The grounds of the motion were that said portion of the answer constituted no defense, and was wholly irrelevant to the issue. The court gave judgment for appellee. Defendant moved for new trial, which was denied, to which she excepted, and appealed to this court.

Mr. James P. Brown, for appellant:

If a wife refuses to occupy the homestead of her husband while he is living, and she actually lives in another state, is it the policy of our law for her to so disgrace it, and then, as soon as the breath has left his body, for her to return and claim the homestead to the exclusion of the dead husband's heirs and creditors? It was for the benefit of no such wife that our homestead laws were made.

Travick v. Harris, 8 Tex. 312; *Cockrell v. Curtis*, 83 Tex. 105; *Earle v. Earle*, 9 Tex. 630; *Sears v. Sears*, 45 Tex. 559; *Newland v. Hoi-land*, 45 Tex. 588; *Prater v. Prater*, 87 Tenn. 78; *Farnell Brick, T. & C. Shingle Co. v. McKenna*, 86 Mich. 283; *Thompson, Homesteads & Exemptions*, §§ 73-76; *Dickman v. Birkhauser*, 16 Neb. 686.

No court would suggest that a husband should apply for a divorce merely as an aid to his preventing his wife or widow from ever enjoying, or coming into possession of his property.

NOTE.—For misconduct of wife to forfeit her rights in the husband's estate, see also cases in note to *Adams v. Storey* (Ill.) 11 L. R. A. on page 791; and also the case of *Rosholt v. Mehus* (N. D.) 23 L. R. A. 220, and note.

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1 Bishop, Mar. Div. & Sep. § 38.

Is there any reason in the case at bar why appellee should not be estopped to claim homestead, as regards the lot in suit?

Nuhn v. Miller, 5 Wash. 405, 84 Am. St. Rep. 868, and cases in footnote; *Pickens v. Giliam*, 43 La. Ann. 350.

A wife cannot force her husband to support her during her wrongful absence from him.

2 Kent, Com. p. 146.

If she can thus renounce such support, why not also homestead support?

1 Bishop, Mar. Div. & Sep. §§ 1228-1284.

Since the reason of antiquated rules, growing out of the ancient disabilities of married women, no longer exists, on account of the enfranchising spirit of modern laws, the rules themselves should be no longer enforced.

Sidway v. Nichol, 62 Ark. 146; *Prater v. Prater*, 87 Tenn. 78.

Messrs. McCulloch & McCulloch, for appellee:

Two rules have been established, one by the Texas courts to the effect that such conduct of the wife works a forfeiture of the claim of homestead after the death of the husband, and the other, the New Hampshire court, holding the opposite.

Trawick v. Harris, 8 Tex. 312; *Earle v. Earle*, 9 Tex. 630; *Sears v. Sears*, 45 Tex. 559; *Newland v. Holland*, 45 Tex. 588; *Meador v. Place*, 43 N. H. 308; *Atkinson v. Atkinson*, 40 N. H. 249, 77 Am. Dec. 712; *Thompson, Homesteads & Exemptions*, §§ 8, 73-77; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 580; *Lies v. De Diablar*, 12 Cal. 327; *Christie's Succession*, 20 La. Ann. 383, 96 Am. Dec. 411.

The constitutional provision clearly makes the right of the widow depend on her legal status as wife and widow, and not upon her *de facto* relations to the family or the occupancy of the property, thus bringing it squarely within the New Hampshire doctrine.

Johnston v. Turner, 29 Ark. 290; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 580; *Meador v. Place*, 43 N. H. 307, and *Lies v. De Diablar*, 12 Cal. 327; *Gates v. Steele*, 48 Ark. 539; *Memphis & L. R. R. Co. v. Adams*, 46 Ark. 159.

Hughes, J., delivered the opinion of the court:

The homestead provision for the widow (Const. 1874, art. 9, § 6) is as follows: "If the owner of a homestead die, leaving a widow but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's rights to cease at twenty-one years of age—and the shares to go to the younger children, and then all to 40 L. R. A.

go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate." It would seem that the language of this section of the Constitution settles the question involved in this suit. The appellee had never been divorced from her husband, and she was unquestionably his widow. How, then, can she be debarred of her homestead right without reading into the Constitution an exception or provision it does not contain, to the effect that if the wife abandon her husband, and is guilty of immoral and unwifely conduct, she shall forfeit her right thereby to the homestead? We think such a construction unwarranted and untenable. We are aware that it has been held otherwise in Texas and some other states. *Trawick v. Harris*, 8 Tex. 312; *Earle v. Earle*, 9 Tex. 630; *Sears v. Sears*, 45 Tex. 559; *Prater v. Prater*, 87 Tenn. 78; *Farwell Brick, T. & C. Shingle Co. v. McKenna*, 86 Mich. 283. On the other hand, we find that in the case of *Meador v. Place*, 43 N. H. 308, and cases therein cited, it is held that the abandonment by the wife of her husband, and living apart from him, in another state, does not forfeit her right to the homestead upon the death of the husband. In this state it is held that the domicile of the wife follows that of the husband; and we understand this to be the rule, and that the fact that she abandons her husband, and lives apart from him, in another state, will not form an exception or cause her to forfeit her right to the homestead. She is not a nonresident, while her husband is a resident. Her legal status as to this is governed by that of the husband. *Meador v. Place*, 43 N. H. 308; *Johnston v. Turner*, 29 Ark. 280, and cases; *Thompson, Homesteads & Exemptions*, §§ 73, 77; *Atkinson v. Atkinson*, 40 N. H. 249, 77 Am. Dec. 712. "The wife, though living separate, might have returned to her duty at any time." He owed her protection and support as long as the relation of husband and wife existed by law. And the desertion of the wife could not alter his legal status. He was still the head of a family, entitled to a homestead; and as long as the relation of husband and wife existed *de jure*, the appellee was his wife, and at his death was his "widow," and entitled, under the Constitution, to the right of homestead. Const. 1874, art. 9, § 6; *Gates v. Steele*, 48 Ark. 539; *Stanley v. Snyder*, 53 Ark. 429.

A majority of the court is of the opinion that, under the Constitution and laws of this state, the appellee is, in law, the widow of Dan Harris, and that she has not, by her abandonment of him, and living apart from him, in another state, forfeited her right to his homestead, however reprehensible her conduct morally may have been.

The judgment of the Circuit Court is therefore affirmed.

MARYLAND COURT OF APPEALS.

James W. JONES, *Appt.*,

v.

T. Albert SKINNER *et al.*

(.....Md.....)

1. The right to vote in the district in which a steamer is tied up while at her home port is not acquired by the purser, who lives on the steamer, but who had previously acquired a voting residence in another district of the city.
2. The fact that a person is improperly and illegally permitted to vote at another place will not alone disqualify him from continuing to vote at his actual residence.

(May 13, 1896.)

A PPEAL by defendant from an order of the Superior Court of Baltimore City striking his name from the register of qualified voters. *Affirmed.*

The facts are stated in the opinion.

Mr. George Weems Williams, for appellant:

To acquire a residence by choice, one must remove to this state, or, being an actual resident of the state, he must remove from one county to another with the bona fide intention of abandoning his former place of residence and of making this state or the county to which he removes his actual home for a definite or an indefinite period of time.

Shaeffer v. Gilbert, 73 Md. 71.

The appellant must, therefore, show: (1) The existence of a bona fide intention on his part to abandon his former residence in the second legislative district; (2) the existence of a bona fide intention on his part to make the third legislative district his actual home, and that he has continued to reside therein with that intention for six months or more.

No facts could more strongly show a bona fide intention to abandon than those presented by the record in this case.

How can Jones possibly have any intention of returning to his room in a house, when that house has been vacant for two years?

If a person is residing at a particular place, and there is doubt as to whether he is residing there temporarily, and claiming another place as his home, if he claims and exercises the right to vote at the place where he is for the time residing, that fact ought to be regarded as evidence well nigh conclusive that he has abandoned his former residence, and determined to make his home where he claims his vote.

McCrary, Elections, § 34, p. 32.

"Residence" does not mean one's permanent place of abode, where he intends to live all his days, or for an indefinite or unlimited time; nor does it mean one's residence for a temporary purpose, with the intention of returning to his former residence when that purpose shall have been accomplished, but means one's ac-

tual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time.

Shaeffer v. Gilbert, 73 Md. 71; *Langhammer v. Munter*, 80 Md. 518, 27 L. R. A. 330.

"Residence" does not of necessity mean living in a house.

Langhammer v. Munter, 80 Md. 526, 27 L. R. A. 330; *Re Collins*, 64 How. Pr. 63.

Messrs. John C. Rose and Harry W. Henderson for appellees.

Briscoe, J., delivered the opinion of the court:

The material facts of this case are almost identical with the case of *Howard v. Skinner* (decided at this term of court), *post*, 753, except in one particular, which will be briefly stated in this opinion. The appellant, Jones, testified that he moved to Baltimore city from St. Mary's county about seven years ago, and considers Baltimore his home; that he was employed by the Weems Steamboat Company as purser of the steamer Sue; that he first resided on Lexington street, near Gilmor (nineteenth ward, second legislative district); he then moved to 403 North Paca street (tenth ward, second legislative district); and from there he moved to the steamer Sue (Pier No. 9, Light Street wharf, the third legislative district, where he has been for two years, except the period of two months of the winter of 1896, when he resided at 416 West Fayette street (tenth ward, second legislative district); that he had never voted anywhere else except in the city of Baltimore, where he had voted four times; the first time he voted from Lexington street, and then twice from Paca street; and that he was now registered from the steamer Sue, Pier 9, Light Street wharf (third legislative district), and had voted at the previous election from there. He further testified that the steamer remained in Baltimore only two days in each week; that Baltimore is the home port of the steamer; that the schedule of the steamer was as follows: Leave Baltimore on Saturday at 5 P. M. for Washington, remaining at the terminus in that city from eight to sixteen hours, and returning to Baltimore on the following Wednesday; leave Baltimore on Wednesday night at 9 P. M. for the Patuxent river, arriving in Baltimore again on Saturday morning.

Now, it is conceded that the appellant possessed all the qualifications of a legal voter except that of residence, and there can be no question, it seems to us, that he has also acquired a legal residence in the city of Baltimore but not in the third legislative district of that city, as claimed by him. The fact that he resided upon the steamer Sue, while tied to its wharf or pier, does not, as held by this court in the recent case of *Howard v. Skinner*, fix or establish a voting residence. Nor does the fact

NOTE.—On the question of the domicile of a person for voting purposes, see also *Langhammer v. Munter* (Md.) 27 L. R. A. 330.

On the question how far the right to vote is absolute, see *State, Allison, v. Blake* (N. J.) 25 L. R. A. 430, and *note*; also *State v. Old* (Tenn.) 31 L. R. A. 337; see also the companion case of *Howard v. Skinner* (Md.) *post*, 753.

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that the appellant was improperly and erroneously registered and voted at a prior election in this district change or determine his residence. The sole ground relied upon by the appellant to establish residence, on the prior registration, was the fact that he resided upon the steamer while tied up in the district where he proposed to register; and this, we have distinctly held, is not sufficient to constitute a voting residence. If a person is clearly a resident of and legal voter in one place, and is improperly and illegally permitted to vote at another, that fact alone will not disqualify him from continuing to vote at the place of his actual residence. *Lincoln v. Hapgood*, 11 Mass. 350. The appellant did not acquire then such a residence in the first precinct of the fifteenth ward of the third legislative district as entitled him to be registered there, but, having acquired a residence in the city of Baltimore, he is entitled to be registered and to vote in the ward of the legislative district from which he removed, until he has acquired a residence elsewhere. For these reasons, the order of the court will be affirmed.

Order affirmed with costs.

Wallace HOWARD, *Appt.*,

v.

T. Albert SKINNER *et al.*

(.....Md.)

A voting residence at the home port of a steamer is not acquired by a clerk who sleeps in a room on the boat, and who has no other room or place to live, and is unmarried.

(May 12, 1898.)

A PPEAL by defendant from an order of the Superior Court of Baltimore City striking his name from the registry list of qualified voters. *Affirmed.*

The facts are stated in the opinion.

Messrs. William S. Bryan, Jr., and George Weems Williams for appellant.

Messrs. John C. Rose and Harry W. Henderson for appellees.

Briscoe, J., delivered the opinion of the court:

On the 26th of October, 1897, Robert W. Perry, Jr., of Baltimore, filed a petition under act 1896, chap. 202, in the superior court of Baltimore city, wherein he alleged that the appellant, Wallace Howard, who professes to reside aboard the steamer Westmoreland, of the Weems Steamboat Company, at Pier 2, Light Street wharf, Baltimore, and who is registered as a qualified voter, in the first election precinct of the fifteenth ward (third legislative district), was not a qualified voter, entitled to be so registered; and, from an order of the court directing his name to be stricken from the list of registered voters for this precinct and ward, this appeal has been taken.

It appears from the record that, at the trial of the case, the appellant, Howard, who was

the only witness examined, testified that he had been employed as clerk of the Weems Steamboat Company for over three years; that the steamer upon which he was employed was engaged in the transportation of passengers and merchandise between the city of Baltimore, the Kappahannock and Patuxent rivers, with its home port in the city of Baltimore; that he was unmarried, and had a room upon the steamer, where he slept; that he had never voted either in Baltimore or elsewhere. He also testified that he came to Baltimore from St. Mary's county, where he would return in the event of losing employment; that he had no room or other place to live except on the boat; that he had lived with his aunt on Preston street, in the second legislative district of Baltimore, about one or two weeks before he was employed by the steamboat company. There was other evidence tending to establish the qualification of the appellant as a voter; but, as it is conceded that he possessed all the necessary qualifications prescribed by the Constitution of the state except that of residence, it need not be more fully stated for the purposes of this case.

It is quite apparent, under the facts of the case, that the appellant never acquired a voting residence in the city of Baltimore, unless his alleged residence upon the steamer, while temporarily lying at her pier at Light Street wharf, in the city of Baltimore, gave him one. The appellant's domicile of origin was St. Mary's county, and this continued until he acquired another elsewhere. By the express terms of § 1 of article 1 of our Constitution, a person who shall have acquired a residence in a county or city of the state, entitling him to vote at an election there held, shall be entitled to vote in the election district from which he removed, until he shall have acquired a residence in the part of the county or city to which he has removed. *McLane v. Hobbs*, 74 Md. 171; *Shaeffer v. Gilbert*, 73 Md. 66. And in *Turner v. Crosby*, 85 Md. 180, this court said, in construing article 23 of chapter 202 of the Acts of 1896 (the present registration law of the state), that, in determining whether any person is or is not a resident of any voting precinct, it shall be presumed that, if a person is shown to have acquired a residence in one locality, he retains the same until it is affirmatively shown that he has acquired a residence in another locality.

The next question, then, is, Did the appellant acquire a voting residence in the city of Baltimore by residing upon the steamer, in the manner as stated by him? Now, the rule of law seems to be settled that a seaman or seagoing man retains his domicile of origin, although he is regularly employed on a steamer, unless, by actual residence, he acquires a domicile elsewhere. In *Thorndike v. Boston*, 1 Met. 245, Chief Justice Shaw states the rule thus: "If a seaman without family or property, sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent for many years, yet if he does not, by some actual residence or other means, acquire a domicile elsewhere, he retains his domicile of origin." And to the like effect are the cases of *Sherwood v. Judd*, 3 Bradf.

NOTE.—See the preceding case of *Jones v. Skinner* (Md.) *ante*, 752, and footnote.

276; *Bangs v. Brewster*, 111 Mass. 885; *Long v. Ryan*, 80 Gratt. 718; *Desobats v. Berquier*, 1 Binn. 849, note a, 2 Am. Dec. 448; *Re Bye*, 2 Daly, 525; *Fry's Case*, 71 Pa. 302, 10 Am. Rep. 698; and also *Cooley*, Const. Lim. 755; *Story*, Conf. L. 55; *Dacey*, Domicil, 139; and *Jacobs*, Domicil, 395. And this, we think, is the safe rule to be adopted and applied in cases similar to the one now under consideration. The appellant's domicil of origin continued until another domicil was acquired, and, as he could acquire no new residence where the steamer happened to stop or to have her wharf, he did not lose his original residence. If a person could gain a voting residence by simply residing upon a steamboat, because it was temporarily fastened to a pier or wharf, while discharging its freight and taking on its cargo, then one might acquire any number of residences, and would have the right to register at either terminus of the steamer, or at any point where the steamer stops. "Residence," as contemplated by the framers of our Constitution, for political or voting purposes, means a place of fixed present domicil. The object in prescribing residence as a qualification for the exercise of the right of suffrage, says this court in *Shaeffer v.*

Gilbert, 73 Md. 70, is not merely for the purpose of identifying the voter, and as a protection against fraud, but also that he should become in fact a member of the community, and, as such, have a common interest in all matters pertaining to its government. Residence upon a steamer like that claimed by the appellant has none of the characteristics of a fixed or permanent abode, within the meaning of our Constitution as entitles a person to be registered as a qualified voter. If the contention of the appellant in this case was sustained, then a steamboat company could fix the legal residence of its employees, who reside upon its steamers, by simply changing its pier or wharf. The case of *Re Collins*, 64 How. Pr. 63, relied upon by the appellant, is clearly distinguishable from the case at bar. It has no application to the residence of a voter, as prescribed by the Constitution of our state. It follows, then, the ruling of the court below that the name of the appellant, Wallace Howard, be stricken from the list of qualified and registered voters of the fifteenth ward of Baltimore, was correct, and its order will be affirmed.

Order affirmed, with costs.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Ellen M. BAKER *et al.*, Trustees, etc.,
v.

Z. Adams WILLARD *et al.*, Trustees, etc.

Harriet M. LOWELL

v.

SAME.

(.....Mass.....)

- 1. The easement or right in respect to light and air from an open space** annexed to a mansion-house estate, created by will by providing that the establishment shall continue as much as possible unchanged, does not amount to a general right to have the space kept open for the whole extent of the court, but only to an ordinary easement of light and air for the windows and doors of existing buildings, where there was no communication or entrance to the court from the mansion-house estate, and its only use of the court was for light and air and for a drain.
- 2. The right to have a court kept open** is not created by estoppel by bounding land thereon in a deed by an administrator selling land under a license of the probate court.
- 3. A tenant in common cannot create an easement** over the premises without consent of his cotenants.
- 4. The doctrine that an easement appurtenant to a close is appurtenant to every parcel** into which that close may be divided is not applicable to an easement of light and air which ordinarily is limited to windows and doors or other apertures in a building.

NOTE.—For American law as to easements of light and air, see notes to *Case v. Minot* (Mass.) 22 L. R. A. 536; and *Jones v. Millsaps* (Miss.) 23 L. R. A. 158.
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- 5. The right of a passage on foot** over a space not less than 3½ feet in width does not include the right to have the passage kept open to the sky.

(May 20, 1898.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of suits brought to enjoin defendants from closing a passageway. *Dismissed.*

The facts are stated in the opinion.

Messrs. L. S. Dabney, F. V. Balch, F. Rackemann, L. I. Partridge, and Hutchins & Wheeler for plaintiffs.

Messrs. Solomon Lincoln, William A. Munroe, and Henry H. Sprague, for defendants.

The plaintiffs claim an easement of light and air in the whole of the court, and the right to have it kept open and unobstructed.

Such rights as are claimed, however they may be designated, must be acquired by express grant. They are in substance rights to light and air, and such rights cannot be established by implication or prescription.

Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80.

There were no easements over the Jeffries estate in favor of the mansion-house estate while Eliot lived. He acquired the mansion house estate in 1784, and the Jeffries estate in 1799.

Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688; *Johnson v. Jordan*, 2 Met. 234, 37 Am. Dec. 85.

No easement of light and air can be created except by express grant.

Randall v. Sanderson, 111 Mass. 114; *Keats*

v. *Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Christ Church v. Lavezolo*, 156 Mass. 89.

There is nothing in the facts to justify such a construction of the will of Samuel Eliot as would make the easements claimed pass with the mansion-house estate, even if easements of light and air or open court could have been created by implication. Even then they could have been implied in Massachusetts only from necessity.

Carbrey v. Willis, 7 Allen, 364, 88 Am. Dec. 688; *Randall v. McLaughlin*, 10 Allen, 366; *Buss v. Dyer*, 125 Mass. 287.

Even in England a right of way, not of necessity, will not pass under a devise unless the testator by appropriate language shows an intention that it should pass.

Taus v. Knowles [1891] 2 Q. B. 564; *Polden v. Bastard*, L. R. 1 Q. B. 156.

There was no right of drainage. It was not mentioned. It could have been created by implication, if at all, only from necessity. The house was on a corner where there was ample opportunity to construct other drains.

Johnson v. Jordan, 2 Met. 234, 37 Am. Dec. 85.

Even if such easements had been created they would have been lost by a merger of title in William H. Eliot.

Riger v. Parker, 8 Cush. 145, 54 Am. Dec. 744; *Atwater v. Bodfish*, 11 Gray, 150.

William H. Eliot was but a tenant in common of the place, and whatever may have been the intent of his administrator he had not the power to encumber the place with easements to the prejudice of his cotenants.

Adam v. Briggs Iron Co. 7 Cush. 361; *Crocker v. Cotting*, 166 Mass. 183, 33 L. R. A. 245.

Whatever easements of light and air might have existed, under the English rule, in favor of the mansion house over Phillips place would have been confined to the windows of the mansion house as it then existed.

Aldin v. Clark [1894] 2 Ch. 487; *Goddard*, *Easem.* 5th ed. 1896, pp. 265, 368 et seq.

If the construction of a deed is doubtful, the practical construction put upon it by the parties and their successors may be looked at in connection with the deed itself, and the circumstances existing at the time of its execution.

Whittenton Mfg. Co. v. Staples, 164 Mass. 319, 29 L. R. A. 500; *Haven v. Foster*, 14 Pick. 534; *Pomeroy v. Latting*, 15 Gray, 435; *Clark v. Brown*, 3 Allen, 509; *Brooks v. Whitmore*, 139 Mass. 358; *Winchester v. Glazier*, 152 Mass. 316, 9 L. R. A. 424; *Reynolds v. Boston Rubber Co.* 160 Mass. 240; *Humphreys v. Old Colony R. Co.* 160 Mass. 323; *Crocker v. Cotting*, 166 Mass. 183, 33 L. R. A. 245.

The plaintiffs have seen the place occupied by the defendants and their predecessors for twenty years. They have taken no steps for enforcement of rights in the passageway, if any ever existed, or to prevent their extinguishment. If rights existed, laches prevents the maintenance of these proceedings.

Starkie v. Richmond, 155 Mass. 188.

The defendants claim and intend to exercise the right to build over the $\frac{3}{4}$ feet passageway not already built over, covering it with an arch at a height sufficient not to interfere with its

use as a passageway for foot passengers. This they may do.

Atkins v. Bordman, 2 Met. 457, 37 Am. Dec. 100; *Gerrish v. Shattuck*, 132 Mass. 235; *Burnham v. Nevins*, 144 Mass. 88, 59 Am. Rep. 61; *Perry v. Snow*, 165 Mass. 23.

Allen, J., delivered the opinion of the court:

We will consider in the first place the nature and extent of the supposed original right which the plaintiffs respectively seek to establish. This right had its origin in the provisions of the will of Samuel Eliot, who died in 1820. He was the owner of the estate in Boston, on the corner of Beacon and Tremont streets, bounding south of Beacon street, and east on Tremont street. His mansion house faced on Tremont street, and the land immediately connected with it was bounded southerly by Beacon street, and northerly by an open court or space about 20 feet wide, and extended westerly to his boundary line. On the northerly side of the open court or space he had built three brick dwelling houses, which faced southerly, and were then occupied, respectively, by three of his daughters, with their husbands. Mr. Eliot's mansion house stood about 8 feet south of the southerly line of the court, having an L which extended westwardly on the same line with the mansion house. Five of the windows of the mansion house looked upon the court, and two rooms were entirely dependent on these windows for light; but there was no entrance or communication between the mansion-house estate and the court,—there being between them a fence 6 or 7 feet high, in which there was no opening. There was a drain through the court, which was used for all the four houses. Mr. Eliot, by his will, devised to the said three daughters, "severally and respectively, the brick dwelling houses, and their respective privileges and appurtenances, by them at the day of the signing of this will respectively occupied and improved; each to have and to hold their houses, and estates thereto belonging, now in their occupation; to them, their heirs and assigns forever." He devised the mansion-house estate as follows: "It is my will that my wife, Catharine Eliot, and my children who may reside with her, shall have the use of my present mansion house, and also the free use of all my plate, furniture, stores of every description in the house, and my horses and carriages, for their full enjoyment, without being responsible for any loss, consumption, or wear or injury to the same to my other children; it being my design that the family establishment shall continue, as much as possible, unchanged. The said devise of the mansion house to my wife for life is on the condition that she shall continue to reside therein personally as mistress thereof. . . . I give the reversion thereof to my son, William Harvard Eliot, his heirs and assigns, forever." After sundry other bequests and devises, not here material, he devised all the residue of his estate equally to his children, of whom there were seven. The will contained no specific devise of the land between the three dwelling houses and the mansion-house estate. At that time, as found by the master, the preservation

of the space between the mansion house and the three new brick houses, as an open court, was important, if not indispensable, to the convenient and accustomed enjoyment of the mansion house, in respect of light and air, so long as the mansion house should be continued in the state and situation in which it then was. October 20, 1829, the widow of Samuel Eliot died; and William H. Eliot thereupon became, under his father's will, the owner in fee of the mansion-house estate, subject to the condition that he should personally occupy the same. By mesne conveyances, the title to the westerly brick dwelling house had come to Timothy H. Carter, who erected a building upon the westerly portion of the court; and William H. Eliot thereupon brought a writ of entry against him to recover one-seventh part of the land. This case went to the full court, and by the decision reported in 12 Pick. 436, it was held that the fee of the court did not pass to the testator's three daughters, under the devise of the three dwelling houses, but to his seven children, under the general residuary clause. This decision was given on April 6, 1832, as we infer from the date in the margin of the volume. In the opinion, the court, in speaking of the open space, says: "There are some considerations which have led us to the conclusion that it was the intention of the testator to devise an easement, and not a fee. He manifested in his will a great attachment to the mansion in which he had long lived, and a strong desire that it should be continued in the state and situation in which it then was. The preservation of the space between that and the three new brick houses, as an open court, was important, if not indispensable, to the convenient and accustomed enjoyment of the mansion house. . . . We cannot, by possibility, believe that the testator intended to devise the upper houses without a right of way to the street. . . . We are of opinion that it was the intention of the testator to preserve an open court there for the benefit and convenience of the adjoining houses, to give the respective owners thereof an easement in the court for various purposes." It was also then agreed (and the same fact is found and reported in the present case by the master) that the court was never used by the testator as a passageway to his mansion-house estate, nor in any other way in connection with it, except for light and air for the windows, and for the drain. The right of drainage is now immaterial. It is thus apparent that it was then considered that by the will of Samuel Eliot some easement or right in respect to light and air from the open space was annexed to the mansion-house estate, but the extent of it was not defined in that decision. The present plaintiffs contend that it was something more than the ordinary easement of light and air for the windows and doors of existing buildings, and that it amounted to a general right to have the space kept open for the whole extent of the court as it then was.

There is no doubt that, under some circumstances, provision may be made by owners of land for keeping certain spaces open generally for light, air, prospect, and other purposes of convenience and enjoyment, without attaching this right to particular buildings. Open

squares may be dedicated to public purposes. *Abbott v. Cottage City*, 143 Mass. 522, 58 Am. Rep. 148. And, in making plans for the improvement and development of lands provision is often made for keeping certain spaces open, of which illustrations may be found in *Brooks v. Reynolds*, 106 Mass. 81; *Salisbury v. Andrews*, 128 Mass. 836, and in numerous other reported cases. So that the question is, What was the testator's intention in this case? Such a restriction is to be interpreted according to the apparent purpose of protection or advantage to the several estates concerned. *Smith v. Bradley*, 154 Mass. 227; *Hano v. Bigelow*, 155 Mass. 341. In the present case we find no satisfactory evidence to show that the testator sought to create any further protection or advantage to the mansion-house estate, in respect to light and air, than the ordinary easement of that kind. It does not appear that he had any further building scheme in mind, or that he contemplated the cutting up of his mansion-house estate into separate lots. What he had at heart was, as expressed in his will, "that the family establishment shall continue, as much as possible, unchanged." The court in *Eliot v. Carter*, 12 Pick. 436, mention, as significant, his strong desire that the mansion "should be continued in the state and situation in which it then was." No intention is manifested to provide for the benefit of additional buildings, to be thereafter erected. So far from making any provision for light, air, or prospect for future structures, he left the easement in favor of his existing dwelling to be gathered from implication. He speaks of his mansion house, but says nothing in express terms of the land connected with it, except, in one instance, he mentions the "house and land thereto properly belonging." His interest attached to the dwelling place as it was, and he made no provision looking to its division into separate building lots. The plaintiffs have failed to show an intention on the part of the testator to create any further easement, in respect to keeping the court above the surface of the ground open, than the ordinary easement of light and air for the benefit of the mansion-house estate as it then was. *Leech v. Schuchert*, L. R. 9 Ch. 468, 473. We have then to consider whether the plaintiffs are entitled to the benefit of such an easement, assuming for the present that the easement, in its original extent, has not been extinguished by merger or otherwise.

William H. Eliot having died, his administrator, under leave of the probate court, conveyed the mansion-house estate, in 1833, to Israel Thorndyke. In this deed the land conveyed was bounded northeasterly, "in part, by a court called 'Phillips Place.'" It is suggested in argument that these words created, by estoppel, a right to have the court kept open. But this deed was made by an administrator, who was selling land under a license of the probate court. He was not at that time selling the testator's interest in the open court, and perhaps he never would do so. We are not aware that it has ever been held that under such circumstances an administrator could impose an easement on other land, which he was not then selling; nor, under the circumstances do we think that an intention to create such a

easement should be inferred. Moreover, even assuming that the administrator had all the powers of the testator, the latter at his death owned only one undivided seventh part of Phillips place; and he, being only a tenant in common, could not have created such an easement without the consent of his cotenants. *Clark v. Parker*, 106 Mass. 554. See also *Jones*, Easem. § 224, and cases there cited.

The estate was subdivided by Thorndyke, who in 1835 conveyed the lot now owned by Mrs. Lowell,—one of the present plaintiffs,—by deed, to Stowell. This lot is now No. 2 Beacon street, rectangular in shape, and has 26 feet front on Beacon street. The easterly boundary line is about 63 feet west of Tremont street at the front, and somewhat further at the rear. The lot now owned by the other plaintiffs is No. 4 Beacon street, lying westwardly from Mrs. Lowell's lot, and separated by an intervening lot; and this lot was also conveyed by Thorndyke, in 1835, to a different purchaser, Lovejoy. The L of the mansion house reached back at least nearly to the easterly line of what is now Mrs. Lowell's lot, and perhaps extended a very few feet over that line; it being impossible now to determine exactly where the westerly wall of the L stood. All the windows which looked upon the court were, however, east of the boundary of that lot. The stable and other outbuildings stood further back from the court, and it does not appear that they depended on the court for either light or air. Upon these facts, it is quite obvious that the easement of light and air was limited to the mansion house. This easement does not exist in favor of a vacant piece of ground, unless by virtue of provisions or circumstances clearly showing an intention to that effect. We need not now go nicely into the question of the exact rules for determining the measure of this right, in favor of new structures, in cases where the original building has been pulled down or altered (as to which see *Scott v. Pape*, L. R. 31 Ch. Div. 554, and *Greenwood v. Hornsey*, L. R. 33 Ch. Div. 471), because the easement created in this case did not extend so far as to include either of the lots of land now owned by the plain-

tiffs. The plaintiffs contend that an easement appurtenant to a close is appurtenant to every parcel into which that close may be divided. This is usually so, in respect to a right of way. *Whitney v. Lee*, 1 Allen, 198, 79 Am. Dec. 727; Washb. Easem. *59. But the doctrine is not applicable to an easement of light and air, which ordinarily is limited to windows and doors or other apertures in a building. Gale, Easem. 6th ed. 289, 290, 298-300, 506, 507; Goddard, Easem. 5th ed. 51-53, 263-265, 289, 368; 2 Washb. Real Prop. 5th ed. 362 *et seq.*; Washb. Easem. *493-501.

If all other points are assumed in favor of the plaintiffs, they fail to show that any easement of light or air was created, by the will of Samuel Eliot, or otherwise, in favor of those parts of his estate which they now own. No such easement was necessary for the enjoyment of those parts of the estate, and an implied grant of an easement is not to be extended by construction beyond what was necessary, or what is fairly shown to have been within the intention of the creator of it. *Carbrey v. Willis*, 7 Allen, 364, 369, 83 Am. Dec. 688; *Parker v. Bennett*, 11 Allen, 338, 392; *Badger v. Boardman*, 16 Gray, 559; *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Sharp v. Ropes*, 110 Mass. 381; *Dalton v. Angus*, L. R. 6 App. Cas. 740; *Moore v. Hall*, L. R. 3 Q. B. Div. 178; *Scott v. Pape*, L. R. 31 Ch. Div. 554; *Harris v. DePinna*, L. R. 33 Ch. Div. 238; *Aldin v. Clark* [1894] 2 Ch. 437.

Thorndyke's deeds to Stowell and Lovejoy each contained a grant of "the right of passage to and from the rear of said lot through Phillips place to Tremont street, which is guaranteed only for foot persons, and of a width of not less than 8½ feet." The defendants admit that the plaintiffs, respectively, are entitled to this easement, but the plaintiffs have failed to show that they are entitled to have the passage kept open to the sky. *Burnham v. Nevins*, 144 Mass. 86, 59 Am. Rep. 61, and cases there cited. This view of the case being decisive in favor of the defendants, we do not consider the other questions argued.

Bills dismissed.

MICHIGAN SUPREME COURT.

Emma S. BANDFIELD, *Plff. in Err.*,
v.

Charles A. BANDFIELD.

(.....Mich.....)

A tort committed upon a wife by her husband while they are living together as husband and wife gives her no right of action, in the absence of statutory provision.

(May 17, 1896.)

ERROR to the Circuit Court for Ionia County to review a judgment in favor of

NOTE.—As to the right of action between husband and wife under modern statutes, see *note to McKendry v. McKendry* (Pa.) 6 L. R. A. 506.

40 L. R. A.

defendant in an action by a divorced woman against her former husband to recover damages for communicating syphilis to her during the continuance of the marriage. *Affirmed.*

The facts are stated in the opinion.

Messrs. R. A. Hawley and W. E. Hawley, for plaintiff in error:

One of the absolute rights, to which every individual is entitled, is the right of personal security. "The right of personal security consists in the legal and uninterrupted enjoyment of life, limb, body, health, and reputation." An injury to either, together with the consequent damage, affords to the injured person a cause or right of action, and, at common law, the person so injured could sue in his own name to recover therefor; except in

the case of a married woman or other person under disability.

It has been held, at common law, that the cause or right of action for such injury belonged to the married woman when such injury was committed by a third person, or, in other words, by a person not her husband; but that she had no remedy in her own name unless her husband joined with her.

Reeves, Dom. Rel. p. 87; Bishop, Married Women, § 705; *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Smith v. Smith*, 98 Tenn. 101.

The contrary doctrine, however, has been held in several cases; and it has been laid down as the common-law doctrine that, inasmuch as she could not sue in her own name, and the damages, when recovered, did not belong to her, the right of action was not hers.

Duffies v. Duffies, 76 Wis. 374, 8 L. R. A. 420; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

At common law, on account of the legal fiction of the unity of husband and wife, the wife has no cause of action for an injury committed upon her by her husband during coverture.

The harshness of this doctrine, by the gradual evolution of the common law, has been considerably modified, without the aid of any legislation whatever. So, the courts came to regard the alleged unity of husband and wife as an unreasonable fiction, and in many ways have sought to avoid its harshness when deemed desirable to do so.

Seater v. Adams, 66 N. H. 142; *Foot v. Card*, 58 Conn. 4, 6 L. R. A. 829; *Haynes v. Nowlin*, 129 Ind. 581, 14 L. R. A. 787; *Warren v. Warren*, 89 Mich. 123, 14 L. R. A. 545; *Burdeno v. Amperæ*, 14 Mich. 91, 90 Am. Dec. 225.

The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female.

2 How. Anno. Stat. § 6295.

Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried.

2 How. Anno. Stat. § 6297.

Under this statute the wife could sue in her own name for injuries either to her person or her reputation, and the damages, when recovered, belong to her.

Hyatt v. Adams, 16 Mich. 180; *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145; *Michigan C. R. Co. v. Coleman*, 28 Mich. 440; *Hunt v. Eaton*, 55 Mich. 362; *White v. White*, 58 Mich. 546; *Smith v. Smith*, 73 Mich. 445, 3 L. R. A. 52; *Warren v. Warren*, 89 Mich. 123, 14 L. R. A. 545; *Rice v. Rice*, 104 Mich. 371.

It has been held by this court that a wife can sue another woman for alienating her husband's affections.

Warren v. Warren, 89 Mich. 123, 14 L. R. A. 545.

In *Smith v. Smith*, 73 Mich. 445, 3 L. R. A. 52, this court held that the wife could sue a third person for a libel written and signed by the husband, and which such third person

published under the direction and at the request of the husband.

It has also been held by this court, in *People v. Chapman*, 62 Mich. 280, that a husband who stood by while a rape was committed upon his wife, and did not interfere to prevent the outrage, could be charged with and convicted of the crime of rape, as a principal.

The alimony allowed to the wife depends upon the property and means owned by the husband; and it is the policy of the courts, in granting alimony, to make the same in some degree proportionate to the property of the husband. In no case should the husband be divested of all his estate.

2 Am. & Eng. Enc. Law, 2d ed. pp. 120-123.

Mr. F. C. Miller, for defendant in error:

Under the married woman's statutes, the wife cannot maintain an action against her husband for a personal injury. Even after divorce, the wife cannot sue the husband for a personal tort committed by him upon her while the relation existed.

Cooley, Torts, p. 268; Schouler, Dom. Rel. 4th ed. § 52; 9 Am. & Eng. Enc. Law, p. 795. *Phillips v. Barnet*, L. R. 1 Q. B. Div. 438. *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27. *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 59. *Freethy v. Freethy*, 43 Barb. 641; *Longendyke v. Longendyke*, 44 Barb. 366; *Walker v. Reay*, 38 Pa. 410; *Houston v. Houston*, 4 Pa. Dist R. 248; *Mink v. Mink*, 16 Pa. Co. Ct. 189; *Peter v. Peters*, 43 Iowa, 183; *Schultz v. Schultz*, 59 N. Y. 644; *Nickerson v. Nickerson*, 65 Tex. 281; *Barton v. Barton*, 32 Md. 214; *Main v. Main*, 46 Ill. App. 106.

A married woman cannot enter into a partnership with her husband, or conduct any business in connection with him for her own benefit, and charge her separate estate therefor.

Artman v. Ferguson, 73 Mich. 146, 3 L. R. A. 343; *Edwards v. McEnhill*, 51 Mich. 160.

A husband living with his wife and having joint possession with her of a dwelling house which she owns and both occupy is not guilty of arson in burning such dwelling.

Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302.

Neither the husband nor wife is guilty of larceny in converting property of the other, either at common law or since the passage of the married woman's act.

Thomas v. Thomas, 51 Ill. 162a. See also *Jenne v. Marble*, 37 Mich. 321; *White v. Whit*, 58 Mich. 546; *Hovland v. Hovland*, 20 Hur. 472; *Ilgenfritz v. Ilgenfritz*, 49 Mo. App. 127.

The husband cannot sue his wife to recover damages for deceit by which he was induced to marry her.

Kujek v. Goldman, 9 Misc. 34.

Grant, Ch. J., delivered the opinion of the court:

The sole question is: Can a wife maintain suit against her husband for a personal tort committed upon her while they were living together as husband and wife? We answered this question in the negative in the case of *Wagner v. Carpenter*, Circuit Judge, decided November 17, 1897. In that case the husband had uttered a gross libel against his wife. She brought suit by *capias ad respondendum*, and

the proceedings were quashed by the circuit judge, for the reason that the wife could not maintain the suit against her husband. The wife applied to this court for the writ of mandamus to compel the circuit judge to vacate that order. The writ was denied, and the order of the circuit judge sustained. No opinion was written. But the sole and identical question there involved is the same as is involved in this suit. The briefs there filed pursued the same line of argument and cited the same authorities as are now cited. Counsel cite the married woman's act of this state as conferring this right. This act is found in 2 How. Anno. Stat. §§ 6295, 6297, which read as follows: "The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female. . . . Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried." In many decisions the courts of many of the states, notwithstanding the statutes conferring rights upon a married woman over her separate property not conferred by the common law, have thus far, without exception, denied the right of a wife to sue her husband for personal wrongs committed during coverture. No such right is conferred by our statute unless it be by implication. The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long established rules of the common law. Courts should not be left to construction to sustain such bold innovations. The rule is thus stated in 9 Bacon, Abr. title *Statutes*, I. p. 245: "In alldoubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law, farther or otherwise than the act expressly declares; therefore, in all general matters, the law presumes the act did not intend to make any alteration; for if the Parliament had had that design, they would have expressed it in the act."

The result of plaintiff's contention would be another step to destroy the sacred relation of man and wife, and to open the door to law-suits between them for every real and fancied wrong,—suits which the common law has refused on the ground of public policy. This court has gone no further than to support the wife, under the married woman's act, in protecting her in the management and control of her property. It has sustained her right to an action for assault and battery, for slander, and for alienation of her husband's affections against others than her husband. *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145; *Rice v. Rice*, 104 Mich. 371. At the same time, it has held that the wife could not enter into a partnership or other business with her husband, and thus become responsible for the contracts and debts of her husband. *Artman v. Ferguson*, 78 Mich. 148, 2 L. R. A. 848; *Edwards v. McEnhill*, 51 Mich. 160. Personal wrongs inflicted upon her give her the right to a decree of separation or divorce from her husband, and our statutes have given the court of chancery exclusive jurisdiction over that subject. This court, clothed with the broad powers of equity, can do justice to her for the wrongs of her husband, so far as courts can do justice, and, in providing for her, will give her such amount of her husband's property as the circumstances of both will justify, and, in so doing, may take into account the cruel and outrageous conduct inflicted upon her by him, and its effect upon her health and ability to labor. 2 Am. & Eng. Enc. Law, 2d ed. p. 120; 2 How. Anno. Stat. § 6245. In the absence of an express statute, there is no right to maintain an action at law for such wrong. We are cited to no authority holding the contrary. We cite a few sustaining the rule: *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Freethy v. Freethy*, 42 Barb. 641; *Peters v. Peters*, 42 Iowa, 182; *Schultz v. Schultz*, 89 N. Y. 644; *Cooley, Torts*, 2d ed. p. 268; *Schouler, Dom. Rel.* § 252; *Newell, Defamation*, p. 366; *Townshend, Slander & Libel*, 8d ed. p. 548.

Judgment affirmed.

The other Justices concur.

MINNESOTA SUPREME COURT.

Julia SELKIRK, *Appt.*,

v.

P. O. STEVENS *et al.*, *Respts.*

(.....Minn.....)

*The plaintiff is an Indian, and a licensed trader on White Earth reservation. She purchased on the reservation a quantity of game killed thereon by tribal Indi-

*Headnote by START, Ch. J.

ans, and transported it by wagon off the reservation to the nearest railway station, and there delivered it to a carrier, to be shipped out of the state. It was seized and confiscated while in possession of the carrier by the defendants, acting as game warden and game and fish commissioners of the state. *Held*, that the defendants' acts were legal.

(May 23, 1896.)

APPEAL by plaintiff from an order of the District Court for Becker County sustaining

NOTE.—For game laws as affecting interstate commerce, see note to *State v. Geer* (Conn.) 13 L. R. A. 804, *Affirmed* 161 U. S. 519, 40 L. ed. 798. See also 40 L. R. A.

State v. Swett (Me.) 29 L. R. A. 714; *People v. O'Neil* (Mich.) 38 L. R. A. 606; and *Dickhaut v. State* (Md.) 36 L. R. A. 765.

ing a demurrer to the complaint in a suit brought to recover the value of certain game which defendants as state officers took out of the possession of the plaintiff's agent while it was being transported out of the state. *Affirmed.*

The facts are stated in the opinion.

Mr. M. L. Countryman for appellant.

Mr. T. E. Byrnes for respondents.

Start, Ch. J., delivered the opinion of the court:

The material facts alleged in the complaint are: The plaintiff is an Indian and an actual inhabitant of White Earth Indian reservation, situated within the limits of this state, and a trader thereon under a license from the United States. Prior to November 19, 1896, as such trader, she purchased upon the reservation, from Indians residing thereon, and who were members of the tribes located thereon, a quantity of game birds which were killed thereon by such Indians, consisting of prairie chickens and partridges, of the value of \$485. On the day named the plaintiff attempted to ship the birds out of the state, and did transport them from the reservation by wagon to Detroit, Minn., the nearest railway station, and there delivered them to the express company for carriage out of the state to eastern states, to be there sold by her agents for her account. After the birds had been delivered to the express company and while in its possession, and in process of shipment out of the state, the defendant as game warden of the state, acting under the authority of his codefendants, who constitute the board of game and fish commissioners of the state of Minnesota, seized the birds, and delivered them to the board, and thereupon the defendants, claiming to act as such officers, sold the birds, and paid the proceeds thereof into the treasury of the state. The defendants interposed a general demurrer to the complaint, which was sustained, and the plaintiff appealed from the order sustaining it.

At the time of this attempted shipment of the birds out of the state the statute of the state for the preservation of game contained, with other provisions, the following: "No person at any time shall catch, take or kill, or have in possession or under control any of the birds, animals, or fish caught, taken, or killed in this state . . . with intent to ship the same beyond the limits of this state, or with intent to allow or aid in their shipment out of this state, or shall ship or intentionally allow or aid in their shipment out of this state. . . ." Gen. Stat. 1894, § 2170. "It shall be the duty of all the members of the board of game and fish commissioners, all game wardens, sheriffs, and their deputies, constables, and police officers of this state, at any and all times, to seize and take possession of any and all birds, animals, or fish which have been caught, taken, or killed at a time, in a manner, or for a purpose, or had in possession or under control or have been shipped contrary to any provision of this act. Such seizure may be made without a warrant." Id. § 2177. This statute makes it unlawful to ship game out of the state at any time, and authorizes its seizure and confiscation if the statute is violated. The statute is constitutional. *State v. Northern P. Exp. Co.* 58 Minn. 408; 40 L. R. A.

Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 798.

It necessarily follows that the seizure in question was lawful, and that the complaint does not state facts constituting a cause of action, unless the fact that the game was killed on the reservation by Indians exempts it from seizure at a place within the state, and off the reservation, while it is in possession of a carrier for shipment out of the state. The question for our decision is not whether our game laws may be enforced against Indians, so that they may be prosecuted and personally punished for its violation on the reservation. Were this the question, it would have to be answered in favor of the Indians, for this court, in the case of *State v. Campbell*, 58 Minn. 354, 21 L. R. A. 169, rightly held that tribal Indians on this reservation are not subject to the criminal laws of the state. But the sole question here is the legal status of game found off the reservation, and in the hands of the carrier for shipment out of the state, which was killed on the reservation by Indians: The answer to this question involves a determination of the extent of the jurisdiction of the state over this reservation. The White Earth reservation is not unceded Indian country. It was such prior to 1855, but by an act of Congress approved December 19, 1854 (10 Stat. at L. [chap. 7] 598), the president of the United States was authorized to enter into negotiations with the Chippewa Indians for the extinguishment of their title to all lands owned and claimed by them in the territory of Minnesota; the treaties so to be made to contain a provision that "the laws of the United States and the territory of Minnesota shall be extended over the Chippewa territory in Minnesota whenever the same may be ceded, and the same shall cease to be 'Indian country' except that the land reserved to said Indians, or other property owned by them, shall be exempt from taxation and execution; and that the act passed 30th June, 1854, 'to regulate trade and intercourse with the Indian tribes,' etc., be inoperative over the said ceded territory, except the 20th section, which prohibits the introduction and sale of spirituous liquors to Indians." Such a treaty was made February 22, 1855, and proclaimed April 7, 1855, whereby the Indians ceded to the United States all right, title, and interest of whatsoever nature which they had in and to a large tract of land therein described, and which included all of the land now known as "White Earth Reservation." Rev. Indian Treaties (1873) 263. This treaty reserved a number of tracts of land which were set apart for the homes of the Indians, but there was no reservation of the right of the Indians to hunt and fish on and over the ceded territory. None of these reservations included any lands within the limits of White Earth reservation. A portion of the land now included in the last-named reservation was set apart for the future home of the Indians by treaty of May 7, 1864, proclaimed March 20, 1865; and by treaty of March 19, 1867, proclaimed April 18, 1867, there was set apart for the use of the Indians, in order to provide them with a suitable farming region, thirty-six townships of land, to include White Earth lake and Rice lake. Rev. Indian Treaties, 259, 271. Under

the provisions of the treaty of 1867, what has since been known as White Earth reservation was established. The legal effect of the treaty of February 22, 1855, was that the lands now embraced within the limits of White Earth reservation became public lands of the United States, and that every right of the Indians therein became absolutely extinguished. The laws of the then territory of Minnesota became operative over the whole territorial limits of the present reservation. When the territory of Minnesota became a state in 1858, the jurisdiction of the state was just as complete and absolute over the lands now included in the reservation in question as it was over any other part of the state, except as to the sale of spirituous liquors to the Indians. The state has never ceded or relinquished any part of this jurisdiction. Such jurisdiction was modified by the subsequent setting apart the reservation for the use of the tribal Indians, under the control of the general government, to the extent only that the state cannot tax the property of the Indians, nor interfere with the control of such Indians while on this reservation, or punish them for acts committed thereon in violation of its laws. This limitation of the power of the state does not arise from the fact that the laws of the state are not operative upon this reservation, but it grows out of the personal relations of such Indians to the general government. They are its wards, and under its guardianship and control, and the state may not interfere with or impair the efficacy of such guardianship. Subject to this limitation, all of the general laws of the state, including its game laws, are in force in every part of White Earth reservation. A white man may be punished by the state for a

crime committed thereon, but a tribal Indian may not be. *State v. Campbell*, 53 Minn. 354, 21 L. R. A. 169. After the Indian title to the land within this reservation was extinguished, and before it was set apart for the Indians in 1867, the state owned the game thereon in trust for the whole people of the state, with the right and duty to make and enforce such laws as it deemed necessary for its protection and beneficial use. The state has never parted with this ownership and trust. It is, therefore, not true, as a legal proposition, whatever may be the case ethically, that the Indians own the game on this reservation, for it belongs to the state, and its game laws are operative upon this reservation. But its remedies for enforcing them are imperfect, in that it cannot punish Indians for violating such laws on the reservation. A white man on the reservation may be so punished.

It is unnecessary to, and we do not, decide whether the state may or may not interfere with game which is unlawfully in the possession of the Indians on the reservation. But we do hold that when, as in this case, game is once off this reservation and in the possession of any person or corporation in violation of the law, it may be seized and confiscated by its proper officers, without reference to where or by whom it was killed.

It is immaterial whether the shipment of the game in question commenced on the reservation or off it, and at Detroit, for, if it commenced on the reservation, no question of interstate commerce can arise, for the reservation is a part of the state, and it has jurisdiction over it, except as we have stated.

Order affirmed.

NEBRASKA SUPREME COURT.

DRUMMOND CARRIAGE COMPANY *et al.*, *Piffs. in Err.*,
v.
George T. MILLS.
(.....Neb.....)

- *1. Upon the rendition of a judgment against appellant in the district court, that court has no such jurisdiction of the person of the surety in the appeal undertaking that it may render the same judgment against him that it may against the appellant.
2. By operation of the common law, in the absence of any specific agreement, every person who has bestowed labor and skill on a chattel bailed to him for the purpose, and has thereby increased its value, has a lien on such chattel, and may retain it until paid his reasonable charges for his services.
3. Such rule of the common law is in force in this state.
4. The common-law lien to which we have just referred may, by force of special facts or

*Headnotes by HARRISON, Ch. J.

NOTE.—On the question of the priority of a chattel mortgage and a subsequently acquired lien on the property, see also *note to Wright v. Sherman* (S. D.) 17 L. R. A. 792; also *Chapman v. First Nat. Bank* (Ala.) 22 L. R. A. 78.
40 L. R. A.

circumstances, override or be superior to prior contractual or statutory liens.

5. In this state the title to mortgaged chattels remains in the mortgagor until foreclosure of the mortgage.

6. A physician gave a mortgage on a buggy of which he retained possession and used it in his business. It was of the recitals of the mortgage that he should not so negligently or improperly use or care for the property as to subject it to probable loss or material depreciation in value, and the mortgagee had knowledge that the buggy at times needed repairing, and had seen it at one time left at the shop to be repaired. The mortgagor, without the knowledge of the mortgagee, left the buggy with a carriage company for needed repairs. The company repaired the buggy, and retained possession thereof to enforce a claimed lien for, or the payment of its reasonable charges for, such repairing. The mortgagee instituted an action of replevin against the carriage company to obtain possession of the buggy, asserting right thereto under and by virtue of his mortgage lien. Held, that the mortgage lien was subordinate to the common-law lien, since the recitals of the mortgage and the facts and circumstances disclosed that the mortgagor had at least implied authority from the mortgagee to have the repairs made.

(*Ragan, C., dissents.*)

((April 8, 1898.))

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover possession of a buggy. *Reversed.*

The facts are stated in the opinion.

Mr. B. N. Robertson, for plaintiffs in error:

The mortgagor in this case being rightfully in possession of the chattel at the time the repairs were contracted for, was the owner thereof.

Randall v. Persons, 42 Neb. 607.

The Drummond Carriage Company was lawfully in possession of, and had a lien upon, the property in controversy at the commencement of this action.

6 Wait, Act. & Def. p. 149, and cases cited; *Lord v. Jones*, 24 Me. 489, 41 Am. Dec. 391; *Arians v. Brickley*, 65 Wis. 26, 56 Am. Rep. 611.

Nor is the existence of a special agreement between the parties for the payment of a fixed sum for labor inconsistent with a claim of lien for services.

Mathias v. Sellers, 86 Pa. 486, 27 Am. Rep. 723; *Pickett v. Bullock*, 52 N. H. 354; *Morgan v. Congdon*, 4 N. Y. 552.

A lien which arises by operation of the common law overrides all prior existing contract or statutory liens on the property to which it attaches.

1 Jones, Liens, § 8; *Herman*, Chat. Mortg. p. 308; *Darlington*, Pera. Prop. p. 48; *Jessup v. Atlantic & G. R. Co.* 3 Woods, 441; *Williams v. Allsup*, 10 C. B. N. S. 417; *Hammond v. Danielson*, 126 Mass. 294; *Kirtley v. Morris*, 48 Mo. App. 144; *Scott v. Delahunt*, 65 N. Y. 128; *Watts v. Sweeney*, 127 Ind. 116; *White v. Smith*, 44 N. J. L. 105, 43 Am. Rep. 347; *Smith v. Stevens*, 36 Minn. 308; *Corning v. Ashley*, 51 Hun, 483; *Sullivan v. Clifton*, 55 N. J. L. 324, 20 L. R. A. 719; *Lynde v. Parker*, 155 Mass. 481; *Lawson*, Presumptive Ev. 1886, p. 175; *McKenzie v. Stevens*, 19 Ala. 692; *Ryan v. Sams*, 12 Q. B. 460.

Public policy demands that the lien of the plaintiff in this case be enforced as against the mortgage.

Jones, Chat. Mortg. 4th ed. § 478; *Ingalls v. Green*, 62 Vt. 436.

The owner is not permitted to appropriate to his own use the labor and skill of the innocent party who wrought the change.

Wetherbee v. Green, 23 Mich. 311, 7 Am. Rep. 653; *Carpenter v. Lingenfelter*, 43 Neb. 728, 32 L. R. A. 422.

Where one by mistake in good faith has expended labor upon the property of another, if he has by his labor greatly increased the value of the property he will become the owner.

1 Am. & Eng. Enc. Law, p. 53; 3 Lawson, Rights, Rem. & Pr. §1317; *Baker v. Meisch*, 29 Neb. 227.

Mr. W. H. De France for defendant in error.

Harrison, Ch. J., delivered the opinion of the court:

This, an action of replevin, was instituted by defendant in error, March 22, 1894, before a justice of the peace in Douglas county, to recover the possession of a "Breton Buggy," and in a trial he was given judgment for the

relief demanded. An appeal was perfected to the district court, wherein the defendant in error was again successful. He there obtained judgment against the carriage company, and also against the surety on the appeal undertaking. The carriage company and the surety on the appeal bond present the case to this court for review.

It is contended for the party who signed the appeal undertaking that the district court had no jurisdiction to render the judgment it did against him. The question presented was discussed and determined in the case of *Selby v. McQuillan*, reported in 45 Neb. 512; and it was stated that the district court, on the rendition of a judgment against an appellant, had no jurisdiction to render a like judgment against the surety in the appeal bond; and, following the doctrine there announced, we must hold that the judgment against the surety in this case was without the jurisdiction of the court, and cannot stand. The trial in the district court was without a jury, and on an agreed statement of the facts, as follows: "That W. P. Wilcox was on and prior to July 1, 1891, a physician engaged in the actual practice of his profession in the city of Omaha, Nebraska. That on September 12, 1889, said Wilcox purchased a physician's phaeton or carriage from the defendant, and that from the date of its purchase until on or about the 13th day of May, 1892, the said Dr. Wilcox used the said carriage in his professional business as a physician and surgeon. That on July 1, 1891, said Dr. W. P. Wilcox made, executed, and delivered, for a valuable consideration, being money actually loaned, his certain promissory note to the plaintiff for \$350, due one year after date. That no payments have been made on said note, and the same is due. To secure said note, the said Dr. W. P. Wilcox made and delivered a chattel mortgage to plaintiff covering the said physician's phaeton or carriage, a horse, and harness. The said mortgage was filed in the office of the county clerk of Douglas county, Nebraska, in accordance with law, on the 3d day of August, 1891, a copy of which is hereto attached and made a part of this stipulation, marked 'Exhibit A.' The plaintiff was well acquainted with the buggy in controversy, and knew at the time he took the mortgage that it was used by Dr. Wilcox in his business as a physician. Dr. Wilcox and the plaintiff rode out in the buggy quite frequently in the evenings. The plaintiff was with Dr. Wilcox at the office of the Drummond Carriage Works, defendant, at one time previous to May, 1892, after his mortgage was given, and when Dr. Wilcox run the buggy in there for repairs, which bill of repairs was paid by Dr. Wilcox. About the 13th of May, 1892, said Dr. Wilcox took the buggy mentioned in the mortgage, and in controversy herein, to the defendant for repairs; and, pursuant to agreement between the defendant and Dr. Wilcox, the buggy was to be repaired. The bill for the same agreed upon was \$60, to be paid in cash when the work was done. A copy of the memorandum of repairs to be done, and which were actually done, on the carriage, is hereto attached, marked 'Exhibit B,' and made a part of this stipulation. The original was on or about

May 13, 1892, mailed by defendant to Dr. Wilcox. The repairs done on the buggy* were reasonably necessary for the careful preservation of the carriage, and the bill for the same is well and reasonably worth \$60, no part of which has been paid. The buggy was completed, and the bill was due, on the 1st day of July, 1892. The plaintiff is a resident of Omaha, Nebraska, and has resided therein ever since the 12th day of September, 1889. About the 1st of June, 1892, said Dr. W. P. Wilcox left the city of Omaha for Colorado, to be gone an indefinite period of time. Said Dr. Wilcox was absent from the city from about the 1st of June, 1892, until about the 15th of March, 1894. During the time of said Wilcox's absence from the city, as aforesaid, the plaintiff supposed the buggy was in the barn of the father of said Wilcox, and did not know different until about the 21st of March, 1894, when he was notified by said Wilcox that the said buggy was in the possession of the defendant. In the meantime the plaintiff had made no inquiries about the whereabouts of the buggy, neither had he made any inquiries about the horse and harness, and when this action was commenced the plaintiff did not know where the horse and harness were. Plaintiff never has pressed the said Wilcox for the money secured by the note and chattel mortgage, and never calculated to do so. While Dr. Wilcox was using the buggy in his professional business, he had all his repairing done at the carriage works of the defendant, and the buggy was in the defendant's shop for repairs, and the defendant did small repair work on the buggy twelve different times between the date of its purchase, September 12, 1889, and May 1, 1891. The first actual knowledge that the plaintiff had of the buggy being in the possession of the defendant was obtained from the said Dr. Wilcox on or about March 21, 1894. Immediately after said notification, plaintiff demanded possession of said buggy from defendant, and, upon refusal of defendant to deliver up the possession of said buggy to plaintiff, plaintiff commenced this cause of action. The defendant made no inquiries of Wilcox, when he took the buggy to its place of business for repairs, as to whether the buggy was encumbered or not, nor did the said Wilcox say anything about it to the defendant. The buggy has been in the continuous possession of the defendant from the spring of 1892. The defendant is a corporation duly organized under the laws of Nebraska, and engaged in the manufacture and sale and general repair work of wagons, carriages, and other kinds of vehicles. The defendant, when demand was made on it for the possession of the buggy, refused to deliver the same to the plaintiff until its bill for repairs, as above stated, was paid, and then and there notified the plaintiff that it claimed a lien upon said buggy for the work and labor and material performed and used in repairing said buggy. The value of the buggy was \$75 at the commencement of this action. The defendant, and all the officers thereof at the times when said repairs were agreed upon and made, had no actual knowledge of said mortgage, nor were they aware of the existence of

such a mortgage until the month of March, 1894."

It is urged by counsel for plaintiff in error that it had a lien, by force of law, on the buggy for the amount of its bill of charges for repairing the buggy, which continued so long as it retained possession of the buggy under a claim of lien for such services. The principle invoked is: If property is delivered to a person, to be by his skill and labor, or by adding thereto property of his, enhanced in value, and he performs the labor or adds his own property to that delivered, and thereby increases the value of the latter, he may retain possession of it until paid for his labor or materials. This is a doctrine of the common law, and the right is usually denominated a "common-law lien," and it exists under a state of facts such as we have just detailed, unless there is a contract inconsistent with such lien, or some modifying circumstances which are in conflict with any such right, or disclose an intent not to claim the right. "A mechanic of any kind has a lien upon all personal property, for manufacture or repairs, while it remains in his possession; . . . a carriage maker, for repairs upon a carriage." See 6 Wait, Act. & Def. p. 149, and cases cited. Persons have by common law the right to detain goods on which they have bestowed labor until the reasonable charges therefor are paid. 2 Kent, Com. p. 635. In the absence of specific agreement, if a party has bestowed labor and skill on a chattel bailed to him for such purpose, and thereby improved it, he has by general law a lien on it for the reasonable value of his labor, or the right to retain it until paid for such skill and labor. *Bevan v. Waters*, 3 Car. & P. 520; *Seafre v. Morgan*, 4 Mees. & W. 270; *Lord v. Jones*, 24 Me. 439, 41 Am. Dec. 391; *Grinnell v. Cook*, 3 Hill, 491, 38 Am. Dec. 663. This right rests on principles of natural equity and commercial necessity. 2 Kent, Com. p. 634. No lien exists at common law for the agistment of cattle (*Chapman v. Allen*, Cro. Car. 271; *Jackson v. Cummins*, 5 Mees. & W. 342; *Wallace v. Woodgate*, 1 Car. & P. 575); nor in favor of one to whom a horse has been delivered to be stabled, taken care of, fed, and kept (*Judson v. Etheridge*, 1 Crompt. & M. 742). In such cases, a lien for the charges will only arise by virtue of a statute or special agreement in the nature of a pledge. . . . The case of an agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own or indirectly, by means of any instrument in his possession." *White v. Smith*, 44 N. J. L. 105, 43 Am. Rep. 347; *Jackson v. Cummins*, 5 Mees. & W. 342.

We refer to the agister's lien for the purposes of directing attention to the fact that it is not a lien which has been recognized as arising by force of the general or common law, or as having any existence at common law, but has its origin in, or is the creature of, statutory provision, and that the reasoning employed and rules announced by this court in reference to agister's liens are not forceful, or applicable herein in regard to the lien claimed. The legislature of the territory when the state was a territory

passed the following act: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted and declared to be law within said territory." Comp. Stat. chap. 15, § 1. The right to the common-law lien would exist in this state unless inconsistent, without statutory law, and we cannot discover wherein it is inconsistent with, or has been abrogated by, statute; hence must determine it in force.

In regard to the recognition and enforcement of common-law rules, it is said by this court in the opinion in the case of *Wilson v. Burnstead*, 12 Neb. 1, that, "in the application of the principles of the common law, where the precedents are unanimous in the support of a proposition, there is no safety but in a strict adherence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty, while there is no certainty in regard to what, upon a given state of facts, the decision of the court will be." We must conclude that a common-law lien existed in favor of the carriage company for the amount due it for the repair of the buggy; and it remains further to determine whether it took precedence of the lien of defendant in error's chattel mortgage. The lien of the mortgage was created and perfected by the filing prescribed by law, long prior to the services, etc., of the carriage company in repairing the buggy, and there is no dispute in regard to the time of attachment of either lien.

It now becomes necessary to allude again to some of the facts which appeared of evidence in the cause, more especially to bring out distinctly the position occupied by defendant in error relative to any repairs which became necessary to the useful existence of the buggy, and its possible future appropriation to the satisfaction of the indebtedness, the payment of which was secured by the chattel mortgage. The mortgage provided, in terms, that, until default by the mortgagor in the performance of specified conditions or until the happening of certain indicated events, he should keep possession of the mortgaged property, and one of the enumerated events, by the occurrence of which the mortgagee should, at his option, be entitled to take possession thereof, was this: "If the said party of the first part [the mortgagor] shall so negligently or improperly use or care for said property as to subject the same to probable loss or material depreciation of the value thereof,"—from which it seems probable that it was in contemplation of the parties that the mortgagor would, of course, at his own proper cost and charge, have the buggy repaired, if necessary, during the time of its use by him and the existence of the mortgage. It was also of the evidence that defendant in error saw the buggy and rode in it frequently, and had knowledge of its being repaired by plaintiff in error at least once when he was present and it was run into the carriage company's place of business to be by it repaired.

We may now turn to the rules of law which we deem applicable to the state of facts developed in evidence herein. The legal title to the

buggy was in the mortgagor. He was the owner thereof; the mortgagee had but a lien thereon. *Musser v. King*, 40 Neb. 892; *Raddall v. Persons*, 42 Neb. 607; *Camp v. Pollock*, 45 Neb. 771; *Gould v. Armagost*, 46 Neb. 897. It may be said that a lien which arises by force of the common law may be, under special circumstances, superior to prior existing contractual or statutory liens on the same property. In *Darlington, Pers. Prop.* p. 48, it is stated on this subject: "And though, in general, a lien cannot be created without authority of the owner, liens for repairs take precedence of prior mortgages, where such repairs were necessary for purposes within the intention of the mortgage, *e. g.*, repairs on vessels or carriages, which the mortgagor was to continue to use." A lien on property, by operation of the common law, may have precedence of an existing mortgage. *Jones, Chat. Mortg.* § 47; *Herman, Chat. Mortg.* p. 308. In the case of *White v. Smith*, 44 N. J. L. 105, 43 Am. Rep. 847, it was said: "*Williams v. Allsup*, 10 C. B. N. S. 417, is the leading case on this subject. In that case the plaintiff, a shipwright, detained a vessel for his charges for repairs, as against a mortgagee under a prior mortgage. The mortgage had been recorded pursuant to the merchants' shipping act. The vessel was left in the mortgagor's possession and control for use, and was condemned as unseaworthy. The shipwright's charges were for necessary repairs, made by the mortgagor's direction, without the knowledge of the mortgagee. The court sustained the shipwright's lien for repairs against the claim of the mortgagee. The course of reasoning which led to this result, as expressed in the opinions of the judges, is as follows: Erle, Ch. J., said: 'I put my decision on the ground that the mortgagee, having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose. The case states that the vessel had been condemned as unseaworthy by the government surveyor, and so was in a condition to be entirely unable to earn freight or be an available security or any source of profit at all. Under these circumstances, the mortgagor did that which was obviously for the advantage of all parties interested: he put her into the hands of the defendant to be repaired; and, according to all ordinary usage, the defendant ought to have a right of lien on the ship so that those who are interested in the ship, and who will be benefited by the repairs, should not be allowed to take her out of his hands without paying for them. . . . It is to be observed that the money expended in repairs adds to the value of the ship; and, looking to the rights and interests of the parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien on the ship for repairs necessary to keep her seaworthy.' *Willes, J.*, said: 'By the permission of the mortgages, the mortgagor has the use of the vessel. He has therefore a right to use her in the way in which vessels are ordinarily

used. Upon the facts which appear on this case, this vessel could not be so used unless these repairs had been done to her. The state of the things, therefore, seems to involve the right of the mortgagor to get the vessel repaired, not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright's lien. It seems to me that the case is the same as if the mortgagees had been present when the order for the repairs was given.' Byles, J., said: 'As it is obvious that every ship will, from time to time, require repairs, it seems but reasonable, under circumstances like these, to infer that the mortgagor had authority from the mortgagees to cause such repairs as should become necessary to be done, upon the usual and ordinary terms. Now, what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but that the shipwright should have a lien upon the ship for the work and labor he has ex-

pended on her; nor are the mortgagees at all prejudicially affected thereby. They have the property augmented in value by the amount of the repairs.' See also *Scott v. Delahunt*, 5 Lans. 372; *Hammond v. Danielson*, 126 Mass. 294; *Tucker v. Werner*, 3 Misc. 193; *Corning v. Ashley*, 51 Hun, 483, Affirmed 121 N. Y. 700, mem.

We are not holding that in all cases, or generally, the common-law lien will override and be superior to the prior chattel mortgage lien, but that in cases where the mortgagor can be said to have expressed or implied authority from the mortgagee to procure repairs to be made on the mortgaged property it will be so. The carriage company was entitled to its lien, and it was superior to the lien of the chattel mortgage; hence the judgment of the district court was wrong, and must be reversed.

Reversed and remanded.

Ragan, C., dissents.

NEW YORK COURT OF APPEALS.

Abner G. TISDELL, *Respt.*,

v.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, *Appt.*

(155 N. Y. 163.)

1. A return or tender of unearned premiums is necessary in order to effect a cancellation of an insurance policy providing that it may be canceled "by giving five days' notice," and also that "the unearned premium shall be returned on surrender of this policy."

2. Notice that an unearned premium will be returned, and holding the amount subject to the call of the insured, does not satisfy the obligation of an insurer to return the premium as a condition of canceling the policy.

(*Parker, Ch. J., and O'Brien, J., dissent.*)

(March 1, 1898.)

APPPEAL by defendant from an order of the General Term of the Superior Court of the City of New York reversing a judgment in favor of defendant in an action to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Michael H. Cardoso and Edgar J. Nathan, for appellant:

The state, by the adoption of the standard policy (§ 121 of the insurance law, chap. 690, Laws 1892), has set its seal of approval upon the form of the underwriter's contract.

Crown Point Iron Co. v. Etna Ins. Co. 127 N. Y. 608, 14 L. R. A. 147.

The agreement, which is the subject-matter of litigation in this action, was carefully prepared by astute counsel, and the contracting

parties themselves were intelligent, shrewd, and practical business men of large experience, and no injustice, therefore, will be done to either by interpreting the instrument and every part of it by the ordinary rules for the interpretation of written instruments.

Delaware & H. Canal Co. v. Pennsylvania Coal Co. 50 N. Y. 250.

Where the language of a statute or a contract, read in the order of its clauses, presents no ambiguity, courts will not attempt by transposition of clauses and from what it can be ingeniously argued was the general intent, to qualify by construction the meaning.

Doe, Poor, v. Considine, 6 Wall. 458, 18 L. ed. 869; *Morgan v. Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 743.

If the notice of cancellation contains an offer to return the unearned premium, it is sufficient, and no personal tender of the unearned premium is necessary.

Walthear v. Pennsylvania F. Ins. Co. 2 App. Div. 828; *Backus v. Exchange F. Ins. Co.* Supreme Court Trial Term, N. Y. June, 1897, on appeal, 26 App. Div. 91.

Messrs. Potter, Baldwin, & Miner, for respondent:

The cancellation clause of the standard policy requires that the company shall, as a condition precedent to the cancellation of the policy, serve a five days' notice, and actually pay or tender to the insured a *pro rata* amount of the unearned premium.

Mr. Justice Bartlett, in the case of *Nitch v. American Cent. Ins. Co.*, has, in a very able and exhaustive opinion, construed the cancellation clause in the standard policy consonant with the principles contended herein, and, as we claim, with those of equity and justice. *Affirmed*, 83 Hun, 614, mem., 152 N. Y. 685, mem.

The cancellation clause in the contract of insurance would be invalid unless it provided for a restoration of the premium.

NOTE.—For conditions of cancellation of insurance policy, see also *Clark v. Insurance Co. of N. A. (Me.)* 35 L. R. A. 276.

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Marshall v. Reading F. Ins. Co. 78 Hun, 86, 149 N. Y. 617.

One who has a payment to make is bound to seek his creditor, and when found to tender to him the debt due. It is not the duty of the creditor to seek the debtor and demand money.

Van Valkenburgh v. Lenox F. Ins. Co. 51 N. Y. 465.

In the interpretation of a contract of insurance that construction will be given which is most favorable to the insured.

Rickerson v. Hartford F. Ins. Co. 149 N. Y. 818.

Bartlett, J., delivered the opinion of the court:

The question presented on this appeal is no longer an open one in this court. It was decided in the case of *Nitsch v. American Cent. Ins. Co.* 152 N. Y. 635, mem., Affirmed in this court without an opinion. In that case, as in this one, the question presented was whether the provision of the New York standard policy of fire insurance, relating to the cancellation of a policy at the instance of the company, requires that, in addition to giving the five days' notice, the company must return or tender the unearned premiums in order to effect a cancellation. The answer was in the affirmative. The only question presented for consideration in this case, therefore, is whether the defendant returned or tendered the unearned premium. The record contains an admission made by the defendant upon the trial, which is as follows: "It was thereupon admitted by the defendant herein that neither the premium, nor a *pro rata* amount of the premium of the policy herein, had been returned, paid, or tendered to the plaintiff or his agents, or to the firm of Tisdell & Whittlesey or their agents, by the defendant or its agents." It being the law, as we have observed, that, in addition to the notice of cancellation, there must be a return or tender of the unearned premiums in order to effectuate a cancellation of a policy, this admission of the defendant seems to be broad enough, not only to support the judgment under review, but to cut off all opportunity for controversy on the subject. It is urged, however, that this admission must be read in connection with an admission by the plaintiff that T. Y. Brown, defendant's agent, served upon the firm of Tisdell & Whittlesey a paper, of which the following is a copy:

New York, August 7, 1891.

Tisdell & Whittlesey: You are hereby notified, in accordance with conditions of its policy, that the New Hampshire Fire Insurance Company, of Manchester, N. H., desires to terminate its liability, and cancel policy No. 548,107, issued to you on the 15th day of November, 1890, by T. J. Temple, at 155 Broadway, New York City, insuring stk. and mchy., 128 Fulton St. Therefore, in pursuance of conditions on which said policy was issued, the said company shall without further notice cancel said policy at noon on the 12th day of August, 1891, and the *pro rata* unearned premium will be returned by T. Y. Brown, agent, 26 Pine street, New York, as provided by conditions of said policy.

Yours, truly, New Hampshire Fire Insurance Co. T. Y. Brown, Agent.

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If it be conceded that the contents of this notice should govern, rather than the specific admission of defendant, whenever they come in conflict, the defendant's contention would not be aided, for the notice is not in disagreement with the admission. It need not be argued that, to notify an assured that the "unearned premium will be returned by T. Y. Brown, agent," does not amount to a return of it. No more does the assertion that the notice does not constitute a tender of the unearned premium require support by way of discussion of the elements which go to make up a legal tender. It has been passed upon by this court in *Van Valkenburgh v. Lenox F. Ins. Co.* 51 N. Y. 465. In that case it was necessary for the defendant, under its contract of insurance with the plaintiff, either to refund or tender the unearned premiums, in addition to giving a notice of cancellation in order to terminate the policy. It claimed before the court that its notice that the unearned premium would be returned to him satisfied its obligation in that respect, but the court held that holding the amount of the premium subject to the call of the insured was insufficient. The company was bound to seek him out, and tender to him the whole amount due. *The order should be affirmed, with costs.*

Haight, Martin, and Vann, JJ., concur.

Parker, Ch. J., dissenting:

The plaintiff has recovered a judgment against the defendant upon a policy of fire insurance, which the latter insists was not in force at the time of the fire, its claim being that the policy was canceled long before the fire occurred by the giving of notice that the defendant would cancel the policy on a day therein specified. Whether this notice of itself operated to cancel the policy is the question presented. The plaintiff insists that, in order to effect the cancellation, in addition to the notice it was necessary for the defendant to return or tender the unearned premiums. On the other hand, the defendant asserts that it was only required to give five days' notice of cancellation to accomplish that result. This controversy must be settled by the contract between the parties. That part of it which relates to the subject of the cancellation of the contract reads as follows: "This policy shall be canceled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled, as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rates, except that, when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium." The standard policy, of which this forms a part, has been prepared under authority of law by men experienced in insurance contracts, and it is therefore fair to assume that the agreement may be treated as one prepared by men competent to use language adequate to convey clearly and distinctly the views of the parties. In such case it is the rule that, if the language of a statute or contract, read in the order of

its clauses, presents no ambiguity, courts will not attempt, through transposition of clauses or ingenious argument as to the general intent, to qualify by construction its meaning. *Doe, Poor, v. Considine*, 6 Wall. 458, 18 L. ed. 869.

The first sentence provides for the cancellation of a policy. It declares that "it shall be canceled . . . by the company by giving five days' notice of such cancellation," in other words, the underwriter, by its contract, reserved to itself the right to cancel the contract of insurance by a notice of five days. Nothing else is provided to be done. Notice alone shall be sufficient, says the contract. The language is unambiguous. It admits of no debate, and requires no construction. Words more apt to accomplish the cancellation of a policy by the giving of the five days' notice cannot well be imagined. Having provided for a cancellation of the policy, either by the request of the insured or upon notice given by the company, the next clause of the agreement proceeds to make disposition of the unearned premiums, in the event of the exercise of the option to cancel by either of the parties. The opening phrase of the clause shows that what follows proceeds upon the assumption that the policy shall have been canceled before occasion arises for acting under its provisions. It reads: "If this policy shall be canceled as hereinbefore provided [referring necessarily to the company's five days' notice] the unearned portions of the premiums shall be returned." When? At the time of the giving of the five days' notice of cancellation? Not at all; "on the surrender of the policy" is the occasion fixed by the contract for its return. The scheme of this portion of the contract, then, is to provide, first, for the cancellation of the policy; that is to be accomplished by the simple request of the insured, if he desires to cancel it, or by a five days' notice on the part of the company if it desires to terminate its obligation under the policy. The policy having been put an end to by cancellation, at the insistence of one party or the other, then the situation of the parties is such that the company has in its possession certain premiums which it has not earned, and which it does not desire to earn, and the other party has in his possession the policy of insurance, no longer, of course, of use to him, and of no particular value to the company, except that when it finally comes into the company's possession it of itself furnishes evidence that the unearned premiums have been paid to the insured. With this situation, then, the agreement undertakes to deal, and it provides that upon the surrender of the policy the unearned premium, whether at short rate or *pro rata* premium, depending upon which party brought about the cancellation, shall be returned to the insured. Practically, it says to the insured: "You return the policy to the place where you got it from, and the company will at once turn over the unearned premium to which you are entitled under this contract." This agreement is so clearly expressed that there does not seem to be opportunity for insisting that the language means something quite different from what is suggested to the mind upon the first reading. And still other readings will not

prompt the thought that there is possibly any ambiguity.

It is suggested in the opinion of the learned trial judge in the case of *Nitsch v. American Cent. Ins. Co.* subsequently affirmed in this court without an opinion (152 N. Y. 635, mem.), that, under such a reading of the contract as on its face it is apparent it should have, "a man might pay \$1,000 for insurance to-day, receive a notice from the insurance company to-morrow, which would have the effect to cancel his policy in five days, and at the end of the week have no remedy except an action at law against the company." Such a case could happen, undoubtedly, but it is not likely to. Courts cannot assume that insurance companies will act arbitrarily, or that they are so lacking in business prudence as to be willing to acquire a reputation for practicing a wrong of that character upon customers. On the contrary, we must assume that corporations, as well as individuals, intend faithfully to keep their contracts. But, were it our duty to indulge in a totally different presumption, the situation would not be changed, for the court is without authority to make contracts for the parties. The law-making power of the state—the legislature—has undertaken to provide for the creation of a standard policy of fire insurance for the protection alike of the insured and the insurer, and, if the standard policy needs further amendment, relief must be sought from that source.

Prior to the passage of chapter 488 of the Laws of 1886, providing for a uniform contract of fire insurance to be used by fire underwriters within the state, there were two cases in this court, namely, *Van Valkenburgh v. Lenox F. Ins. Co.* 51 N. Y. 465, and *Griffey v. New York Cent. Ins. Co.* 100 N. Y. 417, 53 Am. Rep. 202, holding that the cancellation clause was not operative unless the company should tender or return to the insured the amount of the unearned premium. The cancellation clause in those contracts differs very materially from the one in question. It read as follows: "This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired time of this policy." Now, clearly, that agreement did provide, as the courts held, that two things were required to terminate the policy: First, the giving of the notice; and, second, the refunding of the unearned premium. Now, after these decisions were made, the cancellation clause of the present policy was prepared, and it does not seem to be an intemperate use of the imagination to draw the inference that it was prepared in view of the decisions to which I have referred, and to meet them by establishing a contract which should make cancellation by the company less difficult. It is certainly difficult to see how they could have used language more appropriate to accomplish that result.

Counsel for the respondent insists that this question is no longer an open one in this court, but was put at rest by the affirmance in the

Nitech Case, 152 N. Y. 635, mem. It is true that at special term judgment went in favor of the plaintiff upon the ground, as appears from the opinion of the learned trial judge, that, in order to effect a cancellation of the policy, it was necessary to give the five days' notice, and, in addition, to return or tender the unearned premiums to the insured. But there was another ground upon which the affirmance of the judgment was required at the general term and in this court, namely, that after the insured had received the five days' notice of cancellation from the general agent of the

insurance company, which was a foreign corporation, he addressed to the corporation at its home office, a letter of inquiry about it, and received such a reply as constituted a waiver of the notice which had been just sent out by the general agent, and thus it happened that the judgment of the circuit rested upon a sure foundation, and required affirmance. The order should be reversed, and a new trial granted, with costs to abide the event.

O'Brien, J., concurs. Gray, J., absent.

TENNESSEE SUPREME COURT.

Joseph TURCOTT, *Appt.*,

v.

YAZOO & MISSISSIPPI VALLEY RAIL-ROAD COMPANY.

(.....Tenn.)

1. A foreign corporation is not "out of the state" within the meaning of Shannon's Code, § 4455, so as to preclude the defense of the statute of limitations, when the corporation has officers and agents in the state on whom service can be made at any time.
2. The failure of a foreign corporation to file and register its charter in compliance with the statute when doing business in the state, until after action is brought against it, will not prevent it from pleading the statute of limitations.

(May 4, 1898.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Shelby County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

Affirmed.

The facts are stated in the opinion.

Messrs. Carroll, Chalmers, & McKellar for appellant.

Messrs. Fentress & Cooper for appellee.

Wilkes, J., delivered the opinion of the court:

This is an action for damages, for personal injuries inflicted in the shops of the defendant company at Vicksburg, Mississippi. The action was brought at Memphis, Tennessee, on the 25th of May, 1895, about one and one half years after the injury was suffered. Demurrers were filed, and the declaration was amended. To the declaration as amended pleas of not guilty, contributory negligence, and the Tennessee statute of limitation of one year for injuries to persons were filed. The latter plea states in detail that the defendant company had been operating its road through the state of Mississippi into and in the state of Tennessee for fourteen years; that it had an office and agents in

the city of Memphis; and on these agents service at any time could have been had; and that at no time had there been any impediment or hindrance to the bringing of this or any other suit against it, or to the service of legal process upon it. To this plea there was a replication, in substance, that the defendant is a foreign corporation organized and existing under the laws of Mississippi, and that at the time of the accrual of this cause of action it had no corporate or legal existence in Tennessee, because it had not complied with the requirements of the Acts of 1891 (chap. 122) as to the filing and registration of its charter, and, not having so complied until after the bringing of this suit, it cannot plead the statute of limitations of one year in bar of the suit. There was a demurrer to this replication, and the demurrer was sustained.

The exact questions presented are whether foreign corporations can plead and rely upon this Tennessee statute of limitation when they have offices and agents in the state subject to continuous service of process, and whether the failure to file and register its charter will deprive it of that right if otherwise it would be held to have it. Under the statutes of Tennessee (Shannon's Code, § 4469) it is provided, among other things, that actions for injuries to the person must be commenced within one year after the cause of action accrues, or be barred. Section 4455, Shannon's Code, provides: "If at any time any cause of action shall accrue against any person who shall be out of this state, the action may be commenced within the time limited therefor after such person shall have come into the state and after any cause of action shall have accrued. If the person against whom it has accrued shall be absent from or reside out of the state, the time of his absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action." The word "person" includes a "corporation." *Id.* § 62. The exception made in this statute does not apply to a natural person unless his absence from the state is such as to prevent service of process. *Taylor v. McGill*, 6 Lea, 294, 301. The statutes relating to service of process upon corporations are as follows: "Service of process on the president or other head of a corporation, or, in his absence, on the cashier, treasurer, or secretary, or, in the absence of such officers, on any director of such

NOTE.—As to the right of a foreign corporation to plead the statute of limitations, see *Winey v. Sandwich Mfg. Co. (Iowa)* 18 L. R. A. 524.
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corporation shall be sufficient." Shannon's Code, § 4639. "If neither the president, cashier, or secretary resides within the state service on the chief agent of the corporation residing at the time in the county where the action is brought shall be deemed sufficient." Id. § 4540. No question is made but that there was ample opportunity to obtain service of process at any time on the defendant, through its officers and agents, nor that foreign corporations are liable to service under these sections. *Cumberland Teleph. & Teleg. Co. v. Turner*, 88 Tenn. 266. But the contention is that a foreign corporation is out of the state, and resides out of the state, and so falls within the exception before stated; and that, while process may be made upon it, still it is optional with a party aggrieved whether and when he will commence his suit, and the bar of the statute cannot be set up if the suit is not brought within one year, and that it does not come within the state, in legal contemplation, till it files and registers its charter. It appears that there is some conflict of decision upon the first question. The reason of the rule of law is that no person who is not, and has not been, subject to service of process within the year, shall avail himself of its exemption. *Taylor v. McGill*, 6 Lea, 294. Unquestionably, the residence of a corporation is the state of its creation. *Young v. South Tredegar Iron Co.* 85 Tenn. 189. And, if we should give the statute a strict literal construction, it might be held that a foreign corporation was not entitled to the benefit of the limitation. Still the courts will not permit the literalism of the statute to thwart its obvious purpose, intent, and meaning. A thing may be within the letter of the statute, yet not within its operation, if not so intended. *State, Dolan, v. Clarksville & R. Turnp. Co.* 2 Sneed, 88; *Taylor v. McGill*, 6 Lea, 294. We think the true rule is laid down in *Murfree on Foreign Corporations*, and that the rule as thus laid down is based on sound reason and principle. In speaking of such foreign corporation pleading the statute of limitations (§ 247) it is said: "As to the second question, whether a foreign company, when sued, can plead the bar of the statute in defense, it may be said that the great weight of authority is in favor of the conclusion suggested above, that the true test of the running of the statute is the liability of the party, invoking its bar, to the service of process during the whole of the period prescribed, that if the operations of the company within the jurisdiction were such as to render it liable to suit, then it may plead the statute. The principles upon which this doctrine rests have nowhere been more effectively expressed than in the decision of the Illinois appellate court, in *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364. Said Pleasants, J. (who delivered the opinion of the court), after referring to a number of cases holding that a corporation must be considered an inhabitant of the state by which it is created: 'We should have no hesitation in approving these applications of the doctrine, if there were no other element in the cases bearing on the question than the origin and nature of the corporation. For it is true that a positive law can never, of its own force, and ordinarily does not otherwise, operate beyond the territorial

limits of the power by which it is enacted; and hence, unless otherwise enabled, a corporation must, indeed, 'dwell in the place of its creation, and cannot migrate into another sovereignty.' But the law of one state may have operation for certain purposes in another, by the comity or permission of the latter; and we see no insuperable difficulty in the way of such migration, provided the former does not positively forbid, and the latter does positively consent. It is conceded that with such consent they lawfully may, as they often actually do, remove their officers, agents, offices, and effects into another sovereignty, and there exercise their functions and franchises. In such a case, where is the corporation? If it be said that it still dwells in the place of its creation, and is acting elsewhere only by agents, the answer is, no more by agents elsewhere than in the place of its creation. It can do nothing anywhere, nor manifest its presence or being at all, except through its agents, its property, or its operation. Where these are, then, it seems most accordant with substantial fact and reason to say, there is the corporation. Where these are not, we know of no means by which process can be served upon it; and, if there be none, that fact would seem to be conclusive upon the question of residence for the time being, at least for purposes of judicial jurisdiction.' In Montana it was held that the fact that a foreign company had subjected itself to a penalty, by failing to file its charter or act of incorporation as required by the statute, though such failure did not disqualify it from being sued, did not thereby lose the right to plead the statute." See *King v. National Min. & Exploring Co.* 4 Mont. 1. In support of the text the author cites the following authorities: *Bank of United States v. McKenzie*, 2 Brock. 393. Compare *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248; *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 227; *Russ v. Central R. & Bkg. Co.* 66 Ala. 472; *Laurence v. Bal-lou*, 50 Cal. 258; *United States Exp. Co. v. Ware*, 20 Wall. 543, 22 L. ed. 422; *Hall v. Vermont & M. R. Co.* 28 Vt. 401; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364; *King v. National Min. & Exploring Co.* 4 Mont. 1; *Connecticut Mut. L. Ins. Co. v. Duerson*, 28 Gratt. 680; *Wall v. Chicago & N. W. R. Co.* 69 Iowa, 498; *McCabe v. Illinois C. R. Co.* 4 McCrary, 492, 13 Fed. Rep. 827; *Winney v. Sandwich Mfg. Co.* (Iowa) 50 N. W. 565. See also *Koons v. Chicago & N. W. R. Co.* 23 Iowa 493. Compare *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400; *North Missouri R. Co. v. Akers*, 4 Kan. 453, 16 Am. Dec. 183; *Waterman v. A. & W. Sprague Mfg. Co.* 55 Conn. 554; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 608, 37 L. ed. 301.

We are aware that New York, Nevada, Kansas, and possibly other states do not follow this rule. It is said that such holding raises a discrimination against individuals and in favor of corporations. The argument is that individuals cannot claim the exemption when they are out of the state or are nonresidents, and it would be inequitable to allow corporations out of the state or nonresidents to claim it. But this apparent difference arises out of the fact that individuals out of the state,

or residing out of it, cannot be reached by process against a resident agent while a corporation can, so that in the one case suit cannot be brought and in the other it may. Absence from the state and residence out of the state, in the sense of the statute, means such absence and such nonresidence as renders it impracticable at all times to obtain service of process; so that, while a corporation's technical legal residence may be where it was created, its residence and status for purposes of suit will be where it can, through its officers and agents, be reached with process. While a corporation may reside beyond the state and be out of the state, still it may, through its officers and agents, subject itself to the jurisdiction of courts of the state. It may sue and be sued in a jurisdiction foreign to its technical residence. Nor do we think the failure to comply with the act of 1891 (chap. 122) will preclude this foreign corporation from setting up the statute. It would not be a proper construction of that statute to hold that a corporation actually doing business in the state without complying with the statute could not be sued for a tort committed; and,

having been impleaded upon the ground of a tort, it cannot be that the failure to comply with that statute must preclude it from making any defense, for it logically follows that, if it cannot make this defense, because of its failure it can make no other. The scope and purpose of that act were to require corporations to file and register their charters in order that they might do business, own or acquire property, and be enabled to sue; but it was never intended to exempt them from suit if they disregarded the statute, nor to estop them from making defense, if so sued; otherwise their property might be taken from them, and they estopped to defend. This company was in the state, owning property and doing business, before the act was passed; and while this did not exempt it from a compliance with the act in order that it might have all the rights of a domestic corporation, at the same time it was not the purpose nor the proper construction of that act that its property should be taken from it, or its right to defend actions brought against it should be cut off by its failure to comply with it.

Let the judgment be affirmed, with costs.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois, *ex rel.*
William MOONEY,

v.

William F. HUTCHINSON.

(172 Ill. 486.)

1. A legislative interpretation of the Constitution, long established and acquiesced in, is of great force in determining the true construction.
2. A constitutional provision fixing the time and mode of exercising a particular power contains a necessary implication against anything contrary to it.
3. One exercise of the legislative power to make an apportionment of the state based on the last Federal census, under Const. art. 4, § 8, providing that the general assembly shall apportion the state every ten years by dividing the population as ascertained by the Federal census, exhausts the power, and precludes the change of the apportionment until the conditions provided for in the Constitution shall again exist.

(*Wuktn, J., dissents.*)

(April 29, 1898.)

PETITION for a writ of mandamus to compel defendant to receive and file a certificate of nomination of the relator for the office of state senator. *Writ granted.*

The facts are stated in the opinion.

Messrs. Moloney & Scofield, for petitioner:

Section 6 of article 4 of the Constitution of

1870 is as follows: "Sec. 6. The general assembly shall apportion the state every ten years, beginning with the year 1871, by dividing the population of the state, as ascertained by the Federal census, by the number 51, and the quotient shall be the ratio of representation in the senate, etc.

It appears from the 1st section of each of the apportionment acts enacted since the adoption of the Constitution of 1848, that the legislature which adopted the respective acts construed the sections of the Constitution relating to the apportionment of the state into senatorial districts to restrict them to an apportionment once in ten years.

Webster v. French, 12 Ill. 304; *Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270; 27 Am. & Eng. Enc. Law, 1st ed. p. 698, note 4; *Cooley*, Const. Lim. 6th ed. p. 73.

The intention of the statute must be sought in the words, and courts have no right to suppose that the legislature intended anything different from their natural import.

Way v. Way, 64 Ill. 406; *Stuart v. Hamilton*, 66 Ill. 258.

The act of May 16, 1898, was never law, and the repealing clause of the act of June 15, 1898, so far as it related to said act, might have been omitted. Its provision did not cover the entire state of Illinois, and it was therefore unconstitutional.

Norton v. Shelby County, 118 U. S. 442, 30 L. ed. 186.

If the general assembly has no authority to apportion the state at any other time than after the taking of each Federal census, then it is without authority to amend an apportionment, when once constitutionally enacted, because such an amendment, in effect, is a second apportionment.

NOTE.—For apportionment acts, see also *Denny v. State*, *Basler* (Ind.) 31 L. R. A. 726, and other cases there cited.
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What a court is to do is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require.

Cooley, Const. Lim. 6th ed. p. 68; *Hills v. Chicago*, 60 Ill. 90; *Gibbons v. Ogden*, 9 Wheat. 188, 6 L. ed. 68; *Beardstown v. Virginia*, 76 Ill. 40.

It is not allowable to interpret what has no need of interpretation.

McCluskey v. Cromwell, 11 N. Y. 601; *Newell v. People, Phelps*, 7 N. Y. 97; *State, Lewis, v. Doron*, 5 Nev. 899; *Prigg v. Pennsylvania*, 16 Pet. 612, 10 L. ed. 1088; *Legal Tender Cases*, 12 Wall. 581, 20 L. ed. 806; *Gibbons v. Ogden*, 9 Wheat. 188, 6 L. ed. 68; *People v. New York C. R. Co.* 24 N. Y. 487; *Smith v. Thursty*, 28 Md. 289.

The power was delegated by the people to the legislature to redistrict the state after each Federal census has been taken, and the districts so created are to be based upon such census, and the districts thus created shall constitute the senatorial districts until the succeeding Federal census has been taken, and new districts created in accordance with the provisions of the Constitution.

Denny v. State, Basler, 144 Ind. 503, 31 L. R. A. 726; *Slauson v. Racine*, 13 Wis. 898; *State, Atty. Gen., v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561; *State, Lamb, v. Cunningham*, 83 Wis. 90, 17 L. R. A. 145.

Messrs. Joseph W. Fifer and John M. Palmer for respondent.

Cartwright, J., delivered the opinion of the court:

The relator, William Mooney, of Joliet, in Will county, in pursuance of leave of the court granted for that purpose, has filed his petition for a writ of mandamus, directed to the defendant, William F. Hutchinson, county clerk of said Will county, commanding him to receive and file a certificate of nomination of the relator for the office of state senator from the twenty-fifth senatorial district. The petition alleges that relator has been duly nominated by a convention held at Joliet, in said county, March 12, 1898, as the candidate of the Democratic party for senator from said senatorial district, consisting of said county of Will, as created by the act of the legislature approved June 15, 1898, in force July 1, 1898, apportioning the state into senatorial districts; that a certificate of said nomination has been duly made and presented to said defendant, and that defendant refuses to receive and file the same, for the reason that said senatorial district has been changed by the addition of Dupage county, by an act of the legislature approved January 11, 1898, entitled "An Act to Amend §§ 1 and 2 of an Act Entitled 'An Act to Apportion the State of Illinois into Senatorial Districts and to Repeal Certain Acts Therein Named,' Approved June 15, 1898, in force July 1, 1898," and that defendant claims that by virtue of said act of January 11, 1898, said twenty-fifth senatorial district now consists of Will and Dupage counties. The defendant has entered his appearance, waiving service of process, and the parties have each waived all formalities, and submit the cause for decision upon a stipulation that the facts

stated in the petition are true. The question thus raised is whether the election for senators and representatives to be held in November, 1898, is to be held in the districts as created by the law approved June 15, 1898, in force July 1, 1898, or in the districts as fixed by said amendatory act approved January 11, 1898, and which, if valid, will go into effect July 1, 1898. The latter act was passed with all the formalities required by law, and was duly approved, and the decision depends upon the question whether its enactment was within the power of the legislature. It is agreed that we shall make a final order dismissing the petition or granting a peremptory writ of mandamus, according as we shall find the one or the other of these acts in force.

The duty of passing upon the constitutionality of an act of the legislature has always been regarded as a delicate one, to be entered upon with hesitation and caution, and to call for most deliberate and careful attention. The legislative and executive branches of the government have necessarily construed the Constitution, and determined that they may rightfully exercise the power assumed by the passage of the act, and their decision is entitled to the highest respect. In the consideration of the question involved, the presumption is in favor of the constitutionality of the act, and it will only be set aside in case of a clear infringement of the Constitution. It is to be assumed that the legislature has not only considered the question of power, but has also acted from patriotic motives, and that in this case the amendatory act was prompted by a sense of duty and justice towards the people in an attempt to secure for them a nearer approach to equality of representation in making the laws by which they are governed. It so happens that this twenty-fifth district selected for the settlement of the controversy was one of those used in the case of *People, Woodyatt, v. Thompson*, 155 Ill. 451, to illustrate the difference of population of different districts, and the want of equality under the act of June 15, 1898. This district was made to consist of Will county alone, with a population 24,876 less than the adjoining twenty-ninth district, composed of the four counties of Lee, Dekalb, Kendall, and Grundy. The presumption is that it was for the purpose of a better adjustment of rights of representation that Dupage county was added, and that the amendatory act was passed with a view to make the legislative branch of the government more nearly representative of the people in their sovereign capacity. This, however, cannot influence the determination of the case if there was a want of power to make the change, for it has always been held, as it was in *People, Woodyatt, v. Thompson*, 155 Ill. 451, that the court cannot declare a statute unconstitutional and void on the ground of unjust differences not prohibited by the Constitution, and within the legislative discretion, and neither can the court sustain a law where there is a want of power to enact it, merely because it is wise in policy or just in its provisions. The parties have properly raised and presented the question of the validity of the act of 1898, and, however grave we may regard the responsibility, we cannot decline the duty imposed upon us; and,

if the act is found to be in conflict with the provisions of the Constitution, we cannot hesitate to so declare.

The Constitution divides the powers of the government into three distinct departments, and for the exercise of legislative power creates a legislative department, to be elected by the people in senatorial districts. The provision authorizing the apportionment of the state into such senatorial districts is § 6 of article 4, which provides as follows: "The general assembly shall apportion the state every ten years, beginning with the year 1871, by dividing the population of the state, as ascertained by the Federal census, by the number 51, and the quotient shall be the ratio of representation in the senate. The state shall be divided into fifty-one senatorial districts," etc. Acting under the provisions of said section, the legislature, by the act of June 15, 1898, divided the state, according to the last Federal census, into fifty-one senatorial districts, and by that act the county of Will was made the twenty-fifth district. The act of January 11, 1898, was in form an amendment, which remodeled and changed forty-three of these senatorial districts, and in the case of the twenty-fifth district added to Will county the county of Dupage. Section 1 of the same article of the Constitution is as follows: "The legislative power shall be vested in a general assembly which shall consist of a senate and house of representatives, both to be elected by the people," and there are further provisions of the Constitution that three representatives and one senator shall be elected in each district, and they constitute the two houses.

The passage of an apportionment act is the exercise of a legislative power (*State, Morris, v. Wrightson*, 58 N. J. L. 126, 22 L. R. A. 548; *State, Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561), and, if there were no other provisions relating to apportionment than the general legislative authority conferred by § 1, the legislature might apportion the state at its pleasure, at any time. There is no express denial in the Constitution of the right to exercise this power whenever the legislature may see fit, and it is therefore argued for the defendant that it may be exercised at any time, and that the legislature may make an apportionment whenever they choose. This does not follow, however, and it is not essential, in order that the Constitution may operate as a prohibition, that it shall contain a specific provision that apportionments shall not be made otherwise than according to its provisions. The general principles governing the construction of Constitutions are the same as those that apply to statutes. *Potter's Dwarrr. Stat.* 654; 6 Am. & Eng. Enc. Law, 2d ed. p. 921. The use of negative words would be conclusive of an intent to impose a limitation, and they are used in some instances in the Constitution, but their absence is not conclusive of the opposite. Where there are provisions inserted by the people as to the time when a power shall be exercised, there is at least a strong presumption that they design it should be exercised at that time, and in the designated mode only; and such provisions must be regarded as limitations upon the power. *Cooley, Const. Lim.* 6th ed. p. 94. If legislative power

is given in general terms, and is not regulated, it may be exercised in any manner chosen by the legislature; but where the Constitution fixes the time and mode of exercising a particular power it contains a necessary implication against anything contrary to it, and by setting a particular time for its exercise it also sets a boundary to the legislative power. If a power is given, and the mode of its exercise is prescribed, all other modes are excluded. *Sedgw. Stat. & Const. Law*, 81. The legislature must keep within the legislative powers granted to it, and observe the directions of the Constitution. *Sutherland, Stat. Constr.* § 26. This doctrine was applied in *State, Morris, v. Wrightson*, 58 N. J. L. 126, 22 L. R. A. 548, where an apportionment of assembly districts in New Jersey was in question, and it was said: "In the construction of statutes it is a cardinal rule, which applies as well to constitutional provisions, that when the law is in the affirmative that a thing shall be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done by other persons or in another manner, upon the maxim, *Expressio unius est exclusio alterius*."

In *Page v. Allen*, 58 Pa. 333, 98 Am. Dec. 272, which involved the constitutionality of the registry law of that state, it was held that the inhibitions of the Constitution as to legislation are to be regarded as well when they arise by implication as by expression, and that the expression of one thing in the Constitution is the exclusion of things not expressed. It is here admitted, as it necessarily must be, that the provisions for apportionment are all exclusive except the particular one as to time. It is not denied that the basis for apportionment must be the population of the state as ascertained by the last Federal census, that the population can only be divided by the number 51, and that the quotient must be the ratio of representation in the senate. The only claim is that the provision as to time is not exclusive, and we cannot see any substantial ground for establishing a different rule respecting the time than the mode of doing the act. In Wisconsin the Constitution provided for an apportionment and organization of assembly districts once in five years, but contained no express prohibition against their alteration between the periods fixed for apportionment, and in *Stauson v. Racine*, 13 Wis. 398, it was said that, whatever limitation existed upon the power of the legislature in that respect was to be derived from the general scope and object of the provisions of the Constitution concerning the apportionment of senators and representatives, but that it might well be said that this furnished such limitation, and it was held that the provision implied that apportionments should not be made at any other time than that fixed by the Constitution. The Constitution of Indiana fixes the time once in six years when an enumeration of the voters of the state shall be taken, and an apportionment shall be made by law. In *Denney v. State, Basler*, 144 Ind. 508, 31 L. R. A. 726, an apportionment act passed in 1895 was in question, and the main dispute was whether, under the Constitution, any apportionment act could be passed at that time. It was insisted, in sup-

port of the act, that the Constitution committed to the legislative department, by a general grant of legislative power, the authority to make apportionments, and that the provision requiring the enactment of an apportionment law at the beginning of each period of six years was not intended as a prohibition upon the legislature from making other apportionments whenever that body might think best. This question was determined against the claim made, and it was held that if there were no particular provisions in regard to the subject of legislative apportionment, the legislature might, under the full and unrestricted vesting of legislative power, enact apportionment laws at their pleasure, but that the fixing by the Constitution of a time and mode for the doing of such act was, by necessary implication, a forbidding of any other time or mode, and a prohibition of the exercise of the power in any other way.

The eminent counsel who have argued this case for the defendant with great learning and ability have failed to find any decisions contrary to the foregoing, or any authorities conflicting with those given, but insist that there is a difference between the Constitutions of Indiana and this state, which makes the decision in *Denney v. State, Basler*, 144 Ind. 503, 31 L. R. A. 726, inapplicable here. The distinction attempted to be shown we are compelled to regard as unsubstantial, and cannot consider it a ground of difference that the enumeration which was made the basis of the apportionment in Indiana is taken by the state once in six years, while the census which is made a like basis in this state is taken by the United States, and once in ten years. The Federal Constitution, which was adopted in 1787, provides in § 2 of article 1 for an enumeration within three years after the first meeting of Congress; and within every subsequent term of ten years, as a basis for the apportionment of representatives and direct taxes. Under that Constitution a census has been taken in every period of ten years, commencing with 1790, and under it there will be, at every period of ten years provided for by the Constitution of this state, a census taken as a basis for division of the state into senatorial districts.

The decisions are also criticised by counsel for defendant under the rule that what is expressed is exclusive only where it is creative, and that the maxim applies only to a provision which grants originally a power, but does not limit or destroy a pre-existing right. It is contended that the power to apportion does not originate with the provision of the Constitution, but is a pre-existing right independent of the provision, and that, therefore, the rule is not to be applied. To this we cannot assent. The legislature is the creature of the Constitution, and the provisions in respect to the two houses, the division of the state into senatorial districts by a particular plan, and the membership of each of the houses, are creative in their nature. They relate to the framework—the membership and the organization—of the legislative department of the government created by the Constitution for the exercise of legislative powers. They prescribe the manner in which districts shall be created, that a senator

and three representatives shall be elected in each district, and provide for the constitution and organization of the department which shall exercise legislative power. The conditions for the exercise of this power of apportionment are particularly prescribed, and we think that those acting under it cannot vary the conditions. Endlich, Interpretation of Statutes, § 533. Another rule is that, where there is a general provision which would include a particular subject, and there is a special provision relating to that subject, the special provision controls, and the particular subject is not governed by the general provision. In this rule we found, as we conceived, a substantial ground for holding the judicial apportionment act of 1897 in force from its passage, and not included in the general provision as to when laws shall take effect. *People, Herdman, v. Rose*, 166 Ill. 422. Here there is a general delegation of legislative power, with subsequent provisions giving specific and precise directions to make the apportionment at a particular time and in a designated way, and these, we think, manifest an intention to impose a negative upon the exercise of the power at any other time.

We have already said that, if there were no further provision than the general grant of legislative power, the legislature might apportion the state at its will; and this was the situation under the Constitution of 1818, which contained no restriction except the single one in § 8 of the schedule to that instrument, fixing the apportionment until the first enumeration directed to be taken in 1820 and every five years thereafter. The apportionment after the first census was not made to depend upon any subsequent enumeration or event, and after the first enumeration the legislature not only apportioned the state every five years, but made changes during intervals. A change in the practice commenced with the adoption of the Constitution in force April 1, 1848. In that Constitution was first introduced a provision for reapportionment at particular times, according to the number of white inhabitants at the first regular session after returns were made. Under that Constitution the legislature made its first reapportionment in 1854, based on the census of 1850. This apportionment continued in force until the Federal census was taken in 1860, and then a new apportionment was made in 1861. The present Constitution was adopted in 1870, containing a similar provision now under consideration. After that time the legislature apportioned the state in the years 1872, 1882, and 1898. From the time of the adoption of the Constitution of 1848 for a period of fifty years, up to the act of January 11, 1898, apportionments were made at the intervals stated, based upon the census taken by the United States, and there was no change made between such periods. This practical construction of the Constitution reinforces the conclusion at which we have arrived. Such a legislative interpretation, long established and acquiesced in, is regarded as of great force in determining the true construction, and raises a strong presumption that it is correct. *Sedgw. Stat. & Const. Law*, 412; *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447;

Mathews v. Shores, 24 Ill. 27; *People, Dunham v. Morgan*, 90 Ill. 558; *Cooley*, Const. Lim. 6th ed. p. 82.

Attention has been called by counsel to the fact that the legislature of 1898 passed an apportionment act which was approved May 16, 1898, and also passed the subsequent act of June 15, 1898, repealing the same and apportioning the state. This act of May 16, 1898, is conceded to have been an unconstitutional and void act, which never became a law for the reason that it omitted the town of Riverside, a populous town in Cook county, which was not included in any of the senatorial districts, and was deprived of representation. The validity of the act of June 15, 1898, was therefore not affected by it, since the power to apportion the state was not thereby exercised. The validity of the act of June 15 passed beyond the field of controversy by the decision in *People, Woodgatt, v. Thompson*, 155 Ill. 451, and is now conceded. The act of May 16, 1898, has no force as affecting the question of construction by the legislative body of the legislative power, because it was incomplete and void. Its passage and repeal do not in any manner weaken the force of the construction of the Constitution given by the legislature and acquiesced in for a period of about fifty years.

It is also argued that a fair construction of the provision in question is that it was to secure to the people a reapportionment at least once in ten years, rather than to fix the time for the exercise of the power or to operate as an exclusion of apportionments at other times. The same argument was insisted upon in *Denney v. State, Basler*, 144 Ind. 508, 81 L. R. A. 726, but did not prevail, and it was held that the apportionment could only be made after the taking of an enumeration, and that, when a valid apportionment was once made, it must stand until after the making of the next enumeration. If the purpose had been as contended, it is probable that the Constitution would have expressed that intent, which is lacking. Furthermore, it does not seem, from the history of legislative apportionments prior to the adoption of the provision, that there was any occasion to provide for securing apportionments as often as such periods, or that a neglect to apportion was regarded as an evil to be provided against. The legislatures during the thirty years under the Constitution of 1818 had been in the habit of making frequent apportionments. The courts may always look to ascertain the evil intended to be remedied, but this provision could not have been aimed at an evil which did not exist, and it would rather seem that the object was to establish definite periods for reapportionments. When the legislature of 1893 made the apportionment of that year, the conditions existed which authorized the exercise of the power, and the legislative discretion was exercised based upon the Federal census of 1890,—a division of the population by 51, and the resulting quotient as the ratio of representation. That power and discretion, when fully exercised, were exhausted, and the power will not again arise until the conditions provided for in the Constitution shall again exist. The power and discretion are to be exercised at stated intervals, and in certain modes, and that legislature, upon a

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consideration of the facts, exercised the power and the discretion. A subsequent reapportionment, based upon the same census, the same division, and the same quotient, which it is admitted must be used, would be nothing but reversing the judgment and discretion of that legislature, exercised upon the same facts at the time expressly authorized by the Constitution; and we cannot think that it was in the contemplation of those who adopted the Constitution that succeeding legislatures should set aside the action of the first by changing and remodeling districts, where no new condition contemplated by the Constitution exists. The power to make apportionments has not always been exercised at exact periods of ten years, but the power conferred by the Constitution is a continuing one from the time it is constitutionally devolved upon the legislature until it is performed. *People, Woodgatt, v. Thompson*, 155 Ill. 451; *State, Atty. Gen., v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561. Twelve states, having a general plan of apportionment similar to our own, have, by their Constitutions, forbidden a change between the periods fixed in such Constitutions. These prohibitions are conclusive of that which, in our case, must be the subject of construction, and which has been practically construed by the legislature for a long period of time, as we have already seen. The absence of such an express prohibition in our Constitution is not, as before stated, at all conclusive that the prohibition was not intended.

Plausible reasons may be given for sustaining the power,—and especially in this particular instance,—which would naturally appeal with force to those who believe that the apportionment of 1898 was prompted by some other motive than the public good, or a desire to secure to the people, as near as possible, equality of representation; but this consideration cannot have force as against the provisions of the Constitution, and it is to be remembered that the same rule which would permit a correction of inequality would also permit the setting aside of a just and fair apportionment made at the time fixed by the Constitution, and the substitution of unjust and oppressive conditions within the latitude allowed by the Constitution to the legislature. We are convinced that the construction we have given to the Constitution is the correct one, and we feel ourselves under the necessity of declaring the apportionment act of 1898 unconstitutional and invalid.

A peremptory writ of mandamus is awarded according to the prayer of the petition.

Wilkin, J., dissenting:

In the limited time at my disposal, I can only state in a general way why I think the foregoing opinion and conclusion unsound. The proposition, "The provision authorizing the apportionment of the state into such senatorial districts is § 6 of article 4," is in my opinion a misconception, and forms the basis of the wrong conclusion reached. That section does not empower the general assembly to make apportionment laws, nor does its language purport to do so. It only declares how the power already existing in the legislature shall be exercised. Nor can I see how the fact

that the legislative body of the state is provided for in the Constitution—"is the creature of the Constitution"—in any way gives support to the assertion that § 6 is creative of the power in that body to apportion the state. It is admitted that the power to pass such laws is a legislative power. It is inherent in the general assembly, and can be exercised by it at such times and in such manner as it may deem wise and proper, except in so far as it is limited by the Constitution. It has often been said by this court: "No proposition is better settled than that a state Constitution is a limitation upon the power of the legislature, and that the legislature possesses every power not delegated to some other department or expressly denied to it by the Constitution." The rule is nowhere more clearly stated than by Judge Cooley in his work on Constitutional Limitations, quoted with approval in *People, Woodgatt, v. Thompson*, 155 Ill. 451, as follows: "Whatever the people might do the courts cannot prevent their representatives from doing unless the people have positively and expressly forbidden it. Such restrictions and limitations ought to be clear and explicit. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." The question here, is, Does the language "the general assembly shall apportion the state every ten years, beginning with the year 1871, by dividing the population," etc., prohibit the passage of such statutes oftener than once in each period of ten years? The language as to when an apportionment shall be made, it will be seen is very general and indefinite, and does not warrant the assumption throughout the majority opinion that it fixes the time when it shall be done. It does not require the first apportionment to be made in the year 1871, or at the first session after the Federal census of 1870, and every ten years thereafter; and in this respect is peculiar. It is unlike our Constitution of 1848, or that of the states of Indiana and Wisconsin, referred to in the cases cited from those states. They expressly provide for apportionments at fixed intervals, but no such requirement is found in our present Constitution. It does no more than fix decennial periods, beginning with the year 1871, and require an apportionment to be made within each of those periods. Any session of the legislature during the period can lawfully divide the state into senatorial districts, if it has not been done at a prior session in the period,—and this, not because it was the duty of a prior session to do so, and the duty a continuing one, but because the duty devolves upon one session as much as another. It could not be claimed that the act in question is unconstitutional because passed in the year 1898. The contention must be that power is only given to make one apportionment in the period, beginning with the year 1891, and ending with the year 1901; and that the legislature of 1898, by the passage of the act at that session, had exhausted that power. Is it true that the authority of the general assembly is by this

indefinite language limited to the passage of a single act during each ten years? That there is no express language to that effect is admitted. But the theory of the foregoing opinion is that the prohibition arises by necessary implication. I do not so understand the language. The power to apportion the state every ten years is not, in my opinion, so incompatible or inconsistent with the right to do so oftener as to amount to an implied prohibition. The assertion that there is no substantial ground for establishing a different rule respecting the time when apportionments may be made than that which applies to the mode of doing the act, is certainly unwarranted. It is conceded by the respondent that an apportionment must be made every ten years; but the insistence is that consistently with that duty, it may be done oftener, and this raises the question of construction. It is impossible, however, that a mode other than that prescribed, can be followed consistently with the provision in question: that is, the population must be divided by 51, the quotient to be the ratio of representation. Certainly the ratio cannot be obtained consistently with that express requirement by using any other number as a divisor, and hence there is no room whatever for construction in that regard. And so as to the other requirements in the mode prescribed. The holding here is that, because the Constitution says the general assembly shall apportion the state every ten years, it cannot do so more than once in any period of ten years, no matter what may be the emergency therefor. It seems to me no such conclusion can be reasonably drawn, much less arise by necessary implication. It is the duty of courts to so construe constitutional provisions and acts of the legislature as to harmonize the two, and sustain the law, if it is possible to do so. The rule is: "Language restricting the legislative power of the general assembly must be construed strictly (*People, Burgess, v. Wilson*, 15 Ill. 392), and, unless it shall then clearly appear that the legislation in question is within the terms of the restriction, it must be sustained. If it be doubtful only, whether it is or not, the doubt must go in favor of the validity of the action of the general assembly." *Wilson v. Sanitary District*, 133 Ill. 459. "If doubt exists as to the constitutionality of the statute, the benefit of the doubt is to be given to the law. The doubt upon which the court is to act may arise either from an endeavor to arrive at a true interpretation of the Constitution, or from a consideration of the law after the meaning of the Constitution has been judicially determined." 23 Am. & Eng. Enc. Law, p. 351, and cases cited in note. The Constitution, considered as a whole, shows that its framers did not intend the effect given to the language of § 6 by this decision. If the purpose had been to prohibit apportionments oftener than once every ten years it is reasonable to suppose that language would have been used clearly expressing that intention, as is done in § 9 of article 4, fixing the sessions of the general assembly at the time named "and at no other time," and in § 5 of article 6, providing for the division of the state into districts for the election of supreme judges, wherein it is said: "The bound-

aries of the districts may be changed at the session of the general assembly next preceding the election for judges therein, and at no other time;" and again in § 13 of the same article, authorizing the apportionment of the state into judicial circuits, the language being, "New circuits may be formed and the boundaries of circuits changed by the general assembly, at its session next preceding the election for circuit judges, but at no other time." It is also a significant fact that no less than twelve other states of the Union in the frame of their Constitutions have deemed it necessary, by the use of different terms of expression, to provide that apportionments should be made at fixed periods, and at no other time.

There is, to my mind, no force in the argument attempted to be drawn from what is said to be the construction placed upon the Constitution by the legislature in making apportionments of the state every ten years, and not oftener. In dividing the state into senatorial districts once in each period of ten years, the legislature did so, not under a construction of the Constitution thereby placed upon it, but by simply following its plain requirement. That it did not do so oftener cannot be said to amount to a construction by it that no power existed to do so. It cannot be assumed that it refrained from exercising the power, because it understood it did not possess it, rather than because it found no occasion for its exercise. The only necessity for a reapportionment more than once in a decennial period which is here shown arose at the session of 1898, as stated in the foregoing majority opinion, and that legislature did not hesitate to make it. The attempt to weaken the force of that action, as indicating the construction placed upon the Constitution by the legislature, upon the ground that the first act was unconstitutional, is, I think, futile. Without reference to the question as to the power of the legislature to pass upon the constitutionality of statutes enacted by it, it is illogical to say that the legislature could review its own acts by repealing the former statute at the same session, or, as I suppose would be admitted, at the next session of the legislature, on the ground that it was unconstitutional because some small part of the territory was attached to no district, but would have no power to do so upon a discovery that the apportionment was grossly unjust to the people of one or many portions of the state by reason of a disregard of the requirement that the districts shall be formed of compact and contiguous territory, etc., and as nearly as practicable containing an equal number of inhabitants.

No good purpose will be served by a review of the authorities cited in the majority opinion. Unless it must be held that the power of the general assembly to apportion the state is derived from § 6, *supra*, of the Constitution, or rather unless there is no reasonable ground for holding otherwise, none of them, properly understood, support the conclusion announced. The Wisconsin case does not decide the question here involved, nor pretend to do so. And the Indiana decision does so only incidentally, the question not being of controlling importance in that case. But, as already said, the constitutional provisions of these states and those of our own are materially different, and 40 L. R. A.

the decisions for that reason should not be given the force of authority here. The fact that counsel for the defendant have been able to cite no decisions in conflict with them signifies nothing. As already said, the language of our Constitution is peculiar, and so far as I have been able to discover, is found in no other state Constitution. It is before this court for the first time to be construed, and it is not strange that decided cases are not to be found bearing on the issues here. It is not for the defendant to show that the act in question is constitutional, but for those who challenge its validity to point out and make clear its invalidity. For the reason already stated, that the power to make apportionments is inherent in the legislature, and not created by the Constitution, the maxim, *Expressio unius est exclusio alterius*, is not properly applicable in the construction of § 6. It is a rule only to be applied where the intention of the lawmaker is not otherwise manifest; and, as said by Mr. Sutherland, in his work on Statutory Construction, § 825: "Under these conditions it leads to safe and satisfactory conclusions; but otherwise the expression of one or more things is not a negation or exclusion of other things;" and he adds, "What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provisions in the particular act." In my opinion, the apportionment act of January 11, 1898, entitled "An Act to Amend §§ 1 and 2 of an Act to Apportion the State of Illinois into Senatorial Districts," and to repeal certain acts therein named, approved June 15, 1898, is a valid and constitutional enactment, and that the writ in this case should be denied.

Bernard P. GAVIN, *Plff. in Err.*,

v.

Susanna CURTIN.

(171 Ill. 640.)

1. **Equity may take jurisdiction to protect an unproductive life estate and remainder of great value which is liable to be lost through inability of the life tenant to pay the taxes.**
2. **Absence of precedent** is not a sufficient reason for denying the existence of equitable jurisdiction.
3. **Equity will take jurisdiction in all cases** where a right recognized by municipal law exists, and courts of law do not provide an adequate remedy for the enforcement, maintenance, and protection of that right.
4. **The testator's intention that real estate should not be alienated** will not prevent a court of equity from ordering its sale if necessary, to preserve the benefit of it to the beneficiary.
5. **Land left to a life tenant and remainderman may be sold by a court of equity** if it is necessary to prevent its loss through inability of the life tenant to pay the taxes.

NOTE.—On the question of the power of courts to cut off the interests of persons not *in sac.* see also *Kent v. Church of St. Michael* (N. Y.) 18 L. R. A. 331.

6. Possible afterborn children will be bound by a decree directing its sale to preserve the interest of remaindermen under a devise of land from loss for nonpayment of taxes where the parties in being and before the court have the same incentive to accomplish the same purpose as would move and possess the parties not in case if they were in being.

(February 14, 1898.)

ERROR to the Circuit Court for Cook County to review a decree in favor of complainant in a proceeding to preserve for a life tenant and remaindermen property devised to them in the form of real estate which was about to be lost for nonpayment of taxes. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward W. Cullen, for plaintiff in error:

Where the facts alleged, although showing a right, do not bring the case under some one or other of the well-recognized heads of chancery jurisdiction, the maxim, Equity will not suffer a right to be without a remedy, is not sufficient to confer jurisdiction.

See *Rees v. Watertown*, 19 Wall. 121, 22 L. ed. 76; *Heine v. Levee Comrs.* 19 Wall. 655, 22 L. ed. 223.

No person having an interest in the subject-matter of the suit, and who is not before the court, can be bound by the decree.

Story, Eq. Pl. §§ 78, 91, 99, 144-146.

Mr. John W. Walsh, for defendant in error:

In every case in which there is a right recognized by the municipal law, and there is no remedy at law, equity will take jurisdiction and afford whatever relief is appropriate under the circumstances of the case.

Biapham, Eq. 4th ed. § 37; *Pom. Eq. Jur.* 2d ed. §§ 423, 424; *Story, Eq. Jur.* 12th ed. §§ 83, 25; *Mitford*, Ch. Pl. by Jeremy, pp. 111, 112; *Prof. Park* in *Am. Jurist*, pp. 227-235; *Britton v. Supreme Council of R. A.* 46 N. J. Eq. 102; *Watson v. Sutherland*, 5 Wall. 74-80, 18 L. ed. 580-583; *Dodge v. Cole*, 97 Ill. 353, 37 Am. Rep. 111; *Boren v. Smith*, 47 Ill. 482.

A court of chancery has jurisdiction to sell real estate which, under the limitations in the conveyance to those who own it, cannot be alienated, and invest the proceeds when it is necessary to protect the real estate from loss to those who are interested in it.

Curtis v. Brown, 29 Ill. 201; *Voris v. Sloan*, 68 Ill. 588; *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111; *Hale v. Hale*, 146 Ill. 227, 20 L. R. A. 247; *Stein v. Stein*, 79 Md. 464.

The decree is binding on the unborn issue of defendant in error.

Story, Eq. Pl. §§ 76, 77; *Calvert*, Parties to Suits in Equity, pp. 12-51; 17 Am. & Eng. Enc. Law, p. 730; *Monarque v. Monarque*, 80 N. Y. 320; *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455; *Brevoort v. Brevoort*, 70 N. Y. 186; *Freeman v. Freeman*, 9 Heisk. 301; *Cheesman v. Thorne*, 1 Edw. Ch. 629; *Finch v. Finch*, 2 Ves. Sr. 491; *Wills v. Slade*, 6 Ves. Jr. 498; *McCampbell v. Mason*, 151 Ill. 500; *Hale v. Hale*, 146 Ill. 227, 20 L. R. A. 247; *McArthur v. Scott*, 113 U. S. 840, 28 L. ed. 1015; *Willis v. Henderson*, 5 Ill. 13, 38 Am. Dec. 120; *Elmendorf v. Taylor*, 10 Wheat. 152-40 L. R. A.

166, 6 L. ed. 289-294; *Faulkner v. Davis*, 18 Gratt. 684, 98 Am. Dec. 698.

A court of chancery has jurisdiction to appoint trustees, and create a trust, when it is the most convenient means, and best adapted to work out the equities of the complainant and preserve the interest of all persons interested in the property.

Blakley v. Marshall, 174 Pa. 425.

Boggs, J., delivered the opinion of the court:

John Gavin died testate on the 25th day of April, 1892. He left surviving him three sons, Bernard P. Gavin (the plaintiff in error), John F. and James C. Gavin, and a daughter, Susanna Curtin (the defendant in error), wife of William D. Curtin. The deceased, at the time of his death, owned two parcels of real estate in the city of Chicago, described as follows: The N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 18, township 88 N., range 14 E. of the third principal meridian (except the east 424.87 feet, and also except the park way and boulevard), and sublots 3 and 4 of lot 4, block 58, original town of Chicago. The parcel first above described contains about 20 acres of land, and is, for sake of convenience, denominated by the parties in the briefs, and will be hereinafter referred to by us, as the "Fifty-Fifth Street Property." The other parcel, for the like reason, is referred to in the briefs as the "Market Street Property," and will be so called by us.

The will of the deceased is as follows:

I, John Gavin, of the city of Chicago, in the county of Cook, and state of Illinois, being of sound mind and memory, do make, publish, and declare this my last will and testament, hereby revoking all former wills by me at any time made: First, I direct that my funeral expenses and just debts be first paid. Second, I give and bequeath the following sums to the following persons, and charge my real estate with the payment of the same, viz.: To my friend Eliza Farrel, five hundred dollars (\$500); to my friend Patrick Farrell, five hundred dollars (\$500); to the directress of St. Joseph's Academy, conducted by the Sisters of Charity, near Emmetsburg, Frederick county, Maryland, one thousand dollars (\$1,000), to be expended or invested by her in such manner as she may deem for the best interest of said academy; to the president of St. Mary's College, situated near said Emmetsburg, five hundred dollars (\$500), to be expended or invested by him in such manner as he may deem for the best interest of said college. Third, To each of my sons, John F. Gavin, Bernard P. Gavin, and James C. Gavin, their heirs and assigns, forever, I give, devise, and bequeath one fourth of all the rest, residue, and remainder of my estate, real, personal, and mixed. The remaining one fourth thereof I give, devise, and bequeath unto my daughter, Susanna Curtin, for life, with remainder in fee to the children of said Susanna Curtin; and if any child of said Susanna Curtin shall die in her lifetime leaving issue, any of whom shall be living at the time of her death, such issue shall take equally amongst them the share which their respective parents would have

taken if living at her death; and in case said Susanna Curtin die leaving no children and no descendants of any deceased child, then said one fourth shall vest in my sons, John F. Gavin, Bernard P. Gavin, and James C. Gavin, in fee. Fourth. All the rest, residue, and remainder of my estate, real and personal, I devise and bequeath to my three sons, John F. Gavin, Bernard P. Gavin, and James C. Gavin, in fee. Fifth. I hereby appoint James Hoyne and Thomas J. Walsh executors of this my last will and testament. In witness whereof I have hereunto set my hand this 26th day of March, A. D. 1891.

John Gavin. [Seal.]

The defendant in error, on the 9th day of January, 1895, filed in the circuit court of Cook county a bill in chancery, to which she made parties defendant her said three brothers. The bill alleged the execution of the will, the death of the said John Gavin, and that he died seised of the title to the real estate hereinbefore described, and left no other kind of property of any kind or character; that the complainant was not at the date of the death of her said father, and has not been since, and is not now, possessed of any property whatever, except as devisee under the will; that her said brothers, the defendants in the bill, had paid the legacies and bequests mentioned in the second clause of the will, and the costs of administration, amounting in the aggregate to \$4,000, under an agreement with her that she would reimburse them for her proportionate part thereof; that prior to his death the testator, her father, executed a mortgage upon the Market street property to secure an indebtedness due from him, in the sum of \$22,000, bearing interest at the rate of 6 per cent per annum, payable annually, and that the same remains unpaid; that the said Fifty-Fifth street property is vacant acre property, and has been partitioned by decree of the superior court of Cook county, and a part thereof, consisting of 5.151 acres, set off in severalty to the complainant; that it produces not to exceed \$5 per year annual income, and that the annual taxes thereon are about the sum of \$250; that said premises are not susceptible of being made income producing, and will be exposed to danger of being lost to the complainant and the remaindermen by reason of the nonpayment of taxes, and will be subject to special assessments soon, in all probability, to be levied for various improvements, for the purpose of paving streets, sidewalks, etc., which, if not paid, will result in the sale of the premises and the loss thereof to all interested therein; that said Market street property is reasonably worth the sum of \$100,000; that the improvements thereon consist of an old-fashioned four-story building of little value and not considered in the said valuation of \$100,000; that the said improvement is wholly inadequate to secure a fair return upon the value of the property, and that the largest annual income derived from this property has not, since the death of the said testator, exceeded the sum of \$2,500, and that a larger income cannot be secured or that income maintained without the expenditure of considerable sums of money; that the annual taxes thereon are

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about the sum of \$700, and the annual interest charge on the said mortgage \$1,320, making a total outlay of \$2,020, not including insurance, repairs, and other incidental current expenses, so that, at most, the income of complainant from said Market street property does not exceed \$150 per annum, and that in fact she has received only the sum of \$100 per annum since the death of her said father; that the income from the two parcels of property will not discharge the taxes upon the Fifty-Fifth street property by the sum of \$150 per annum, and in their present condition the property imposes an annual burden of that amount upon the complainant, and in addition she is still indebted to her brothers on her obligation to repay to them her proportionate part of the amount advanced by them to discharge the legacies provided for by the second clause of the will; that complainant intermarried with said William D. Curtin in 1888, some four years before the death of her father, and has since lived and cohabited with her said husband, is thirty-seven years of age, and has never borne a child; that she can only convey a life estate, which, under the circumstances, would not benefit but only impose burdens on the buyer, and would be valueless, and that, owing to the fact the remainder in fee is contingent, the fee cannot be conveyed; that she cannot, and in justice and equity ought not, be required to pay the taxes and assessments and preserve the property from loss by sale to pay the same, and that unless a remedy is provided by the courts the fee must inevitably be lost to the remaindermen. The prayer of the bill is that a trustee be appointed and vested with the title in fee to the two parcels of real estate, to hold to the use of complainant (defendant in error) during her life, and to her children (if any be born to her), and to the descendants of any deceased child, if any there be, in fee, and, in default of issue born to her, to her said brothers in fee, and that said trustee be invested with power to sell said premises, and invest the proceeds for the benefit of those entitled, etc.

The defendants to the bill were duly summoned, but did not appear, and were defaulted. The cause was referred to the master to take and report the proof, with his conclusions of fact. The evidence was taken by the master, and, together with his conclusion of fact thereon, reported to the court. The master's conclusions fully supported the allegations of the bill, and are amply and abundantly sustained by the proofs. The court approved the report and entered a decree appointing the said John F. and James C. Gavin trustees, and invested them with the title in fee to the undivided one-fourth of the Market street property, and the said 5.151 acres of the Fifty-Fifth street property, to hold for the use of the said Susanna Curtin for life, remainder to her child or children and children of any deceased child in fee, and in case she should die without children or descendants of child or children, remainder in fee to the said John F., Bernard P., and James C. Gavin, in fee. The decree also invested the trustees with power, subject to the approval of the court, to sell and dispose of the said premises, or any part thereof, or to exchange the same for some species of income

bearing property, and invest the proceeds in safe securities or productive real estate, and to pay the annual income to the said Susanna Curtin, after first paying and discharging all liens by way of taxes, assessments, encumbrances, interest, cost of insurance, and necessary repairs, or to mortgage the premises, if necessary to discharge the existing mortgage on the Market street property. The decree further provided the trustees should execute a bond, with securities to be approved by the court, in the sum of \$25,000, conditioned for the faithful performance of the trust, and that the trustees should, from time to time, report to the court. This is a writ of error to bring the proceedings into review in this court.

Two questions are presented by this record. The first is whether it is within the jurisdiction and power of a court of equity to grant the relief asked by the bill and awarded by the decree; and the other is, Does the decree bind children who may hereafter be born to the said Susanna Curtin?

The record discloses the defendant in error is possessed of a right, recognized by the general principles of municipal law, to enjoy during her lifetime an estate in the premises involved in the proceeding, and that her children, if any are born to her, will be legally entitled to receive and possess in fee the remainder in said property, and that the circumstances are such that the life estate and the remainder in fee will be destroyed and lost to all who are or may be interested therein unless jurisdiction to provide a remedy and power to avert such destruction are vested in some judicial tribunal. It is beyond discussion that courts of law are powerless to render relief. It remains to be determined whether a court of equity may assert and exercise the necessary jurisdiction and power. If not, it would seem we have an instance of the existence of a legal right which cannot be protected and maintained because of a lack of an appropriate tribunal having adequate judicial power to render the necessary relief. We think our institutions are not subject to this reproach, but that our court in equity has full jurisdiction and power to meet the emergency. There are certain general precepts or principles, denominated maxims, which a learned author declares "are in the strictest sense the *principia*," the beginnings out of which have developed the entire system of truth known as "equity jurisprudence." 1 Pom. Eq. Jur. p. 890. Another author of equal learning says: "There are in equity several of these maxims in which the general principles of chancery jurisdiction and the methods by which they are applied, are succinctly expressed. The first of these maxims is that equity will not suffer a right to be without a remedy. The principle expressed by this maxim is, indeed, the foundation of equitable jurisdiction, because, as we have seen, that jurisdiction had its rise in the inability of the common-law courts to meet the requirements of justice." Bispham, Eq. 3d ed. p. 53.

It is to be observed that the rights, to protect and preserve which these learned authors declare courts of equity will provide a remedy, are not mere abstract moral rights, but rights recognized by the existing municipal law. 40 L. R. A.

The right possessed by the defendant in error in this case is one which belongs to the purview of municipal law, and comes within the scope of juridical action, but the power of the courts of law, or their modes of procedure, are inadequate to furnish a complete remedy. It may be that an instance cannot be cited where a court of equity has been called upon to take jurisdiction and render relief in a case in all its aspects precisely the same as the case at bar, but that does not furnish a sufficient reason for declaring the jurisdiction does not exist. The expressions of this court in the case of *Dodge v. Cole*, 97 Ill. 388, 37 Am. Rep. 111, are here in point. It was there said (p. 384, 37 Am. Rep. 122): "The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather, upon the necessities of mankind, and the great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages, and all people. . . . Where it is clear the circumstances of the case in hand require an application of those principles, the fact that no precedent can be found in which relief has been granted under a similar state of facts is no reason for refusing it." We think it may be laid down as an unfailing rule that equity will take jurisdiction in all cases where a right recognized by municipal law exists, and courts of law do not provide an adequate remedy for the enforcement, maintenance, and protection of that right; hence we think the court had jurisdiction to entertain the bill. Was it lacking in power to award relief? It is suggested that in the case at bar it was the intention of the testator, to be gathered from the will, that the real estate here involved should not be alienated, but that the estate should be preserved intact, and should so descend and vest in the remainderman, and that in such case a court of equity is without power to break in upon the will and sell the land. There is no express denial of the right of alienation of the will, but it is manifest it was the expectation of the testator, even if he had not formed a deliberate intention to that effect, that the property should be preserved intact, and so descend to and vest in the remainderman. But we think it well settled that a court of equity, if it has jurisdiction in a given cause, cannot be deemed lacking in power to order the sale of real estate which is the subject of a trust on the ground alone that the limitations of the instrument creating the trust expressly deny the power of alienation. It is true the exercise of that power can only be justified by some exigency which makes the action of the court, in a sense, indispensable to the preservation of the interests of the parties in the subject-matter of the trust, or, possibly, in case of some other necessity of the most urgent character. The jurisdiction and power of a court of chancery in this respect were the subject of discussion in this court in *Curtis v. Brown*, 29 Ill. 201; *Voris v. Sloan*, 68 Ill. 588, and *Hale v. Hale*, 146 Ill. 227, 20 L. R. A. 247, and the conclusion reached in each of such cases is in harmony with the view hereinbefore expressed, that courts in

s finished. The paddle, which grows hot while in use, is cooled in a long water trough, known as the "bosh." Ordinarily, the heater has a helper, who assists him in taking the paddle out of the "bosh" and putting it into the furnace. Plaintiff had such a helper, but, either on account of his inexperience or a dislike of the plaintiff towards him, or for some other reason, immaterial, Mann, on the day in question, attempted to perform his duties without the assistance of this helper. The floor in front of the furnace where he was required to work was made of cast-iron plates 1 inch in thickness and about 26 by 20 inches in size. These plates, when first put down, are straight and level, but in a short time, from exposure to the great heat of the furnace above, and through counter exposure to dampness of the

ground beneath, soon become warped, so that they are higher in some places than others. Such was the condition of the iron floor in front of the furnace where plaintiff was required to do his work, and also around the "bosh" or trough where the paddle was cooled. These higher places, from more frequent contact of those using the floor, become very smooth, as the evidence shows, "smooth as glass." The floor around the "bosh" was more particularly subjected to the exposure of the dampness underneath from the fact that the water was frequently thrown from this trough upon the floor as the paddle was pulled out of the "bosh." The record shows the floor at that place was, most of the time, wet from this cause. The plaintiff, while attempting, without the assistance of his helper, to pull the

Brewing Co. (1894) 57 Minn. 303; Roux v. Blodgett & L. Lumber Co. (1891) 87 Mich. 513. 13 L. R. A. 728.

Those who are curious to see the extent to which this misuse of words pervades the opinions of the courts are referred to an article by the present writer in the American Law Review for September, 1897.

The effect thus ascribed to a promise to remove a specific cause of danger is analogous to that ascribed to a direct order, which, under appropriate circumstances, operates as an implied assurance that there is no present danger, and relieves the servant of the imputation of contributory negligence, except in cases in which no prudent man would have obeyed the order. See *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 380, 18 Am. Rep. 412; *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205; *Keegan v. Kavanaugh* (1876) 62 Mo. 230; *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207.

Not infrequently the evidence in cases of this description shows that the servant relied both on an assurance of present safety, either given in specific words or implied from an express command to perform a certain piece of work, and on a promise to remove the cause of danger. *Hawley v. Northern C. R. Co.* (1880) 82 N. Y. 370; *Flynn v. Kansas City, St. J. & C. B. R. Co.* (1883) 78 Mo. 195, 47 Am. Rep. 99; *Senzikowski v. McCormick Harvesting Mach. Co.* (1895) 58 Ill. App. 418.

The difference between an assurance relating to present safety, and an assurance relating to future safety, is, however, sometimes important, inasmuch as a servant may be legally justified in relying on the former kind of assurance under circumstances which would tend to charge him with contributory negligence if he engaged in certain work merely on the faith of the fulfillment of the latter kind of assurance. Thus, an instruction to the effect that the giving of an express promise to repair will not enable the servant to recover where the danger of using the appliance is so great that no man of ordinary prudence would continue to use it, is rightly refused where the evidence is that the plaintiff went to work because he relied, not on a promise to repair, but because he was told that the appliance had been repaired since he last used it. *Atchison, T. & S. F. R. Co. v. McKee* (1887) 37 Kan. 592.

II. General rule stated.

The general rule, based upon the above considerations, has been thus formally enunciated in words following very closely those used in a recent case: A servant who complains to the

master of the employment by him of an habitually careless and neglectful fellow servant may, where the master promises that the danger due to his neglect will be remedied, continue in the employment a reasonable time thereafter in expectation that it will be so remedied, without assuming the risk therefrom or being guilty of contributory negligence, unless the danger is so apparent, imminent, and immediate that a man of ordinary prudence would refuse so to remain; and what is such a reasonable time is ordinarily a question for the jury. *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447.

The proviso appended to this statement is merely one way of stating the principle that the giving of the promise is not a circumstance which entitles the servant to recover as a matter of law.

The proviso appended to the statement embodies one feature of the principle which precludes the servant from alleging the promise to be a circumstance which, *ipso facto*, entitles him to recover, as a matter of law. This principle appears in its most comprehensive form in the following passage: "If machinery upon which a servant is employed has become dangerous, and the servant has complained of it, and has been promised that it shall be repaired, but is injured before the defect is remedied, and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury in determining whether he has assumed the risk in the meantime, and whether he was using due care in working when he knew there was danger." *Counsell v. Hall* (1888) 145 Mass. 468. Compare *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785; *Gulf, C. & S. F. R. Co. v. Donnelly* (1888) 70 Tex. 371.

The doctrine may also be expressed in language which emphasizes the consideration that it is an exception ingrafted upon a general principle, as where it was said that the rule that a servant accepts the ordinary risks of his employment, and of defects in machinery and appliances of which he knows, does not apply to one who has informed his employer of such defects, and only continues in the employment for a reasonable time on the employer's promise to remedy the evils. *Lyttle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289.

So, in another case we find the court remarking that the general rule that the servant assumes, not only the ordinary risks of the employment, but also those superadded by the negligent omissions of the master, where they are known to the servant, is modified where the servant, upon his discovery of a danger

paddle out of the "bosh," and while walking backward over the iron plates, slipped on one of the smooth places of the floor and fell, receiving the injuries complained of. His own statement as to this injury is as follows: "I had just about completed pulling the paddle out of the 'bosh,' when, just at the instant I stopped, I pulled the paddle like this, and went to lay it on the rail, and my feet went out like that. I stopped walking, and, as I stood there, tried to pull the paddle back, and my feet went out."

Q. And very likely it was the pull that you gave the paddle that started your feet, was it not?

A. Well, I don't know about that. I don't know about that. That I couldn't say. I

know I fell, and the paddle fell on me. I know both my feet went out at once.

It appears from the record in this case that the uneven, smooth, and slippery condition of the floor had existed for at least a year prior to this accident, and the condition was fully known to the plaintiff. He had on several occasions during the year notified his foreman of the dangerous condition of this floor; and, while it is not disputed he was fully aware of such dangerous condition, it is urged the defendant had promised to repair the floor, and, relying upon this promise, the plaintiff had continued in its employ. A jury in the circuit court of Cook county rendered judgment in favor of the plaintiff for the sum of \$5,000. This judgment was by the appellate court of

arising from such an omission, complains to the master and receives such promises or assurances as to make it reasonable for him to assume that the deficiency will be supplied before he is exposed to injury from it. *International & G. N. R. Co. v. Turner* (1893) 3 Tex. Civ. App. 487.

See also the following passage, where the standpoint is the same: "Employees on entering into a hazardous employment take the ordinary risks attending that service; but when servants complain of what appears to them to be an impending peril in a position to which they have been ordered, and they notify the master of the danger, and ask to be relieved, the master cannot refuse to relieve them, insist upon their continuing the work in that position, and, where they remain at his direction, waiting for an inspection which he has promised but neglected to make, relying upon his promise and superior judgment, and fearing the consequences of disobedience, and are injured, be then allowed to say: 'You were guilty of contributory negligence in doing what I directed you to do,' or, 'You assumed that risk when you entered my employment.' Under such circumstances, employees cannot be said to have either heedlessly or voluntarily assumed the risk." *Schlacker v. Ashland Iron Min. Co.* (1891) 89 Mich. 262.

In this class of cases the attention of the master will usually have been called to the existence of the danger by the servant whose safety is menaced by it, and formal statements of the general rule commonly refer to the circumstance that the servant has notified the master of the dangerous conditions which he desires to have remedied. See, for example, *Woodward Iron Co. v. Jones* (1885) 80 Ala. 123, *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 48 Am. Rep. 609; *Missouri Furnace Co. v. Abend* (1883) 107 Ill. 44, 47 Am. Rep. 425; *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785.

But it is clear, upon principle, that positive action of this kind on the servant's part is by no means necessary to fix his rights. A promise given by the master *proprio motu* must evidently possess the same virtue and efficacy as one given in response to a complaint by the servant.

III. *Rationale of the relation between the parties after the giving of the promise.*

From the authorities cited above, it is apparent that the situation contemplated by the cases in which the rule is applied is that the

servant has been exposed, through the failure of the master to keep the instrumentalities of his business in proper condition, to some danger from which, under the implied terms of the contract of service, the master was bound to protect him; and that the fact of the master's having promised to remove that danger suspends, for a certain period, the operation of the principle which, either on the ground of an assumption of the risk, or of contributory negligence, precludes a servant from recovering damages for an injury caused by a hazard which he was aware of and properly appreciated. The opinions of the judges, however, disclose a difference of view as to the precise effect of the promise. To us the most satisfactory theory seems to be that indicated by the remark which Byles, J., interjected during the argument of counsel in the leading case of *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, where the servant was injured by machinery left unfenced in contravention of the provisions of a statute: "While the machinery was fenced, was not this the contract of the plaintiff: 'I will work with fenced machinery'; after the fencing was broken, was not the contract: 'I will continue to work, if you will restore the fencing.'"

That the true rationale of the situation existing after the promise is that a new conditional contract comes into force is indicated very strongly by those cases in which the promise to remove a specific cause of danger is given before the servant enters the employment. *Hyatt v. Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 294 (master liable for exposing servant to extreme cold, against which he has been assured that he will be protected); *Cheaney v. Ocean S. S. Co.* (1893) 92 Ga. 726 (master liable for injuries resulting from his violation of a promise to station a man at the hatch of a ship in order to protect laborers in the hold while the loading is going on).

It must be admitted, however, that the courts have usually preferred to describe the results of the promise in other ways.

In *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785, the court, after mentioning the various reasons assigned for the rule, favors the one which would place it on "the ground of a contract on the part of the employer . . . that if the servant continues in the service in the meantime, and until the defects are remedied, the employer, and not the servant, will assume the risks;" and observes that "if the emergencies of a master's business require him temporarily to use defective machinery, we fall to see what right he has,

the first district affirmed, and on appeal comes to this court.

Mr. E. Parmalee Prentice, for appellant:

A promise to repair does not relieve an employee from the assumption of hazard, where the danger arises from the ordinary use of familiar agencies.

District of Columbia v. McElligott, 117 U. S. 621, 29 L. ed. 946; *Bailey*, Personal Injuries Relating to Master & Servant, 209-211; *Marsh v. Chickering*, 101 N. Y. 400; *Corcoran v. Milwaukee Gaslight Co.* 81 Wis. 193; *Gowen v. Harley*, 12 U. S. App. 574, 56 Fed. Rep. 974, 6 C. C. A. 190; *Tuttle v. Detroit*, G. H. & M. R. Co. 122 U. S. 189, 30 L. ed. 1114; *Hayden*

in law or natural justice, to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use, under a promise thereafter to repair it."

But it is not easy to say from this statement whether it is referable to the idea of a substituted contract, or of the continuance of the original one. That the latter is the view finally adopted by this court, see *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 303.

Perhaps the most generally received view is that the inference which would normally be drawn, that the servant intended to assume the new risk, or was guilty of contributory negligence in remaining in a service in which that risk must be constantly incurred, is rebutted by evidence that the promise was relied on. In other words, that waiver of a certain right of action which, apart from the promise, would be imputed to the servant, as a consequence of his continuance of work, will not be implied, where a promise has been given. Thus, in the leading case of *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, we find Chief Justice Cockburn arguing as follows: "It was, indeed, strongly urged upon us, on the part of the defendant, that as the plaintiff, upon becoming aware that the machinery was no longer properly fenced, instead of refusing to go on, as he might have done, continued to perform his service with a knowledge of the increased risk to which he was exposed, he must be taken to have voluntarily incurred the danger, and is, therefore, in the same position as if he had originally accepted the service as one to be performed on unfenced machinery. I am, however, of opinion that there is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied. In the latter case, it seems to me that the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of his master to fulfil his obligation."

Similar language is found in *Pleart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148; *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 49 Am. Rep. 669.

As a waiver involves the conception that a pre-existing right has been relinquished, the necessary implication is that the position here taken is the same as that which has been taken 40 L. R. A.

v. Smithville Mfg. Co. 29 Conn. 548; *Richards v. Rough*, 58 Mich. 212.

If there had been a sufficiently definite promise, nevertheless plaintiff did not rely upon it.

Taylor v. Felsing, 164 Ill. 331; 2 Thomp. Neg. 1148; *Louisville & N. R. Co. v. Orr*, 84 Ind. 50; *Counsell v. Hall*, 145 Mass. 468; *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280.

A servant has no right to rely upon the master's promise to repair, beyond a reasonable time.

Swift & Co. v. Madden, 165 Ill. 41; *Taylor v. Felsing*, 164 Ill. 331; *Chicago Drop Forge & Foundry Co. v. Van Dam*, 149 Ill. 337; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 145 Ill. 578; *Stafford v. Chicago, B. & Q. R. Co.*

with greater distinctness in other decisions in which the legal situation has been defined by enunciating the principle that, in consequence of the giving of the promise, the responsibility for any injuries that may occur from the defective condition of the agency to which it relates remains with the master, instead of being shifted to the servant, as would be the case if the latter's continuance of work had not been induced by the promise. "The most logical reason of the rule is that, under such circumstances, it must be taken as understood between them that the continued use in the then condition of the instrumentality, being for the convenience and purposes of the master, is to be at his risk and not at the risk of the servant. *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 303.

"The reason why such a promise modifies the rule which charges the servant with risks resulting from defects of which he has knowledge is, that the objection and promise to repair leave the risk where the duty is, upon the master." *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322.

"The assurances of the employer that the danger shall be removed is an agreement by him that he will assume the risk incident to the danger for a reasonable time." *Eureka Ca. v. Bass* (1896) 81 Ala. 200, 60 Am. Rep. 152.

"If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risk." *Cooley, Torts*, p. 559. Quoted with approval in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 225, 25 L. ed. 617.

In cases of this type "the presumption of an assumption of risk arising from a continuance in the service is said to be rebutted." *International & G. N. E. Co. v. Turner* (1893) 3 Tex. Civ. App. 487. To the same effect, see *Woodward Iron Co. v. Jones* (1885) 90 Ala. 125; *Galveston, H. & S. A. R. Co. v. Drew* (1883) 59 Tex. 10, 46 Am. Rep. 261.

The most obvious objection to the theory enunciated in these cases is that, if we are to suppose the original contract to have been kept alive by the promise, it is difficult to offer any adequate reason for the distinction thus assumed to exist between the effect of an express promise as to the condition of the appliances, and the effect of the implied promise which the original contract conveys, as to the same sub-

114 Ill. 244; *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20; *Galveston, H. & S. A. R. Co. v. Drew*, 59 Tex. 10, 46 Am. Rep. 261; *Stephenson v. Duncan*, 78 Wis. 404; *Kroy v. Chicago, R. I. & P. R. Co.* 82 Iowa, 357; *Greenleaf v. Dubuque & S. C. R. Co.* 88 Iowa, 52; *Muldorney v. Illinois C. R. Co.* 89 Iowa, 615; *Lumley v. Caswell*, 47 Iowa, 159; *Way v. Illinois C. R. Co.* 40 Iowa, 841; *Russell v. Tillotson*, 140 Mass. 201; *Lynch v. Sagamore Mfg. Co.* 143 Mass. 206; *Hatt v. Nay*, 144 Mass. 186; *Buzzell v. Laconia Mfg. Co.* 48 Me. 118, 77 Am. Dec. 212; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722.

A definite promise by the master to repair defects, relied on for a reasonable time, does

not absolutely relieve the servant from the assumption of hazard as a matter of law, but raises a question for the jury.

Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573; *Counsell v. Hall*, 145 Mass. 468; *Beach, Contrib. Neg.* § 872, note 3; *District of Columbia v. McElligott*, 117 U. S. 621, 29 L. ed. 946; *Gulf, C. & S. F. R. Co. v. Donnelly*, 70 Tex. 371.

Mr. George B. Finch, for appellee:

If the servant notifies the master of defects, and the master promises to make the needed repairs, the master thereby takes on himself the responsibility of any accident caused by such defect, happening within such time as the servant may reasonably rely on such promise.

Holmes v. Clarke, 6 Hurlst. & N. 349; *Mis-*

ject-matter. This aspect of the question is thus discussed in *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, 627: "It would be difficult to find a principle on which to base a rule relieving a servant from obligation to use proper care for his own safety because the master had promised to repair a known defect which exposed him to danger, and had requested him to remain in a service known to be dangerous. It cannot be placed logically on the unequal situation of master and servant in a country in which all men are free to serve or not to serve any particular employer. If he be placed on the ground that the promise to repair and request to continue in the service rebut the ordinary presumption that the servant assumes the known risk incident to the given employment, it will be difficult to maintain it in a case in which the servant continues in the service with a knowledge that the defect has not been repaired, and that he is in constant danger from the use of the defective thing. If it be placed on the broad, but very indefinite, ground that justice and policy require such a rule, it will be difficult to give a reason why the same rule should not exist in all cases in which injuries result from the use of defective appliances or implements known by employer and employee to be defective, and their use dangerous; for the law implies an undertaking on the part of the employer to furnish reasonably safe machinery, implements, and appliances, and to repair them when out of order; and it implies a request to continue in the service, and to use them until notified that this is no longer desired, unless the employment is for a definite period. When there is no express promise to repair, or request to continue in the service, the employee assumes the risks incident to a service conducted with machinery, implements, or appliances known by himself as well as the employer to be defective and dangerous. This being true, it is difficult to perceive that there should be a difference, on grounds of policy or justice, between the liability of the employer based on an implied promise or obligation and request, and that based upon an express promise to repair, and request to continue in the service in any case in which the employee knows that the defect has not been repaired, but continues to use the defective thing, or to work without something known to him to be necessary to his safety. . . . When the cause of the injury is the direct act of the master or his representative, it cannot be said that the servant remaining in the employment is the proximate cause of the injury, even though the servant may have known that the master or his representative had frequently done the same or

similar acts which imperilled his safety; for the act which in such case causes the injury is the wrongful act of the master or of his representative, the result of the exercise of the will of the one or the other, and hence the proximate cause of the effect, from which the master ought not to be permitted to go free from liability on the ground that the servant knew he had, before the happening of the injury, done acts such as that from which the injury resulted, but still remained in his service."

The force of this reasoning is very much impaired by the assumption with which the court sets out, that the issue to be determined is whether the promise tends to exempt the servant from the charge of contributory negligence in exposing himself to danger; whereas the actual controversy is whether, by virtue of a new contract, or the continuance of the original one, the responsibility remains with the master. The error of this assumption is thus pointed out in a recent decision of the Texas court of civil appeals, though scarcely with as much point and clearness as might be desired: "In this state the assumption of risk and contributory negligence are treated as distinct defenses. The servant may remain in the service when he knows of a defective condition of the appliances, without having negligence imputed to him by law. He nevertheless assumes the risk, unless the facts take his case out of the general rule, and bring it within the exception noted. On the other hand, a protest and promise to repair may be shown, and the servant may yet be guilty of contributory negligence in using a defective and dangerous machine. *Green v. Cross* (1890) 79 Tex. 132; *Missouri P. R. Co. v. Somers* (1890) 78 Tex. 443; *Texas & P. R. Co. v. Bryant* (1894) 8 Tex. Civ. App. 134. It would seem to follow that a promise of the master to repair, upon complaint by the servant, relieves the servant, in continuing in the service, not merely of the imputation of contributory negligence, for no such imputation arises as matter of law, but of any assumption of the risk, and hence imposes such risks upon the master. . . . As the risks to be incurred by the servant, under such circumstances, are not assumed by him, but by the master, the loss must fall upon the latter, unless the danger to the servant is so great that the policy of the law will forbid persons, even under such a promise, to take it, and then seek compensation in the courts, or unless, having taken it, the servant, by his own carelessness in performing his work has increased the risk and contributed to his own injury. Although the promise may be given, the law does not relieve the servant of the duty resting upon men generally of using rea-

souri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573; *Weber Wagon Co. v. Kehl*, 139 Ill. 644.

Phillips, Ch. J., delivered the opinion of the court:

Of the assignments of error made on this record and argued by appellant there is only one proper for this court to consider. The question of the negligence of appellant, with some other questions argued by counsel for appellant, are those of fact, which have been settled by the judgment of the appellate court.

Error is assigned by the appellant on the refusal of the trial court to give to the jury, on the trial of this cause, the following instruction: "The court instructs the jury that an employee

who continues in the service of his employer after notice of a defect increasing the danger of the service assumes the risk as increased by the defect, unless the master promised to remedy the defect; and, in the event that the master does so promise, the servant may, while relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect; and that, if the master does not, within a reasonable time after such promise, remedy the defect, then, and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and the court therefore instructs the jury that if they believe from the evidence in this case that the standing upon which the plaintiff

sonable care for his safety. But, in determining whether or not due care has been observed in a given case, the promise and its natural effect upon a man of ordinary prudence are to be taken into consideration. This view of the question is not thoroughly sustained by our decisions, and considerable doubt is thrown upon the doctrine under consideration by the opinion in the *Brentford Case* (1891) 79 Tex. 619. It is intimated there, that the servant cannot hold the master responsible for an injury resulting from such a risk, if he knew when he exposed himself, that the promise had not been complied with." *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322.

But the views of the Texas supreme court, though false in this one respect, seem to be based on sound principles in so far as they emphasize the logical difficulties of ascribing any greater efficacy to an express, than to an implied, promise, where both promises are given by the same contracting parties, and the express promise binds him to do precisely the same thing as the implied promise in regard to the same subject-matter. Upon the whole, therefore, it would appear to be better to avoid the dilemma which this position creates by falling back on Mr. Justice Byles' view that the giving of the express promise creates an entirely new contract which imposes an additional duty on the master concerning the safety of the servant, and confers a corresponding right of action upon the servant. Under this theory a supplementary agreement supersedes the original one so far as regards the particular instrumentality to which the promise relates, and remains in force as long as it may reasonably be supposed that the servants' continuance of work is induced by the promise. The extreme difficulty, however, of obtaining any standard by which to ascertain the precise duration of this temporary contract is manifest, and it is perhaps for this reason that the rights of the servant are usually determined in cases of this type by considering them from the alternative point of view suggested by every case in which the servant goes on working with knowledge of an extraordinary risk,—that is to say, by considering whether his conduct was prudent under the circumstances. The position of the employer is, then, simply that, although he may have violated one of his contractual duties, the servant is precluded from taking advantage of this breach for the reason that he was himself guilty of contributory negligence. The remainder of the note, therefore, will necessarily take the form of a review of the rulings of the courts upon this aspect of the relations of the parties after the promise is given.

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IV. *Continuance of work after promise not contributory negligence as matter of law.*

a. *Generally.*

The question whether a servant was guilty of contributory negligence in view of the testimony which is commonly produced in cases of the kind under review will be found to depend upon two considerations, viz., whether the election to take the risk was prudent, and if so, whether due care was exercised by the servant in view of the fact that the employment involved an unusual amount of danger. These two points are manifestly quite distinct and are properly differentiated in *Counsell v. Hai* (1888) 145 Mass. 468. But some cases seem to disclose a confusion of thought upon the subject. See, for example, *Corcoran v. Milwaukee Gaslight Co.* (1892) 81 Wis. 191, where the court appears to waver between a theory which would deprive the servant of a right to recover on the ground of negligence in continuing to work, and the theory that he did not take appropriate precautions in view of the dangers of the situation. Contributory negligence of the latter description merely involves a special application of the general principle that everyone is bound to use that degree of care which the circumstances require, and as the danger covered by the promise is, ex hypothesi, greater than that which the servant would ordinarily be called upon to incur, the inquiry in cases dealing with this aspect of his conduct is merely whether he has exercised the increased degree of care demanded by the increased peril. These cases will be reviewed in a later subdivision (VIII.), and our attention will first be given to those which exemplify the more special and characteristic effects of the promise, and illustrate that form of contributory negligence which consists in staying in a position which necessitates exposure to a continuous risk greater than a prudent man would consent to incur.

Bearing in mind the doctrine that, quite apart from the question, What may be the effect of a promise? the knowledge of the servant is only a fact to be taken into consideration in determining whether a servant was guilty of negligence in continuing to work with a defective appliance (see *Clarke v. Holmes* (1865) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 5 Jur. N. S. 992, 10 Week. Rep. 405, per Cockburn, Ch. J., and *Crompton and Byles, J.J.*), we note that the general principle underlying the decisions is that the giving of the promise is merely to strengthen the servant's position in respect to the inference that might be drawn as to his want of care in exposing himself to the particular danger to which the promise re-

worked while in the employ of the defendant was defective; that the defendant promised to remedy the same, but failed to do so within a reasonable time after such promise, and that the plaintiff continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then, and in such event, the court instructs the jury that the plaintiff assumed the additional risk of the defect in the condition of the floor, and, if the jury so finds, they will return their verdict for the defendant." This instruction was refused by the trial court, and it is practically admitted that no other instruction involving the same principle was given to the jury, for the reason, as counsel for appellee insists, that it does not contain a correct expression of the law of this

state. It is urged as an objection to this instruction that it would inform the jury that the servant may, while relying upon the promises of the master to repair a defect, remain in the service of the master only for such time thereafter as would be reasonable and sufficient to enable the master to remedy the defect; and that, if the master does not, within a reasonable time after such promise, remedy the defect, then, and in such event, if the servant still continues in the employ of the master, he assumes the risk as increased by the defect of which he himself had knowledge. The trial court not only refused this instruction, but by another instruction, requested by the plaintiff, told the jury that, if the defendant promised to repair the defect, and he was led to believe and expect that the floor would soon be re-

lates. The promise does not, *ipso facto*, entitle the servant to recover.

"It has ever been held that the promise of a master to repair a defective machine or implement used in his business, and known by . . . him and the servant to be dangerous, will relieve the servant from the ordinary result of contributory negligence on his own part, though cases may be found in which stress was laid on the fact that such a promise was made." *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, Disapproving an instruction which permitted the plaintiff to recover merely by reason of his having continued to work in reliance on the promise, and without regard to the question whether he may not have been negligent in the premises. Compare, to the same effect, *International & G. N. R. Co. v. Williams* (1891) 32 Tex. 342.

The position is simply this: As the servant's exposure to a known risk would not necessarily charge him with contributory negligence, as a matter of law, even if no promise had been given, the introduction of the new element of the promise diminishes the number of cases in which the court is entitled to say that this defense is available to the master.

Thus, in a leading case, where the court declared that, apart from the promise, the servant's continuance of work would have been negligence per se, the following language was used. "We may add that it was for the jury to say whether the defect in the cowcatcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part." *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 225, 25 L. ed. 612, 617.

So, a servant who has been promised by the master that an incompetent and unsafe fellow servant shall be removed, may remain for a time in the service, without being conclusively chargeable, as a matter of law, with contributory negligence, even though, without such promise, he would have been so chargeable. *Lyberg v. Northern P. R. Co.* (1888) 39 Minn. 15.

The principle as generally stated, however, takes the absolute and not entirely correct form,—justified in some measure by the rarity of the cases in which the servant can be held 40 L. R. A.

guilty of negligence, as a matter of law, when a promise has been given, that the question of the servant's contributory negligence is for the jury. *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 48 Am. Rep. 669; *Northern P. R. Co. v. Babcock* (1894) 154 U. S. 190, 38 L. ed. 953; *Kane v. Northern C. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 339; *New Jersey & N. Y. R. Co. v. Young* (1892) 1 U. S. App. 96, 49 Fed. Rep. 723, 1 C. C. A. 428; *Wust v. Erie City Iron Works* (1892) 149 Pa. 263; *Missouri Furnace Co. v. Abend* (1888) 107 Ill. 44, 47 Am. Rep. 425; *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 249, 47 Am. Rep. 785; *St. Clair Nail Co. v. Smith* (1892) 43 Ill. App. 105; *McKelvey v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 500; *Gibson v. Minneapolis, St. P. & S. S. M. R. Co.* (1893) 55 Minn. 177; *Lanin v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Roux v. Blodgett & L. Lumber Co.* (1891) 85 Mich. 519, 13 L. R. A. 728; *Lytle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289; *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 303; *Woodward Iron Co. v. Jones* (1885) 80 Ala. 123.

"No doubt, a defect thus arising in machinery may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that a party complaining had materially contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff who has materially contributed to his own injury, by his own negligence, cannot recover, although he may show negligence in the opposite party. But the question whether the injury of which a plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff has had any share in bringing it about, is one wholly for the jury. In the present case, the jury have determined this question in favor of the plaintiff, and we are bound by their decision." *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405.

"It would be simply inhuman to hold that if an employee, thinking the machinery he is using is to some degree unsafe, reports its condition to his employer and is then told to continue to use it for a short time, and that it will be immediately repaired, and then, in obedience to instructions, continues his work cautiously, believing that he can by great care avoid an accident until the evil is remedied, and is injured in spite of all these precautions, his master is not guilty of negligence, but that the servant is, and that therefore there can be no recovery. Such a rule, too, would be as bad for the master as it is for the servant. It cer-

paired, and that he continued to remain in the employment of the defendant up to the time he was injured, irrespective of whether or not such time was a reasonable one in which the defect might have been remedied, the plaintiff was entitled to recover. It is a recognized rule that it is the duty of the master to furnish to the servant reasonably safe machinery and appliances with which to perform his work; but when the servant discovers that the service has become more dangerous than he anticipated when he entered the employment of the master, or when he discovers defects in the machinery or appliances which make it unsafe for him to longer continue in the employ of the master, or from any other cause he concludes there is danger in continuing further in the service, it is his duty to notify the master

of such danger, or of such defects in the machinery or appliances connected with his work; and, upon the master being notified, the servant has the right to continue in the employ of the master for a reasonable time, awaiting the remedy of such defect. He has the right to rely for a reasonable time upon the promise of the master that such defect in the machinery, appliances, or other surroundings connected with his work will be repaired and the machinery made safe, and the right to expect that such promise so made by the master will be fulfilled. If such expectation on the part of the servant, however, is not fulfilled, and the defect remedied by the master within a reasonable time, and the servant has full knowledge of the dangerous condition of his machinery, appliances, or surroundings, and that he

tainly is not the law." *Conroy v. Vulcan Iron Works* (1878) 6 Mo. App. 105.

In *Holmes v. Worthington* (1861) 2 Fost. & F. 533, Willes, J., charged the jury as follows: "If the defendants knew of the defect, and undertook to repair it, and the plaintiff went on working, relying on their repairing it, then they may be liable. If the plaintiff complained of the defect, and the defendants promised that it should be remedied, he is not to be deprived of his remedy, merely because, relying on their promise, he remained in their employment."

To preclude the servant, therefore, from maintaining an action where he has been assured that a defect will be remedied, it must be assured that a defect will be remedied, it must be was, for some special reason, imprudent under the circumstances. Whether there was such a reason in any given case is a question which involves a consideration of the two elements which indicate what may be termed the aggregate amount of the danger to which the servant has exposed himself by continuing work, viz., the imminence and greatness of the peril and the length of time during which the exposure to it has continued. On the one hand, the more serious the peril, the more rapidly will the permissible period of continuance run out. On the other hand, the fact that under the doctrine of probabilities some accident will sooner or later occur as a result of exposure to an even moderate peril, when it is constantly incurred, for a considerable period, justifies the argument that, the longer the time that has elapsed without a fulfillment of the promise to remedy a defect, the more certainly has the servant been guilty of negligence in continuing in the employment.

"The probability of suffering injury is measured in some degree by the length of the period of exposure. One may be especially watchful to avoid danger for a time, while the same degree of watchfulness would not be so likely to be exercised continuously. . . . Reasonably prudent men may expose themselves, for a brief period of time, to possible risks, not of the gravest kind, when they would refuse to do so continuously." *Lyberg v. Northern P. R. Co.* (1889) 39 Minn. 15.

It is obvious that both these factors must necessarily be considered to some extent in every case, and that the rights of the servant may therefore be said, in mathematical language, to depend upon the sum of two variable quantities. But, as the principal stress must usually be laid upon one or other of the factors, it will be convenient to adopt a classification of the cases according to the greater or less prominence which may have been assigned to one or other of them.

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b. Contributory negligence predicated from the gravity of the risk incurred.

The general rule has been thus laid down: "If the nature of the defects in the machine is such as to create an open, imminent danger such as no prudent man, careful of his life and limb, and none but a reckless man, would risk, then the injury results from his own negligence, . . . but if the nature of the defect is not such as to impress a prudent man with a feeling or consciousness of imminent danger, then the master is liable." *McKelvey v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 500.

The first half of this statement expresses the rule in the form which it would naturally take in cases in which the servant's right of recovery is denied. It implies that the mere giving of a promise will not of itself suspend the operation of the principle that a servant cannot recover for an injury of which his own negligence was an efficient cause, and that he will, therefore, be unable to maintain an action where the danger to which he was exposed after receiving the promise is such that no man of ordinary prudence would have run the hazard of remaining in the employment.

"Where an employee knows that the danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover for an injury, even though he remained in the employer's service in reliance upon the latter's promise to remedy the defects which produced the danger." *Indianapolis & St. L. R. Co. v. Watson* (1857) 114 Ind. 20.

Similar language is used in *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405; *District of Columbia v. McElligott* (1886) 117 U. S. 621, 20 L. ed. 946; *Kane v. Northern C. R. Co.* (1888) 12 U. S. 91, 32 L. ed. 339; *St. Louis, A. & T. R. Co. v. Kelton* (1892) 35 Ark. 483; *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322; *McAndrews v. Montana Union R. Co.* (1895) 15 Mont. 290; *Harvey v. Aituras Gold Min. Co.* (1893, Idaho) 31 Pac. 819.

An instruction is erroneous which in effect declares, as a conclusion of law, that, if the master promised repairs he is liable without regard to the character of the defects, or the probability or improbability of danger, or whether, all things considered, the plaintiff was or was not so negligent in continuing to work that he ought not to recover. *McKelvey v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 500. Compare *Counsell v. Hall* (1888) 145 Mass. 468; *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619; *International & G. N. R. Co. v. Williams* (1891) 82 Tex. 342.

The second half of the statement expresses the rule in the language which is appropriate

is subjected at all times to prospective injury, it is his duty to quit the service of the master, and not subject himself to further danger.

In the case of *District of Columbia v. McElligott*, 117 U. S. 621, 29 L. ed. 946, the cause arose out of personal injuries received by a laborer while at work upon a bank of gravel. The evidence tended to show he discovered the bank was in an unsafe condition, and asked the supervisor for a man to watch it, whereupon he received assurance such would be done. No such assistance however was given, but the laborer continued to work for a half day thereafter, knowing the danger, when the bank fell, and severely injured him. It was held by the court in that case that it was the duty of the laborer, having knowledge of the dangerous condition of the bank, to exercise

diligence and care in protecting himself, without regard to any assurance which he might have received from his employer. The rule in the above case is stronger than the rule in this state. As a general rule, the courts will consider that the master who employs a servant has a better and more comprehensive knowledge of the machinery and materials to be used than the employee. The servant has a right to presume that the materials and appliances which are furnished to him in the performance of his duty are sufficient therefor. This rule, however, is not applicable to all cases, and, where the servant has equal knowledge with the master, and a full knowledge of all existing defects, and more especially in the performance of ordinary labor, in which no intricate machinery is involved, the rule is not ap-

plied to cases in which the servant's right of recovery is conceded. It affirms the principle that the master's promise will entitle the servant to recover for any injury received within a reasonable time after the promise was given, unless the danger which the master agreed to remove was such that no prudent man would have exposed himself to it. *Brownfield v. Hughes* (1889) 128 Pa. 194; *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412; *Conroy v. Vulcan Iron Works* (1876) 62 Mo. 35; *Rothemberger v. Northwestern Consol. Mill. Co.* (1894) 57 Minn. 461; *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 249, 47 Am. Rep. 785; *Harris v. Hewitt* (1896) 64 Minn. 54; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447; *Homestake Min. Co. v. Fullerton* (1895) 69 Fed. Rep. 923, 36 U. S. App. 22, 16 C. C. A. 545; *Atchison, T. & S. F. R. Co. v. Midgett* (1895) 1 Kan. App. 138; *Sioux City & P. R. Co. v. Finlayson* (1884) 16 Neb. 578, 49 Am. Rep. 724; *Southern Kansas R. Co. v. Croker* (1889) 41 Kan. 747.

Usually, of course, it is a question of fact for the jury whether the defect was such that only an imprudent man would have continued to use the defective appliance. *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 225, 25 L. ed. 617, *Clarke v. Holmes* (1892) 7 Hurst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 406; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447; *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 303.

But sometimes a court will undertake to declare, as a matter of law, that the continuance of work was negligence, as where the servant drove a vicious horse with an old and rotten harness, although the employer had promised to fix the harness or give a new one,—especially where a new harness had been furnished. *Levesque v. Jansen* (1895) 165 Mass. 16.

The mere fact that the servant was aware that the danger to which he would be exposed was serious is not necessarily conclusive against him. The promise, and its natural effect upon a man of ordinary prudence, are to be taken into consideration. *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322.

So, it has been held that, where a promise does not designate any time at which an incompetent fellow servant will be removed, the plaintiff may reasonably infer that he will be removed at once, or as soon as possible, and the jury, in determining whether he was guilty of negligence in continuing to work, may justifiably consider that such an inference will naturally influence his conduct. *Lyberg v. Northern P. R. Co.* (1888) 39 Minn. 15.

It has been very truly remarked that, relying upon the promises of a master to remove

the cause of danger, "the most prudent work men will often take risks, not merely on account of their own necessities, but in consideration of their employer's, whose interests require their continued service." *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 48 Am. Rep. 660.

Hence a finding, in answer to a special interrogatory, that the danger of using a defective appliance was great, apparent, and continuous, will not overcome the effect of a general verdict for the plaintiff, where there is no finding that an ordinarily prudent man would not have used it under the circumstances. *Indianapolis Union R. Co. v. Ott* (1894) 11 Ind. App. 564 and 579.

When the imminence of the danger is relied upon as a circumstance which precludes the servant from recovery, it is necessary to show that the injury was caused by an event which might reasonably have been expected to occur in consequence of the existence of that particular danger to which the master's promise related. Thus, an engineer is not, as a matter of law, negligent in taking out a locomotive with the "chafing-irons" in a defective condition, where he has reported the defect, and the foreman of the roundhouse has promised to repair it, when the trip is finished; the only probable imminent danger in such a case being that the engine may part from the tender, and that is not a personal danger but one merely affecting the property of the railroad. A collision which causes the engine to override the tender, and thus cuts off the escape of the engineer, is not an event which is expected to be anticipated. *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785.

c. *Contributory negligence predicated from the length of time the servant has worked after the promise was given.*

The allowable period of continuance in the employment is commonly described by the epithet "reasonable." *Lyttle v. Chicago & W. M. R. Co.* (1890) 34 Mich. 289; *Woodward Iron Co. v. Jones* (1895) 80 Ala. 123; *Swift & Co. v. Madden* (1897) 165 Ill. 41; *Ferriss v. Berlin Mach. Works* (1895) 90 Wis. 541; *Breckenridge Co. v. Hicks* (1893) 94 Ky. 362; *Conroy v. Vulcan Iron Works* (1876) 62 Mo. 35, Followed in *S. C.* (1878) 6 Mo. App. 102; *Atchison, T. & S. F. R. Co. v. Midgett* (1895) 1 Kan. App. 138.

The use of this expression necessarily implies that the question whether the servant has exceeded the limits of the allowable period is ordinarily one for the jury. *Joliet, A. & N. E. Co. v. Velle* (1891, Ill.) 26 N. E. 1086; *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 48 Am. Rep. 660; *Smith v. E. W. Backus Lumber*

plicable. In *Marsh v. Chickering*, 101 N. Y. 400, this exception is recognized, and it is said that the facts that a laborer using ordinary tools and appliances notified the master of a defect of which the servant himself had full knowledge, and asked it to be remedied, and the master promised so to do, do not render the master responsible. The rule in this state is more liberal, however, and permits the servant to remain in the employ of the master for a reasonable time, awaiting the remedy of such defects. In *Corcoran v. Milwaukee Gaslight Co.* 81 Wis. 181, the plaintiff had been employed by the defendant in making general repairs about its building, and had occasionally been required to use a ladder. Upon his state-

ment that the ladder was not safe, the foreman had promised to have a safe ladder provided. Relying upon such promise, the plaintiff continued in the employ of the defendant, but the foreman failed to provide such safe ladder. The plaintiff was ordered by the foreman to ascend the ladder, and make certain repairs, and, the ladder being unsafe, and the floor on which it rested being slippery, the plaintiff was injured by the falling of the ladder while ascending it. The court in that case held no liability, saying it has been held by it that in a proper case the servant may rely upon such assurance to remedy defects for a reasonable time, but, if he remains in such service after the expiration of such reasonable time, he

Co. (1896) 64 Minn. 447; *Belair v. Chicago & N. W. R. Co.* (1879) 43 Iowa, 662; *Ferriss v. Berlin Mach. Works* (1895) 90 Wis. 541.

The opinions of the appellate courts, therefore, upon this question usually reach us in the shape of an answer to a request to set aside a verdict for one of the parties, or to revise the action of trial judges in taking the issue from, or leaving it to, the jury, and this fact renders many of the decisions rather unsatisfactory as precedents.

In view of the fact that the determination of the question, What is a "reasonable time?" must, in almost every instance, be left to the jury, several attempts have been made to impart a greater definiteness to that expression by stating the circumstances proper to be considered in cases where its meaning is material.

Some authorities interpret the phrase "reasonable time" as meaning such a time as would reasonably be allowed for the performance of the promise. *Rothenberger v. Northwestern Consol. Mill. Co.* (1894) 57 Minn. 461; *Parody v. Chicago, M. & St. P. R. Co.* (1882) 15 Fed. Rep. 205.

Others as the time within which the defect might reasonably have been remedied. *Harris v. Hewitt* (1836) 64 Minn. 54.

Others as the time which may elapse while the servant is reasonably expecting the promise to be performed. *Counsell v. Hall* (1888) 145 Mass. 468.

Others amplify this statement by declaring that the servant can recover for an injury caused by the defect "within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." *Shearm. & Redf. Neg. § 96*, quoted with approval in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612.

In *Stephenson v. Duncan* (1889) 73 Wis. 404, the declaration was held fatally defective for the reason that it averred that the defendant had ample time to put the appliance in safe condition between the time when the plaintiff informed him of the defect and the time of the injury. This allegation was held to imply that the plaintiff continued in his employment beyond the time within which he might reasonably expect the defendant would keep his promise and remedy the defect.

The view of the dissentient minority in *Illinois Steel Co. v. Mann* appears to be more in harmony with the general principles which determine the servants' rights under the circumstances, and is substantially the same as that adopted in the decision in the cases cited above.

Some courts have adopted the reasoning of 40 L. R. A.

the following passage from *Wharton on Negligence*, § 221, where, after laying down the rule as to the effect of a promise in modifying the general principle referred to at the beginning of this note, the learned author proceeds thus: "The only ground on which this exception can be justified is, that in the ordinary course of events the employee, supposing the employer would right matters, would remain in the employer's service; and that it would be reasonable to expect such continuance. But this reasoning does not apply to cases where the employee sees that the defect has not been remedied, and yet exposes himself to it. In such case, on the principles heretofore announced, the employer's liability in this form of action ceases. He may be liable for breach of promise; but the causal connection between his negligence and the injury is broken by the intermediate voluntary assumption of the risk by the employee." See *Woodward Iron Co. v. Jones* (1885) 80 Ala. 123. In a later case the same court again defined its position as follows: "A promise already broken can afford no reasonable guaranty of the fulfillment of any expectation based on its disappointed assurances. For a servant or employee to persist in exposing himself to danger on the faith of such a promise may often be a want of that ordinary prudence which the law exacts of him at every stage of his employment, according to the degree and nature of the danger. *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152.

To the same effect, see *Bridges v. Tennessee Coal, I. & R. Co.* (1895) 109 Ala. 287.

In *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, the court strongly intimated its preference for the same view, but it has been expressly repudiated in *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785, and thus combated with great cogency in *Texas & N. O. R. Co. v. Bingle* (1896) 9 Tex. Civ. App. 322. "It seems to us that such a view, unless it be limited to cases in which the servant has been guilty of negligence, disregards the effect of the promise of the master, as taking upon himself the risk incurred by the servant in doing the work. If the servant, by the promise, is at first justified in remaining in the service, and does not in so doing take upon himself responsibility of the danger incurred, how can it be said that he makes it his own when he continues to work with the defective appliance at the time he receives his hurt? Such a doctrine would entirely destroy the force of the promise as an assumption of responsibility by the master, and force the servant to stop working with the imperfect appliance, notwithstanding such promise, until the repair had been made. Of course, in supposable cases the servant may not be warranted

is thereby deemed to waive his objection, and assume the risk. To the same effect, also, is *Gowen v. Harley*, 12 U. S. App. 574, 56 Fed. Rep. 974, 6 C. C. A. 199. In that case the court says: "The rule that the master is responsible for damages resulting to a servant from defects in machinery and appliances, of which the servant has notified him, and which he has promised to repair, governs cases in which machinery or tools that are used in the work are discovered to be dangerously defective while in use, and to cases in which tools or machinery are necessary for the same performance of the work. It has no application to a case where the service required is simple manual labor without tools or machinery, and

where no such tools or appliances are necessary to the performance of the work with a reasonable degree of safety." In *Stephenson v. Duncan*, 73 Wis. 404, it was held that the servant has the right to abandon the service because it is dangerous, but that he may refrain for a reasonable time in so doing, in consequence of assurance by the master that the danger shall be remedied; and he will not be held to thereby assume the risk. But, if he continues in the service for a longer time than is reasonable to allow for the performance of the master's promise, he will be deemed to have waived his objection, and assumed the risk. In the case of *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425, this court said: "It is

in continuing to use the machinery, though a promise to repair be made, for the danger may be so great and patent that no prudent man would incur it: or the servant may, by subsequent carelessness of his own, add to the risk assumed by the master,—in either of which cases the promise to supply the defect could not avail him. But, in our own opinion the mere fact that the servant, acting under such a promise, knows at the time he receives his injury from the defective condition that it has not been removed, does not impose upon him the risk, any more than did his continuance in the service with knowledge of the defect at the time the promise was made. The opinion in the *Brentford Case* deals mainly with the defense of contributory negligence, rather than with that of assumption of risk, and is not a decision of the point now under consideration, though there are expressions in the opinion which seem to controvert the exception to the general rule, arising from a promise to repair. A limitation, generally recognized, upon the doctrine that the promise to repair places the risk upon the master is, that the servant can rely upon the promise only for a reasonable time for the master to comply with it; and must not himself be guilty of a want of due care contributing to his injury."

The essential objection to any such rigid presumption as that for which Mr. Wharton stands sponsor is that it seems to be wholly inconsistent with a reasonable construction of the general principle which dominates cases of this type, viz., that the question whether the plaintiff was negligent in being in the service when he was injured is one of fact to be decided with due reference to all the testimony produced. Common sense, in fact, rejects the idea that a servant is necessarily imprudent because he puts confidence in a master who has failed to keep his promise. Reliance on the promise only ceases to be justifiable when the employer has obviously no intention of removing the danger, and whether that time has arrived must, in all but the very clearest cases, remain a question for the jury. So far as this particular aspect of the question is concerned the correct theory would rather seem to be that the servants continuance of work with knowledge that the promised repairs have not been made within the time stipulated merely affords "a very strong argument that the servant is no longer relying upon the promise, but has decided to take the risk." *Counsell v. Hall* (1888) 145 Mass. 470.

Material facts to be considered in connection with the length of the period which has elapsed since the giving of the promise are, the frequency with which the servant was called upon to handle the defective appliance after the promise was received, the opportunities he may

have had to examine it, and the necessity for making that examination, in view of his complaint as to its condition, and the right he had to suppose it had been repaired in pursuance of the promise. *Belair v. Chicago & N. W. R. Co.* (1876) 43 Iowa, 662.

In determining whether the danger from continuing to work with an incompetent subordinate, for a certain period, was such that a prudent man would not have exposed himself to it, even on the faith of the master's promise to remove him, the circumstances to be considered are, "the general nature of the employment, the nature and extent of the danger necessarily and generally incident to it when carried on in company with an incompetent subordinate, as well as the particular nature of the work being done during the period . . . [covered by the promise] and the opportunities which the plaintiff's position presented for self-protection during a brief period by watchfulness, or by so ordering the employment . . . as to lessen the risk from his want of skill." *Lyberg v. Northern P. R. Co.* (1888) 39 Minn. 15.

In *Swift & Co. v. Madden* (1897) 165 Ill. 41, it was held that, as a promise to repair which makes no mention of the time at which the repairs are to be completed amounts to a promise to repair in a reasonable time, and as a servant to whom such a promise is made can remain in the service a reasonable time to permit the fulfillment of the promise, it is not error to refuse an instruction which would disable the servant from recovering if the jury found that the promise was indefinite as to the time when the defect should be repaired, and the servant continued to work from day to day with the knowledge that no repairs had been made.

d. Illustrative cases.

In any case where a prudent man would be justified in remaining in the service at all after the discovery of the danger covered by the promise, the servant cannot be regarded as negligent where he continues to work under a well-founded belief that steps to secure his safety will be taken almost immediately. *Fairbank v. Haentzsch* (1874) 73 Ill. 236 (danger from moving machinery,—no specific time mentioned in promise); *Sendzikowski v. McCormick Harvesting Mach. Co.* (1895) 58 Ill. App. 418 (defective machine; no specific time mentioned in promise); *Shlack v. Ashland Iron Min. Co.* (1891) 89 Mich. 253 (mining company liable for the death of a miner who was directed to remain at work by the mining captain after complaining of expected danger, and, being left there for two hours, was killed in consequence of so remaining); *Madara v. Pottsville Iron & S. Co.* (1894) 160 Pa. 109 (father entitled to re-

now uniformly stated by text-writers, that where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard without being guilty of negligence, and, if any injury results therefrom, he may recover, unless when the danger is so imminent that no prudent person would undertake to perform the service. . . . The doctrine on this subject rests on sound principle, and it will be found to be supported by English and American decisions. The reason upon which the rule is said to rest is, that the

promise of the master to repair defects relieves the servant from the charge of negligence by continuing in the service after the discovery of the extra perils to which he would be exposed." In *Counsell v. Hall*, 145 Mass. 468, the plaintiff was employed by the defendant to take charge of an engine and boiler, and plaintiff complained to defendant that the glass water gauge of the boiler was defective and dangerous, and defendant promised to get a new one. About two weeks after, the gauge exploded, injuring the plaintiff. The court said: "If machinery upon which a servant is employed has become dangerous, and the servant has complained of it, and has been promised that it shall be repaired, but it is injured before the defect is

cover for the death of his son occasioned by the fact that the platform upon which he was working was obviously too narrow, and the accident happened within twenty minutes after the father had been induced by the boss in charge of the work to allow the deceased to remain temporarily at his employment by the promise that the deceased should be taken right down).

The courts are particularly inclined to put a lenient construction upon the servant's continuance of work, where his immediate desertion of his post would cause extreme inconvenience to his employer and the public, and he may therefore be regarded as having exposed himself to danger from motives of duty. Such cases present themselves where the servant is in control of some machinery used in the business of transportation, which, as is well known, is not infrequently found to be out of order at a time when it will greatly incommode the traffic to withdraw it temporarily from use. Thus, in *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785, the action was held not to be barred, where an engineer was injured while running a defective engine to a certain station, his superior officer having promised to repair it there, if there was time, and, if not, to repair it on his return. So, it was held in *Kane v. Northern C. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 339, where it was held that an employee on a train owes it to the public, as well as to his master, not to abandon his post, and that the absence of a step on one of the cars did not create a danger so imminent as to subject him to a charge of recklessness in continuing work, upon receiving an assurance from the conductor that the defective car would be thrown out of the train when it reached a station a few miles distant from the place where he noticed the defect. So, it has been held not to be necessarily negligence for an engineer to take to the end of the trip, at the request of his superior officer (master mechanic), an engine the only defect of which is a disabled air-brake. *Flynn v. Kansas City, St. J. & C. B. R. Co.* (1883) 78 Mo. 195, 47 Am. Rep. 99.

The following rulings as to specific periods of continuance will serve to illustrate the manner in which the appellate courts have dealt with the verdicts of juries, under different sets of facts, showing the existence of a greater or less danger: In *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, where the machinery which caused the injury had remained unfenced for about a year, and the servant had made frequent complaints, the court of exchequer chamber upheld a verdict absolving the plaintiff of the charge of contributory negligence in continuing to work during that period. But the question whether the 40 L. R. A.

time of continuance was unreasonable was not raised either by the court or by counsel.

In *Belair v. Chicago & N. W. R. Co.* (1876) 43 Iowa, 662, the court refused to say, as a matter of law, that a brakeman waived his objection to a defective draw-bar by continuing in the service about three months, during which he had occasional opportunities for ascertaining whether the master's promise had been kept.

In *Eureka Co. v. Bass* (1896) 81 Ala. 200, 6 Am. Rep. 152, the court set aside a verdict for a miner where the tendency of the fuses supplied to hang fire had become known to him six days before he was injured, through his returning to the mine in the belief that the fire communicated to the fuse had been extinguished, and the court had declined to give a charge to the effect that the plaintiff could not recover if he continued work beyond a reasonable time.

This case was followed in *Davis v. Graham* (1892) 2 Colo. App. 210, where a judgment for the plaintiff was reversed because the trial judge had not given an instruction indicating to the jury the law as to reasonable time.

A miner is justified in continuing his work where his foreman has promised that a pile of debris, which would obstruct his escape in case of accident, would be removed on the following morning, where there is no indication that any such accident is likely to happen before the promise can be kept. *Kelley v. Fourth of July Min. Co.* (1895) 16 Mont. 484.

In *Rothenberger v. Northwestern Consol. Min. Co.* (1894) 57 Minn. 461, the court refused to set aside a verdict to the effect that a period of ten days was not an unreasonable period during which to continue work in a mill, although the defects in the machinery might have been remedied in about two days if all the other repairs had been postponed to the task of removing the danger complained of.

A servant is not, as a matter of law, guilty of contributory negligence because he works in the neighborhood of dangerous machinery from which the covering has been torn away, by continuing in the employment after discovery of the danger, when he has notified the superintendent of the defect, and the latter has directed him to continue at work until noon of the same day, at which time he promises to remedy the defect. *Roux v. Blodgett & D. Lumber Co.* (1891) 85 Mich. 519, 13 L. R. A. 728.

Remaining at work about fifteen days after a promise to repair a slippery floor is not such an unreasonable length of time as to charge a servant with knowledge that there was no intention to change the same. *Weber Wagon Co. v. Kehl* (1891) 40 Ill. App. 585.

A servant is not, as matter of law, guilty of contributory negligence in continuing to work

remedied, and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury. . . . If . . . the time for performance has gone by before the accident, and, as must have been the fact, the servant knows that the repair has not been made, there is a very strong argument that the servant is no longer relying upon the promise, but has decided to take the risk." In *Chicago, Anderson Pressed-Brick Co. v. Sobkowiak*, 148 Ill. 573, the plaintiff was engaged in taking clay from the bank. He had objected to go underneath on account of the dangerous condition of the bank, and said that, if it should go down, he would be injured. One Kelly was foreman in charge, representing the

defendant, and he insisted there was no danger, and ordered the plaintiff to go underneath, and perform his work. Under these circumstances, the court in this opinion held the plaintiff was not on the same footing with the master, and that his primary duty was obedience, and, while he believed it dangerous to go under the bank, and protested, yet where the master sought to allay his fears, and induce obedience to his commands, by declaring there was no danger, the servant in such case, having such fears, and relying upon such assurances, was entitled to recover. That case, however, presents various differences from the case at bar.

While it is true some cases hold the rule to-

for two or three days on an inclined tramway, some boards of which have become loose, where the superintendent has promised to secure them. *Couroy v. Vulcan Iron Works* (1876) 62 Mo. 35.

A brakeman is not, as a matter of law, negligent in continuing to use a defective lantern six days after the conductor has promised to furnish a new one. *Atchison, T. & S. F. R. Co. v. Lannigan* (1895) 56 Kan. 109.

It is error to charge a jury, without qualification, that a servant who continues to work for six months after ascertaining the existence of a defect is absolved from the charge of contributory negligence, if he notified the master of the existence of the defect which he discovered, and the master promised that the defect would be repaired. The question is one of fact. *International & G. N. R. Co. v. Williams* (1891) 82 Tex. 342.

A verdict for a blacksmith injured through the incompetence of a helper will not be set aside where the injury was received four days after the master promised to furnish another assistant, and the testimony leaves it doubtful whether he ought, as a reasonable man, to have apprehended the occurrence of some accident. *Lyberg v. Northern P. R. Co.* (1888) 39 Minn. 15.

V. Servant's action not maintainable unless his continuance of work was actually induced by the master's promise to protect him from some danger, etc.

In order to enable the servant to recover he must show: (1) that he received from the master or the master's representative some assurance the effect of which was that the condition under which he was working would be so altered that the particular danger from which he apprehended injury would cease to exist; and (2) that his reliance on that assurance was the efficient cause of his remaining in the employment.

Where a promise is relied upon either as showing an express assumption of the risk by the master, or as affording a reasonable guaranty that the danger will be removed in time to prevent injury to the servant, it must be shown that what passed between the master and servant had in view either a transfer of the risk from the servant to the master, or the removal of the dangerous condition as a protection of the servant. In other words, the master should have induced the servant to waive his right to leave the dangerous employment either by taking upon himself the responsibility for injuries which might result, or by leading the servant to believe that the duty to repair the appliances, or supply the deficiency, would be performed within a reasonable time. *International & G. N. R. Co. v. Turner* (1893) 3 Tex. Civ. App. 487.

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In the first place, therefore, as there must have been something amounting to a promise by the master, it follows that a simple protest or complaint by the servant, not followed by an assurance that the defect will be remedied, will not cast the responsibility upon the master. *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 67, 47 Am. Rep. 319; *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322; *Weid v. Missouri P. R. Co.* (1888) 39 Kan. 63; *Alexander v. Tennessee & L. C. Gold & Silver Min. Co.* (1894) 3 N. M. 255.

"Protest against, or objection to, a service rendered dangerous by defective machinery, if the party making the protest or objection is under no legal obligation to remain in the service, cannot render the services subsequently performed involuntary." *Galveston, H. & S. A. R. Co. v. Drew* (1883) 59 Tex. 10, 46 Am. Rep. 261. Compare *Wheeler v. Berry* (1893) 96 Mich. 250, where the protest was against being required to use machinery outside of his regular employment.

Much less will the responsibility be shifted where the complaint is merely that the certain defect increases the difficulty of the work, and not that it is dangerous. *Balle v. Detroit Leather Co.* (1889) 73 Mich. 158.

A mere surmise or expectation based on no specific promise will not be sufficient. *McKelvey v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 500; *Southern P. Co. v. Lenah* (1893) 2 Tex. Civ. App. 68.

But the rule does not require that a promise shall have been given in formal terms.

When complaining of defective instrumentalities or machinery it is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects be repaired or remedied. It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise. *Rothenberger v. Northwestern Consol. Mill. Co.* (1894) 57 Minn. 461.

Gr. as another case has it, any acts or expressions by which the servant gives the proper agent of the employer to understand that he is unwilling to continue in the employment, unless the cause of the danger is removed, constitute a sufficient complaint, and any acts or expressions by which such agent gives the servant to understand that the cause of the danger will be removed, constitute a sufficient promise. *Pleart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148.

A notification issued to engineers by the master mechanic, directing them to modify their

be that the servant, after having informed the master of any defects in machinery, tools, appliances, or surroundings of his work, and the master having promised to repair and make safe such defects, has the right to rely upon such promise, and continue in the employ of the master, expecting such promise to be fulfilled, yet the rule in this state, and also in most other states, holds that such expectation on the part of the servant may continue only for a time reasonable for such repairs to be made, or defects remedied; and, if not so made within a reasonable time, the servant, having full knowledge of such defects, will be considered to have waived the same, and subject himself to all the

dangers incident thereto. *Swift & Co. v. Madden*, 185 Ill. 41.

In the case at bar the plaintiff says he had frequently gone to the foreman, and told him that the standing where he was working was dangerous, and that the foreman would make an "offish" reply of some kind, and say he would fix it. Plaintiff says he spoke to the foreman quite a number of times during the year prior to this accident, the last time being two or three weeks before the injury occurred. He also says, in substance, that he did not place much reliance upon the foreman's word, but supposed, however, the floor would be fixed. It is apparent from this record that the

speed on a certain section of the road "until the track can be got into better condition." operates as a declaration that the defects will be remedied, and an engineer has a right to rely on such an assurance. *Flynn v. Kansas City, St. J. & C. B. R. Co.* (1883) 78 Mo. 195, 47 Am. Rep. 99.

On the other hand, it has been held that there was no promise such as the rule contemplates, where a section foreman to whom a yardmaster applied to improve a defective track in the yard, so as to lessen the risk, notified him that he could not do it without orders from his superior, but, upon a subsequent application, promised conditionally "that he would do it if he got time some Saturday afternoon." *Wilson v. Winona & St. P. R. Co.* (1887) 37 Minn. 326.

Nor where the only remark made by the master's representative in regard to the defective appliance was more in the nature of a rebuke for using it in its then condition than an assurance that it would be repaired. *Shackleton v. Manistee & N. E. R. Co.* (1896) 107 Mich. 16.

Nor was a statement made by the mechanic in charge of the shops where the defendant procured its repairs to be made, in reply to complaints made to him of the car in question, that it ought not to be made use of for coupling with the coupler on the other cars, evidence of assurances by defendant that its use would be discontinued, and any tendency to make out a case of culpable negligence on the part of the defendant towards its servants. *Fort Wayne, J. & S. R. Co. v. Gildersleeve* (1876) 83 Mich. 133, 136.

Nor is a promise of getting a new hand car, which will relieve a railroad employee's use of a defective car from constituting contributory negligence, established by evidence that the foreman directed the employee to use the car with great care until he could get a new one, and that he expected a new one at any time. *McAndrews v. Montana Union R. Co.* (1896) 15 Mont. 290.

Nor is a servant warranted in relying on a mere conditional promise by a fellow employee to take the necessary steps to lessen the risk, "if he got time," when he has already admitted that he could not do this without directions from a superior officer. *Wilson v. Winona & St. P. R. Co.* (1887) 37 Minn. 326.

Whether there was actually a promise to remove the danger is a question for the jury, when it is a matter of implication. *Stoutenburgh v. Dow, G. N. Co.* (1891) 82 Iowa, 179.

The weight of authority is to the effect that a promise to furnish other instrumentalities in place of those from which the servant apprehends danger is equivalent in its legal effect to a promise to remedy a defect in some instrumentality the use of which is to be continued. 40 L. R. A.

Pleant v. Chicago, R. I. & P. R. Co. (1891) 82 Iowa, 148; *Atchinson, T. & St. F. R. Co. v. Lannigan* (1896) 56 Kan. 109; *Atchison, T. & S. F. R. Co. v. Sadler* (1887) 88 Kan. 128; *Stout City & P. R. Co. v. Finlayson* (1884) 16 Neb. 578, 49 Am. Rep. 724; *Gowen v. Harley* (1893) 12 U. S. App. 574, 56 Fed. Rep. 973, 6 C. C. A. 190; *Chicago Drop Forge & Foundry Co. v. Van Dam* (1894) 149 Ill. 337, Affirming (1893) 50 Ill. App. 470; *Southern Kansas R. Co. v. Croker* (1889) 41 Kan. 747.

In the recent case of *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 303, the court said: "The cases in which the rule has been applied have been cases where there was a promise on the part of the master to remedy the defect. But we can see no difference in principle between such cases and those where, upon the servant's objecting to continue the use, the master, for his own convenience and purposes, induces the servant to continue it for a short time, upon the promise that the use shall be discontinued at the end of such time. What, for instance, could be the difference on the matter of assuming the risk between a promise to remedy the defects of this particular wagon and a promise to furnish another without such defects? We can see none."

An employee cannot be held to assume the risk of bolts protruding from a coupling of a revolving shaft notwithstanding a promise of the foreman to cover it, on the ground that such promise is not to repair an existing defect in the machinery, but to supply a new or additional appliance which the employer is under no obligation to furnish. *Homestake Min. Co. v. Fullerton* (1895) 36 U. S. App. 32, 69 Fed. Rep. 923, 16 C. C. A. 545.

But some courts seem to incline to the view that the situation is not the same in the two cases.

In *Sweeney v. Berlin & J. Envelope Co.* (1896) 101 N. Y. 520, 54 Am. Rep. 722, the court expressed its opinion, arguendo, that a promise which merely concerns a new appliance not attached to the particular machine whose sufficiency is complained of, nor to any machines of the same make, does not fall within the general rule, but it was held that, upon the evidence, there was no promise made, nor any inducement offered him, to take the risk, and the case was finally decided in favor of the defendant on the ground that the servant had simply been requested to continue working with an old machine of a certain type with the peculiarities of which he had been familiar ever since he had begun work, and therefore assumed the risk of any injury which he might thereafter receive in a service which he was at liberty to quit.

In *Indianapolis Union R. Co. v. Ott* (1894) 55 N. E. 517, it was held that a servant who until

floor was in a dangerous condition. It is apparent also that the plaintiff was fully aware of this dangerous condition, and had been so for at least a year. It was his duty, being fully aware of the danger, to have notified the foreman or his employer, which he did. It was his right, also, under the law, having given such notice, to have continued in the work in which he was engaged for a reasonable time only, awaiting the fulfilment of this promise to remedy such dangerous condition. The jury should have been instructed that the law was as stated in the instruction which was refused. The instruction should have been given, and it was error to refuse it.

the arrival of others which the master has promised to obtain, uses a lantern which he has ascertained to be defective, assumes the risk of injury as one thenceforth incident to the service, and is not in the same position as if he had used it until promised repairs should be completed. But that ruling was changed on rehearing (1893) 11 Ind. App. 504.

In *International & G. N. R. Co. v. Williams* (1896, Tex. Civ. App.) 34 S. W. 181, the court thought that the general principle as to the effect of a promise was not applicable where a section hand was told that a defect in a hand-car would be remedied, and, having been transferred to another car, was injured by the defective car running into it.

That the servant's reliance on the master's promise was not the efficient cause of the injury cannot be inferred where the evidence shows that the servant apprehends no danger from the particular service in which, pending the fulfilment of the promise, he was engaged when he received the injury. *Holloran v. Union Iron & Foundry Co.* (1896) 133 Mo. 470, where a servant engaged in moving a derrick across the uncovered girders on the first floor of a building, after the master had promised to furnish more planks, fell into the cellar by reason of his foot slipping from the girder, upon which he placed it without apprehending any danger therefrom.

Nor does a promise inure to the benefit of the servant unless he was injured at a time and place covered by it. Thus, a promise to shore up a part of a trench where the servant expects to be presently working will not entitle him to recover for injuries caused by an earthslide at that part of the trench where he was at work when he received the promise. *Showalter v. Fairbanks* (1894) 88 Wis. 376.

It is not necessary that the promise should have been addressed to the plaintiff individually, provided it was made in his presence, and the stipulated repairs will remove a danger to which he is exposed. *Atchison, T. & S. F. R. Co. v. Sadler* (1887) 38 Kan. 128; *Alton Lime & Cement Co. v. Calvey* (1892) 47 Ill. App. 343.

In the second place, the promise is a material element in the case only in so far as it is an undertaking to remedy conditions which involve danger to the servant. A stipulation to change those conditions for some other reason than the protection which the servant will thereby obtain will not bring the case within the general principle.

"No case . . . has gone so far as to hold that, where the servant does not complain on his own account, and continues in his employment with full knowledge of the risk, he can recover of the master, because the latter, when the defective condition was called to his attention by the servant, gave assurances, which 40 L. R. A.

For this error the judgment is reversed, and the cause remanded to the Circuit Court.

Carter, J., dissenting:

I do not agree to the reversal of the judgment in this case, nor to the reasons given for such reversal. So far as the discussion of certain of the facts is concerned, it would seem to be sufficient to say that the judgment of the appellate court has finally and conclusively settled the facts in favor of appellee. I do not find so much fault with the statement of the general rules governing such cases as I do with the application of such rules to the instruction which the court below refused to give to the

did not induce the servant to remain, that the defect should be remedied." *Lewis v. New York & N. E. R. Co.* (1891) 153 Mass. 73, 10 L. R. A. 513, where it was held that no action could be maintained by a servant whose employment required him to go upon a pier which had become unsafe because of the decayed condition of the planking, and who continued in the service with full knowledge of the risk, although he complained of the defects on the ground that "someone was liable to get hurt," and received the master's assurance that they should be remedied. It was considered that the complaint was made entirely in the interest of the defendant, and referred only to the danger incurred by strangers.

So, an assurance given by the master that the number of hands will be increased, will not relieve the servant of his assumption of the risk arising from the insufficiency of the number, where the master's promise was made in his own interest, and with reference to the more rapid despatch of his business, and not with a view to the protection of the servant, and to induce him to remain in the service. *International & G. N. R. Co. v. Turner* (1893) 3 Tex. Civ. App. 487.

So, the general rule has no application to a case where neither the master nor the servant contemplated any additional danger to the servant in the use of the defective instrument, but only imperfections in the work done with it. *Tesmer v. Boehm* (1895) 58 Ill. App. 609.

Nor to a case where the remonstrance of the servant is merely to the effect that, with another appliance, the work would be easier, and he himself admits that, before the accident, he never thought that the work involved any danger. *Gowen v. Harley* (1893) 12 U. S. App. 574, 56 Fed. Rep. 973, 6 C. C. A. 190.

Lastly, after the servant has shown that there has been a promise, actual or implied on the part of the master, and that this promise amounts to an undertaking to remove, not only a danger, but a danger by which he himself is threatened, he must still fall in his action unless he proves that he relied in good faith upon the promise. *Showalter v. Fairbanks* (1894) 88 Wis. 376.

The mere fact that the servant has some suspicion that the master's assurances will not be made good is not enough to deprive him of his right of action. *Weber Wagon Co. v. Kehl* (1892) 139 Ill. 644, Affirming (1891) 40 Ill. App. 584.

But an instruction which tells the jury they must find for the plaintiff, if they believe from the evidence that the plaintiff, at the time of the injury, "had reasonable grounds to believe that the defendant would immediately cure the defect," has been held misleading and prejudicial to the defendant, as it leaves the jury to infer that the servant may recover, even if his

jury at the request of the defendant, and for which refusal this court now reverses the judgment. I am satisfied that the instruction in question was erroneous, and that it was properly refused. That instruction, if given, would have told the jury that the servant may, while relying upon the promise of the master to repair, remain in the service of the master only for such a time after such promise as would be reasonably sufficient to enable the master to remedy the defect, and that, if he continues in such service longer than that, he assumes the increased risk. I do not understand the law to be that the time, and that

only, which would be reasonably sufficient for the making of the repairs, is the measure of the time during which the servant may rely upon the master's promise to repair. I submit, with deference to the opinion of the majority of the court, that the reasonable time does not so much relate to the time required to make the repairs as it does to the time the servant is authorized, in the exercise of reason and prudence, to rely upon his master's promise. I know that the authorities and text-books state in general terms, as stated in the opinion of the court, that the servant may continue, after the promise to repair, in the employment of the

belief that the defect would be cured was a mere surmise or expectation of his own, based on no specific promise. *McKelvey v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 500.

Similarly, in *Southern P. Co. v. Lash* (1893) 2 Tex. Civ. App. 68, the servant's right to recover was denied on the ground that the servant continued work, not because he relied on the master's promise, as given, but merely because of an expectation, based on the defendant's habit, to make the repairs in question.

It is ordinarily for the jury to say whether the servant's reliance on a promise by the master induced him to continue work. *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 48 Am. Rep. 609; *Rothenberger v. Northwestern Consol. Mill. Co.* (1894) 57 Minn. 461.

In *Showalter v. Fairbanks* (1894) 88 Wis. 376, it was said to be quite doubtful whether the rule that a servant is entitled to go on working for a reasonable time after a promise to remove a danger, without his being charged with an assumption of the risk, is applicable to any other cases except those in which machinery or tools are found to be defective.

The court cited *Gowen v. Harley* (1893) 12 U. S. App. 574, 56 Fed. Rep. 973, 6 C. C. A. 180, but the ruling in that case does not justify any such expression of doubt, as it is merely an application of the principle that a promise by the master has no effect in augmenting the servant's rights, unless it relates to the removal of some danger which threatens his safety.

• VI. Whose promise is binding on an employer.

The principles upon which it is determined whether a promise, when given by an employee, binds the master, are the same as those which fix the dividing line between an alter ego and a mere fellow servant. That is to say, the promise is or is not deemed to have been given by the master according as the employee who gave it was or was not one charged with the performance of that particular duty of the master, the breach of which has produced the servant's danger.

The plaintiff, in other words, cannot recover on the ground of a promise made by an employee unless the promisor had authority to take such steps as were appropriate, under the circumstances, to secure the safety of the employee. *Ehlncke v. Porter* (1891) 45 Minn. 338.

The following rulings will serve as illustrations of this general principle, but, as they are necessarily colored by the views prevailing in the particular state from which they proceed as to the extent to which a master is liable for the act of a fellow employee of the injured servant, the practitioner should consider them with due reference to the general doctrine which they exemplify.

The employer has been held liable for the promise of the undermentioned employees as respects the matters referred to:
40 L. R. A.

Of a general superintendent of a factory to put in a new floor, to replace one which has become dangerously slippery. *Weber Wagon Co. v. Kehl* (1892) 139 Ill. 644, Affirming (1891) 40 Ill. App. 584.

Of a railway superintendent, to repair a switch. *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412.

Of an assistant general roadmaster, to repair a switch. *Lake Shore & M. S. R. Co. v. Winslow* (1894) 10 Ohio C. C. 193.

Of a yardmaster to have running boards put on a yard engine. *Pleart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148.

Of the day foreman of a mine, that exposed parts of machinery will be covered: Such an act does not require a previous conference with the general superintendent, or the master mechanic, because it does not involve any alteration of the machinery, or interfere to any extent with its operation. *Homestake Min. Co. v. Fullerton* (1895) 36 U. S. App. 32, 69 Fed. Rep. 923, 16 C. C. A. 545.

Of a foreman with power to discharge an incompetent servant, that he will be replaced by another. *Galveston, H. & S. A. R. Co. v. Eckols* (1894) 7 Tex. Civ. App. 429; *Wust v. Erie City Iron Works* (1892) 149 Pa. 263; *Lyttle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 259.

Of a section foreman to supply new tools. *Atchison, T. & S. F. R. Co. v. Sadler* (1887) 38 Kan. 123.

Of a conductor, that a defect in a car will be repaired. *Louisville & N. R. Co. v. Henley* (1893) 92 Tenn. 207.

On the other hand, the master is not bound by the promise of an employee who merely makes repairs which have been determined upon by a person in authority. *Ehlncke v. Porter* (1891) 45 Minn. 338.

Nor by promise of an agent other than the one whom the servant knew to be in charge of such matters. *Chesapeake, O. & S. W. R. Co. v. McDowell* (1894) 16 Ky. L. Rep. 1.

Nor by the promise of an employee who is a mere fellow servant acting under the instructions of the plaintiff himself, and not a representative of the master, qualified to give directions as to the continued use of the defective appliance. *Shackleton v. Manistee & N. E. R. Co.* (1895) 107 Mich. 16.

A servant who asks to have a saw reset and is told by the employee intrusted with that duty to go on working until noon, when he will see what he can do, cannot recover for injuries which he receives before that hour. The neglect, if any, is in a detail of the management of the machinery, not in a duty of the master. *Webber v. Piper* (1888) 109 N. Y. 496, Affirming (1885) 58 Hun, 353.

It is error to give an instruction which assumes that an employee was the representative of a railroad company as regards the repairing of electric lights used to facilitate the

master a reasonable time, to enable the master to make the repairs and remove the defect; but it does not follow that the measure of such reasonable time is as stated in said refused instruction. Let it be supposed that a case is on trial, and the injury to the servant is undisputed. The master admits the defective condition of the machinery or the place where the servant is required to work, and that it caused the injury; admits the servant notified him of such defective condition, and that he gave the servant his promise to make repairs and remove the defects complained of; that he failed to keep his promise, and the servant was in-

jured. Then, under the rule stated in the above-mentioned instruction, and adopted by the opinion of the court, the master would proceed to prove, to relieve himself from liability, that he did not, within such time as would have been reasonably sufficient for the purpose before the injury, make the promised repairs,—in other words, would make a complete defense by proving his own default and negligence; while the servant would be required to prove that the master was not in default, but had not, at the time of the injury, had sufficient time in which to make the repairs. Such positions of the parties would, to

work of loading iron from a car onto a steamer, and that his promise to repair one of them bound the company, where another employee is shown to have been in control of the entire work, and no evidence has been offered to prove that the former employee was vested with any other power than of overseeing the loading of the train. *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619.

VII. Rule where the promise relates to simple appliances.

In *Marsh v. Chickering* (1886) 101 N. Y. 396, it was held that a lamplighter who was injured through the slipping of a ladder on which he had mounted in the discharge of his duties could not maintain an action although his employer had promised to furnish it with hooks and spikes for the purpose of obviating the danger of such accidents. The reasoning which led the court (Ruger, Ch. J., dissenting) to this conclusion will appear from the subjoined extract from the opinion: "As a general rule it is to be supposed that the master who employs a servant has a better and more comprehensive knowledge as to the machinery and materials to be used than the employee who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the performance of the service required of him. The rule stated, however, is not applicable in all cases, and where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work devolving upon him, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof. In considering the application of the rule just stated, due regard must be had to the limited knowledge of the employee as to the machinery and structure on which he is employed and to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise. In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employee has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed and in regard to which he has perfect knowledge, can hardly

be said to have a claim against his employer for negligence, if in using a utensil which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and if he is thereby injured it is by reason of his own fault and negligence. The fact that he notified the master of the defect and asked for another instrument, and the master promised to furnish the same, in such a case, does not render the master responsible if an accident occurs. We have been referred to no adjudicated case which upholds the liability of a party under circumstances of the same character as those presented by the evidence here. A rule imposing such a liability in the case considered would be far reaching, and would extend the principle stated to many of the vocations of life for which it was never intended. It is one of a just and salutary character, designed for the benefit of employees engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those engaged in ordinary labor which only requires the use of implements with which they are entirely familiar. The plaintiff was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to."

The doctrine of this case has been followed in the subjoined rulings:

One employed to make general repairs about a building is guilty of negligence in attempting to ascend a ladder placed on a slippery floor, without himself arranging, under his duty of general repairing, some appliance, fixture, or guard to make the foot of the ladder secure, although the employer had previously promised to procure a safe ladder. *Corcoran v. Milwaukee Gaslight Co.* (1892) 81 Wis. 191.

An employer is not liable for personal injuries sustained by his employee because of an obvious defect in a ladder consisting of the nails being partially withdrawn from the steps, and which could have been easily remedied with a stone or brick if a hatchet or hammer was not obtainable, although he had informed the employer thereof and the latter had told him it was safe for the present, but promised to remedy it. *Meador v. Lake Shore & M. S. R. Co.* (1894) 138 Ind. 290.

Where a defect is of a plain and obvious character, such as the wearing down by constant friction, of a plank which is being used as a walk by employees engaged in the construction of a trestle, and it is obviously rashness for anyone to tread upon the plank, the servant cannot charge the master with liability for the use of such an appliance, merely by reason of the fact that he has given an in-

say the least that might be said, be anomalous. It seems clear to me that the rule stated in this instruction and adopted by this court is illogical, and contrary to reason and natural justice. It is also in conflict with what was held in *Weber Wagon Co. v. Kehl*, 189 Ill. 646. It seems to me that the true rule ought to be, and is, that the assumption of the increased risk by the master by his promise to repair, whereby

the servant is induced to remain, will continue until he fulfils his promise, or notifies the servant of his inability or unwillingness to do so, or until such a length of time has elapsed as would, under all of the attending circumstances, make it unreasonable for the servant to longer rely upon the promise. Under such a rule, the question would be whether the servant, at the time of the accident, relied, or

definite promise to repair it. *Brewer v. Tennessee, Coal, I. & R. Co.* (1896) 97 Tenn. 615.

"The rule that the master is responsible for damages resulting to a servant from defects in machinery and appliances of which the servant has notified him and which he has promised to repair, governs cases in which machinery or tools that are used in the work are discovered to be dangerously defective while in use, and to cases in which tools or machinery are necessary for the safe performance of the work. It has no application to a case where the service required is simple manual labor without tools or machinery, and where no such tools or appliances are necessary to the performance of the work with a reasonable degree of safety. *Gowen v. Harley* (1893) 12 U. S. App. 574, 56 Fed. Rep. 973, 6 C. C. A. 190, where it was held that a receiver operating a railroad could not be held; that a servant could not recover damages for the breach of his employer's promise to furnish skids for the purpose of transferring a box weighing about 250 pounds from one railroad car to another, only about 5 feet away. (The general principle laid down in *Marsh v. Chickering*, supra, was approved, but the decision was also based on the consideration that the promise was not that a danger would be removed, but merely that additional facilities for doing the work would be furnished.

Compare also *St. Louis, A. & T. R. Co. v. Kelton* (1892) 55 Ark. 483; *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 461. In the latter case, however, the court seems to consider that this qualification of the general rule is referable, not only to the fact that the danger in such case is obvious, but that the continued use of the tool after knowledge of the defect, and after the lapse of more than a reasonable time since the promise to remedy it was made, indicates recklessness.

This introduction of the factor of reasonable time is not justified by anything said in the leading case of *Marsh v. Chickering*, supra, and it must therefore remain somewhat doubtful, whether the Illinois court would follow the New York ruling without reservation, if the consideration here emphasized were eliminated from the case.

It is submitted that *Marsh v. Chickering* (1886) 101 N. Y. 306, and the decisions which have followed it, do not rest upon any rational basis. The modification of the general principle introduced by them only upon the hypothesis that one or other of these three theories is correct: (1) That, in the case of simple appliances, the promise of the master does not, in any way, alter or shift his responsibility, even temporarily; (2) that the quantitative value of the constructive knowledge imputed to the servant with regard to the defects in such appliance is different from the quantitative value of such actual knowledge as he may acquire in regard to more elaborate instrumentalities; (3) that the danger of handling simple appliances like ladders, spades, axes, etc., is, as a matter of law, so serious as to require the application of the rule that the master's promise will not warrant a continu-

ance of the service where the hazards to which the servant will be exposed are so imminent that no prudent man would encounter them. All these positions are manifestly untenable: the first because it entails the anomaly of gauging the effect of an express stipulation by the nature of the subject-matter to which it relates; the second, because it involves a logical absurdity; the third, because it ignores the most obvious facts.

The conclusion arrived at by the New York court seems to be accounted for by the undue weight which is ascribed to the fact that, in the case of a defect in a simple appliance, the servant has equal or superior means of knowledge in regard to the dangers to which it will subject him. Assuming the rationale of the situation created by the promise to be that which is stated in subdiv. III., supra, it seems manifest that the question whether the servant's knowledge was equal or superior to that of the master cannot be of any moment except where the continuance of work has been induced, both by a promise of repairs and by an assurance that the defect is not so serious as to threaten immediate injury. It may be a perfectly sound argument that the servant is not justified in relying on the master's promise in regard to the prospects of safety while repairs are being made in an appliance of a very simple kind. But it is not apparent why in the case of such an appliance, just as in the case of any other, the inference may not be drawn that the master has assumed the responsibility for accidents while the repairs are being executed, nor why the servant should not be entitled to hold the master to the performance of the revived or modified contract, which, as we have seen, is implied by a promise to remove a specific cause of danger. The question whether a prudent man would have allowed his conduct to be influenced by the promise would then remain to be decided, as a distinct issue, by a due consideration of all the circumstances presented by the testimony.

VIII. *Obligations of the servant pending the fulfilment of the promise.*

The fact that the master has promised to repair a defect does not relieve the servant of the duty of using reasonable care for his safety. *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322.

If the servant, by his own negligence in the manner of using the defective appliance, brings injury on himself, the master will not be liable." *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 803.

In view of his knowledge of the existence of an abnormal danger, a greater degree of care will be required of him than if he had not known of the defect. *Meador v. Lake Shore & M. S. R. Co.* (1894) 138 Ind. 290.

But the employer "cannot hold [him] that servant to the exercise of an unerring choice of the best method of obviating difficulties and lessening danger. If the servant uses reasonable and ordinary judgment, he does all that can be required, and the fact that his judgment

had reasonable grounds to rely, upon the promise of the master to repair, or had himself assumed the increased risk by continuing in the service after he had ceased to rely upon the master's promise. The rule is stated more broadly than is here contended for in *Chicago Anderson Pressed-Brick Co. v. Sobkowiak*, 148 Ill. 578, citing *Holmes v. Clarke*, 6 Hurlst. &

N. 349. See also *Counsell v. Hall*, 145 Mass. 468.

Magruder, J.: I concur in the views expressed by Mr. Justice Carter.

Boggs, J.: I concur in the dissenting opinion by Mr. Justice Carter.

Rehearing denied December 21, 1897.

may not prove to be absolutely the best does not relieve the employer from liability." Illinois C. R. Co. v. Creighton (1895) 63 Ill. App. 168.

That the servant, when he is called upon to work with an appliance which he has ceased to handle since the master promised to repair it may or may not be justified, according to the circumstances, in acting upon the presumption that the repairs have been completed, is clear both upon principle and authority. Thus, on the one hand, it has been held that an employee who knows that the machine at which he works is out of repair and that a fellow servant has been ordered to repair it on a specified day, is guilty of such contributory negligence as will prevent a recovery for an injury resulting from such defect, in subsequently going to work upon the machine of his own accord, without ascertaining whether or not it had been repaired. *Schulz v. Rohe* (1896) 149 N. Y. 132.

So, the servant will be denied recovery where the defect is of such an obvious kind that if he had been making the ordinary use of his eyesight at the time he was injured, he could not have failed to observe that it had not been repaired. *Brewer v. Flint & P. M. R. Co.* (1885) 56 Mich. 620.

Under certain circumstances the broad principle will be controlling, that an employee who has given notice of a defect to the proper officer whose duty it is to make the repairs, and the impression has been conveyed to him that these would be made, has a right to assume that they have been made, and to act upon that assumption. Thus, an engineer who has received a promise that his engine will be repaired, and is absent on sick leave for several days afterwards, is not, as a matter of law, negligent in taking out the engine at the end of that period without specific information that

the repairs have been completed. *Northern P. R. Co. v. Babcock* (1894) 154 U. S. 190, 38 L. ed. 938.

A complaint which, in effect, alleges that the injured servant was induced to remain in the service by the promise of his foreman that a fellow servant of whose incompetence he had complained would be discharged is complete without a further averment that the plaintiff, when he was injured, was ignorant of the fact that the incompetent servant had not been discharged. To go further would be to plead matters of evidence. *Galveston, H. & S. A. R. Co. v. Eckols* (1894) 7 Tex. Civ. App. 429.

The obligations of the servant to use due care after he has received a promise of repairs do not go to the extent of a requirement that he shall himself take active steps to lessen the danger covered by the promise.

Thus, the fact that a railroad engineer could repair a defective foot-board himself, or run the locomotive with it entirely removed, does not render him guilty of contributory negligence in continuing to use it in its defective condition, where the rule of the company provides that employees shall report defects or repair them themselves, and he has reported the defect to the proper person, and been twice assured that it will be repaired. *Gibson v. Minneapolis, St. P. & S. S. M. R. Co.* (1893) 55 Minn. 177.

Nor is an employee whose duties require him to pass under a coupling of a revolving shaft having protruding bolts under any obligation to turn aside from his ordinary duties and construct a box to cover such coupling, after the foreman's attention has been called to the defect and he has promised to send carpenters to cover it. *Homestake Min. Co. v. Fullerton* (1895) 38 U. S. App. 32, 69 Fed. Rep. 923, 16 C. A. 545.

C. B. L.

OREGON SUPREME COURT.

W. T. PERHAM, Admr., etc., of Nathaniel Carl Perham, Deceased, *Resp't.*,
v.

PORTLAND GENERAL ELECTRIC COMPANY, *Appt.*

(.....Or.....)

1. An action for death caused by wrongful act or omission, whether it results instantly or not, is given by Hill's Ann. Code, §§ 369, 371, providing that the personal representatives may maintain an action at law if the deceased "might have maintained an action had he lived," and that the recovery shall be administered as other personal property of the deceased.

2. The fact that there are no surviving relatives or creditors of a person killed by wrongful act or omission does not preclude a right of action under Hill's Ann. Code, §§ 369, 371, making the recovery assets of the estate.

3. The owner of electric wires carrying a dangerous current is chargeable with negligence in stringing them over a bridge so near the top of it that it is impossible to make repairs on the bridge without coming into contact with them.

4. A workman engaged in repairing a bridge over which electric wires with an apparently safe insulation are strung, where he must come in contact with them in performing his work, has a right to assume that contact with them will not be dangerous,—es-

NOTE.—For negligence as to electric-light wires in or on buildings, see *Griffin v. United Electric Light Co.* (Mass.) 82 L. R. A. 400, and note; also 40 L. R. A.

McLaughlin v. Louisville Electric-Light Co. (Ky.) 34 L. R. A. 812. See also *Mooney v. Luzerne* (Pa.) post, 811.

pecially after the workmen have made an examination of them, and ascertained, as they suppose, that the wires are not dangerous.

5. **Placing electric wires known to be dangerous** at a place where others are lawfully entitled to be constitutes negligence.
6. **The apparent perfect insulation of electric wires**, which is calculated to deceive and to cause one unfamiliar with the facts to suppose them safe, when the wires are placed where persons in the performance of their duties may come in contact with them, amounts to an invitation to them to risk contact therewith.
7. **The exercise of due care and prudence** to prevent injury by dangerous electric wires is a question for the jury.
8. **An instruction against allowing exemplary damages**, or damages as a *solatium* for grief or anguish, need not be given, where the complaint and the proof are confined to the earning capacity, habits, and probable length of life of a person killed.
9. **Verbal inaccuracy** of a charge to the jury will not require a reversal, if the charge as a whole fairly and accurately presents the law applicable to the facts.
10. **The care demanded of electric companies must be commensurate with the danger**, and, where the wires carry a highly dangerous current of electricity, the law requires the utmost degree of care in the construction, inspection, and repair of the wires so as to keep them harmless, at places where persons are liable to come in contact with them.

(April 18, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Statement by **Bean, J.:**

This is an action brought under § 371 of the Code to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant company. The facts, which are practically undisputed, are that on September 27, 1898, the plaintiff's intestate, an employee of the East-Side Railway Company, a corporation owning and operating a suburban railway between Portland and Oregon City, was killed while engaged in repairing its bridge across the Clackamas river by coming in contact with wires owned and used by the defendant company for the transmission of electricity from its station in Oregon City to its customers in the city of Portland, and which were suspended over and horizontal with such bridge. This bridge is described by the witnesses as a Howe truss with half-hip connections, 22 feet wide, and the distance between the top and bottom chords is 35 feet. Near the ends of each top chord are four vertical iron rods with nuts and washers, connecting the top and bottom chords, and the top chords are connected together by 6x8 lateral braces set on edge, crossing each other in the shape of the letter X, and also by iron rods, about an inch in diameter, at either extremity. The main end braces of the bridge run from the ends of the top chords to the outer end of the bottom chords at an angle of 45 degrees, and are con-

nected together, by cross braces similar to the top lateral braces, and also by two timbers 5½ by 9½ inches, called "strut braces," placed horizontally above and below the cross braces. The upper strut brace is 4½ inches below the under side of the top chord, or 20½ inches below the upper surface thereof, and the most southerly lateral rod connecting the top chords of the bridge is 22 inches north thereof, and 13 inches higher than its upper surface. Under a license from the railway company, the defendant had, at the time of the accident, ten wires strung lengthwise and 35 inches above the top of the bridge, which were attached to pins in cross braces or arms extending from one side of the bridge to the other, and supported by standards resting on the top chords. The wires were placed 1 foot apart, except the two on the west side, between which there was a space of 2 feet. On the 15th of September, 1898, the railway company sent a gang of men under charge of a foreman to repair the bridge, and they were engaged in such work until some time in the following month. While thus engaged, it became necessary to tighten the nuts on the vertical rods connecting the top and bottom chords, and, as this could not be done on the south end of the bridge without moving the arm or brace to which the electric wires were attached, the foreman telephoned, on the morning of the 27th of September, to the office of the railway company in Portland, asking that a lineman be sent out to detach the wires, so that the arm could be moved, but, as the company neglected to do so, he concluded to go on with the work and do the best he could. He thereupon directed the deceased and three other workmen to go up on top of the bridge, and tighten the nuts on the rods with a large wheel wrench 7 feet and 8 inches in diameter. The wheel part of this wrench was some 15 or 16 inches above the socket which fitted on the nut, and the wrench was operated by workmen sitting outside of the wheel on the chords or braces of the bridge, or boards placed thereon. Before working in and among the wires, the workmen examined them, and, finding that they were covered with the insulating material in common use, and that such covering was unbroken, and apparently in good condition, and receiving no injurious effect from handling them, concluded that they were safe. At the time this examination was made the wires were what are called "dead wires," as the electric current was shut off about 8 o'clock in the morning and not turned on again until about 4 in the afternoon, but of this fact the workmen were ignorant, and they supposed and believed that the wires were live wires all the time, and that the reason they were harmless was because of the insulation. Along in the afternoon, the deceased and his fellow workmen, having completed the work at the north end of the bridge, proceeded to the south end for the purpose of tightening the rods on that end, but, being unable to place the wheel wrench on the nuts because of the standard which supported the cross bar to which the wires of the defendant company were attached, they were directed by the foreman to move it out of the way. At this time the two wires on the west side of the bridge were live wires,

but this fact was unknown to the workmen. They proceeded to detach a sufficient number of the wires, beginning at the east side of the bridge, to enable them to move the east end of the south standard or support a sufficient distance north to permit the use of the wheel wrench; and after taking out the lag screws, which fastened the standard to the top chord, the deceased was directed by the foreman to cross over to the west side of the bridge to a hand line and draw up the tools necessary to be used in fastening the standard out of the way of the wrench. In obedience to this order, he started to walk over on one of the top lateral braces, stepping over the wires and steadying himself by touching them with his hands, and when he reached the two west wires, which were carrying at the time 5,000 volts of electricity, he accidentally took hold of both wires at the same time, and the entire force of the current passed through his body, killing him instantly.

The complaint alleges: That at the time the defendant so placed its wires over the bridge of the railway company it well knew it would be necessary from time to time for such company to cause the bridge to be repaired, and for persons to work upon the top chords and braces thereof; but, notwithstanding such knowledge, it carelessly and negligently strung its wires only 2½ feet above such chords and braces, and in such a manner that it was not possible or practicable for persons to work upon such bridge without coming in contact with and handling the same; and that it carelessly and negligently failed and omitted to protect or cover the wires, and particularly the two west ones, with safe or sufficient insulating material, and that it carelessly and negligently permitted the covering used thereon to become worn, defective, and wholly insufficient to render them safe to persons coming in contact therewith. That it knew the bridge was being repaired during all the times referred to, and particularly on the 27th day of September, and that it might be necessary at any time between the hours of 7 o'clock in the morning and 5:30 o'clock in the afternoon of that day for the workmen to move about among and come in contact with its wires, and that it was not possible or practicable for them, nor for anyone, to go upon or work upon the top chords or the top lateral braces without so doing; and that it also knew that the deceased was engaged in the work of tightening the vertical rods during the afternoon of the 27th, and that he was necessarily moving about among and coming in contact with and handling the wires, but that, notwithstanding such facts, it carelessly and negligently caused and permitted a high and dangerous current of electricity to be turned into the two wires nearest the west side of the bridge at about 4:20 o'clock in the afternoon, without notice or knowledge to the deceased or any of his fellow workmen; and that the deceased, while engaged in the performance of his duties and exercising due care and caution, and without any fault on his part, came in contact with said wires, and was instantly killed. That all the workmen on the bridge, including the deceased and foreman, thought and believed it was perfectly safe for them to move about among and touch and handle the

wires referred to, because the same seemed to be insulated, but they had no knowledge of the time the current was turned into the wires, but thought and believed they were charged with electricity and were live wires at all times.

The complaint then alleges the appointment of the plaintiff as administrator of the estate of deceased, and upon the question of damages avers: "That said Nathaniel Carl Perham at the time of his death was twenty-five years and six months old, unmarried, strong, healthy, temperate, industrious, frugal, of good intelligence and business capacity, and was a skillful carpenter and bridge carpenter and contractor, and was earning and receiving wages at the rate of \$3 per day, and would, if he had continued to live during the ordinary period of life, have continued to earn and receive the same and even greater wages for his services, and would have accumulated property and estate to the present value of \$20,000, and that by reason of his death, occasioned by the negligence and wrongful acts and omissions of the defendant, as hereinbefore set forth, plaintiff, as administrator of said estate, has been injured and damaged in the sum of \$20,000;" and prays for judgment against defendant for the sum of \$5,000, being the limit of a recovery permitted by the statute. The defendant, by its answer, admits that at the time it placed its wires on and along the bridge in question it knew that it would be necessary to repair the bridge from time to time, and that in doing so persons would be required to go and be upon the top chords and top lateral braces thereof, but it denies that its wires were so placed that it would be necessary for such persons to come in contact therewith, or move about among or handle the same, or that it failed or omitted to protect or cover its wires with proper or sufficient insulating material, or that it permitted the covering used to become worn or defective. But it alleges that it is impracticable to insulate wires carrying such a high voltage as was carried over the wires in question so that they will not be dangerous to the life of persons coming in contact with two of them at the same time: that all of its wires were attached by proper and sufficient glass insulators to wooden cross bars or arms at a height of not less than 2 feet and 10 inches above the top chords and top lateral braces of the bridge, and were new and perfect wires, and the insulating used thereon was in perfect order and condition. It is further alleged that the deceased was guilty of contributory negligence in attempting to step over the wires in crossing the bridge, but that he should have passed under them, either by creeping along on top of the lateral braces or by crossing on the strut brace at the south end of the bridge which was about 4½ feet below the wires. The reply put in issue the material allegations of the answer, and, a trial resulting in a verdict and judgment in favor of the plaintiff, the defendant appeals, alleging as error: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the court erred in overruling its motion for a nonsuit; and, third, that the court erred in the giving and refusal of certain instructions to the jury.

Messrs. Frederick V. Holman, Richard Williams, and E. B. Williams, for appellant:

The amended complaint does not state facts sufficient to constitute a cause of action.

Hill's (Or.) Code, §§ 369-371; *Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450; *Belding v. Black Hills & Ft. P. R. Co.* 3 S. D. 369; *Hurst v. Detroit City R. Co.* 84 Mich. 539; *Charlebois v. Gogebic & M. R. R. Co.* 91 Mich. 59; *Bancroft v. Boston & W. R. Corp.* 11 Allen, 84; *Kearney v. Boston & W. R. Corp.* 9 Cush. 108; *Corcoran v. Boston & A. R. Co.* 183 Mass. 507; *Riley v. Connecticut River R. Co.* 135 Mass. 292; *Mulchahey v. Washburn Car Wheel Co.* 145 Mass. 281; *Maher v. Boston & A. R. Co.* 158 Mass. 36; *Illinois C. R. Co. v. Pendergrass*, 69 Miss. 425.

The circuit court erred in denying appellant's motion for judgment of nonsuit.

Scott v. Oregon R. & Nav. Co. 14 Or. 211; *Ford v. Umatilla County*, 15 Or. 313; *Northorn C. R. Co. v. Huson*, 101 Pa. 1; *Beck v. Vancouver R. Co.* 25 Or. 32; *Salem-Bedford Stone Co. v. Hobbs*, 11 Ind. App. 27; *Salem-Bedford Stone Co. v. O'Brien*, 12 Ind. App. 217; *Miner v. Connecticut River R. Co.* 153 Mass. 398; *Bailey, Personal Injuries Relating to Master & Servant*, pp. 158-165, 168, 169, and notes; *Illick v. Flint & P. M. R. Co.* 67 Mich. 632; *Wormell v. Maine C. R. Co.* 79 Me. 405; *McMullan v. Edison Electric Illuminating Co.* 13 Misc. 392; *Sullivan v. Boston & A. R. Co.* 156 Mass. 378; *Burk v. Edison General Electric Co.* 89 Hun, 498; *Hector v. Boston Electric Light Co.* 161 Mass. 558, 25 L. R. A. 554; *Lothrop v. Fitchburg R. Co.* 150 Mass. 423; *Flood v. Western U. Tele. Co.* 131 N. Y. 603.

The circuit court erred in refusing to give the instructions to the jury requested by the appellant.

Croswell, Electricity, § 234; *Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450; *Belding v. Black Hills & Ft. P. R. Co.* 3 S. D. 369; *Hurst v. Detroit City R. Co.* 84 Mich. 539.

The circuit court erred in giving instructions to jury which were excepted to by appellant.

16 Am. & Eng. Enc. Law, pp. 402, 403, 468, and cases cited; *Croswell, Electricity*, § 234; *City Electric Street R. Co. v. Conery*, 61 Ark. 381, 31 L. R. A. 570; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566; *Ahern v. Oregon Teleph. Co.* 24 Or. 276, 22 L. R. A. 635; *McMullan v. Edison Electric Illuminating Co.* 13 Misc. 392.

Messrs. Reed & Hogue and W. W. Thayer, for respondent:

The amended complaint states facts sufficient to constitute a cause of action.

The allegation that appellant's electric current caused the "instant death" of the decedent does not defeat the right of the administrator to recover the damage the estate has suffered because of such death.

Hill's Annotated Laws of Oregon, § 371, is not a survival statute, but gives a new right of action unknown to the common law for the damages resulting from the death.

Hill's (Or.) Anno. Laws, §§ 34, 39, 369-371; *Putnam v. Southern P. Co.* 21 Or. 230; *Wellman v. Oregon Short Line & U. N. R. Co.* 40 L. R. A.

21 Or. 530; *Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450; *The Oregon*, 73 Fed. Rep. 846; *Holland v. Brown*, 35 Fed. Rep. 43; *Hulbert v. Topeka*, 34 Fed. Rep. 510; *Martin v. Missouri P. R. Co.* 58 Kan. 475; *Missouri P. R. Co. v. Bennett*, 5 Kan. App. 231; *Kureka v. Merrifield*, 53 Kan. 794; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169; *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143; *Legg v. Britton*, 64 Vt. 632; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Weber v. Third Ave. R. Co.* 12 App. Div. 512; *Smith v. Metropolitan Street R. Co.* 15 Misc. 158; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 371; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Matz v. Chicago & A. R. Co.* 85 Fed. Rep. 180; *Mason v. Union P. R. Co.* 7 Utah, 77; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L. R. A. 788; *Givens v. Kentucky C. R. Co.* 89 Ky. 231; *The City of Norwalk*, 55 Fed. Rep. 98; *Nestle v. Northern P. R. Co.* 56 Fed. Rep. 261; 2 Thomp. Neg. pp. 1295-1309; *Tiffany, Death by Wrongful Act*, Appendix.

In the states whose statutes are similar to Lord Campbell's act, the action for death by wrongful act has never been defeated because the death was instantaneous.

Brown v. Buffalo & S. L. R. Co. 22 N. Y. 191; *International & G. N. R. Co. v. Kindred*, 57 Tex. 491; *Reed v. Northeastern R. Co.* 37 S. C. 42; *Bones v. Boston*, 155 Mass. 344, 15 L. R. A. 865; *Kearney v. Boston & W. R. Corp.* 9 Cush. 108; *Matz v. Chicago & A. R. Co.* 85 Fed. Rep. 180; *Boutiller v. The Milwaukee*, 5 Minn. 97; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L. R. A. 788; *Givens v. Kentucky C. R. Co.* 89 Ky. 231; *Roach v. Consolidated Imperial Min. Co.* 7 Sawy. 224, 7 Fed. Rep. 698; *Tiffany, Death by Wrongful Act*, § 73.

The Oregon statute is based upon the same principles, and is designed to serve the same ends, as statutes similar to Lord Campbell's act.

Putnam v. Southern P. Co. 21 Or. 230 *The Oregon*, 73 Fed. Rep. 846.

Under statutes which are properly held to be survival statutes, damages have been held recoverable in the following cases, though the death and the injury were simultaneous:

Kansas City, M. & B. R. Co. v. Daughtry, 88 Tenn. 721; *Haley v. Mobile & O. R. Co.* 7 Baxt. 241; *Fowlkes v. Nashville & D. R. Co.* 9 Heisk. 829; *Nashville & C. R. Co. v. Prince*, 2 Heisk. 580; *Worden v. Humeston & S. R. Co.* 72 Iowa, 201; *Connors v. Burlington, C. R. & N. R. Co.* 71 Iowa, 490; *Murphy v. New York & N. H. R. Co.* 30 Conn. 184; *Hamilton v. Morgan's Louisiana & T. R. & S. Co.* 42 La. Ann. 824; *Cheatham v. Red River Line*, 56 Fed. Rep. 248; *Tiffany, Death by Wrongful Act*, § 75.

The complaint does not show contributory negligence on the part of the deceased.

Johnston v. Oregon Short Line R. Co. 23 Or. 94.

The allegation of damage was sufficient. *Nicolai v. Krimbel*, 29 Or. 76; *Miller v. Hirschberg*, 27 Or. 522; *Wellman v. Oregon Short Line & U. N. R. Co.* 21 Or. 530; *Carlson v. Oregon Short Line & U. N. R. Co.*

21 Or. 450; *Putnam v. Southern P. Co.* 21 Or. 230; *McKay v. Muagrove*, 15 Or. 162; *Willer v. Oregon R. & Nav. Co.* 15 Or. 158; *Aiken v. Coolidge*, 12 Or. 244; *Davidson v. Oregon & C. R. Co.* 11 Or. 186; *Houghton v. Beck*, 9 Or. 325; *Ladd v. Foster*, 81 Fed. Rep. 827; *Holmes v. Oregon & C. R. Co.* 6 Sawy. 262, 5 Fed. Rep. 75; *Tiffany, Death by Wrongful Act*, § 109; *District of Columbia v. Wilcoz*, 4 App. D. C. 90.

The complaint sufficiently shows that deceased could have maintained an action against appellant had he lived.

Reed v. Northeastern R. Co. 37 S. C. 42; *Gurney v. Grand Trunk R. Co.* 37 N. Y. S. R. 155; *Tiffany, Death by Wrongful Act*, §§ 63, 65, 181.

The complaint need not allege the existence of any heirs, legatees, or creditors of deceased, nor of any indebtedness against his estate.

Hill's (Or.) Anno. Laws, §§ 371, 776, ¶¶ 28, 3099; *Wellman v. Oregon Short Line & U. N. R. Co.* 21 Or. 580; *East Tennessee Teleph. Co. v. Simms*, 18 Ky. L. Rep. 761; *Budd v. Meriden Electric R. Co.* 69 Conn. 272; *Harvey v. Thornton*, 14 Ill. 217; *Columbus & W. R. Co. v. Bradford*, 86 Ala. 574; *Alabama & F. R. Co. v. Waller*, 48 Ala. 459; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 884; *Warner v. Western N. C. R. Co.* 94 N. C. 250; *Harper v. Norfolk & W. R. Co.* 36 Fed. Rep. 102; *Roach v. Consolidated Imperial Min. Co.* 7 Sawy. 224, 7 Fed. Rep. 698; *Tiffany, Death by Wrongful Act*, §§ 56, 81.

The question of contributory negligence, as well as that of negligence, is one of fact for the jury if there be any dispute as to the facts; or, if there be no dispute as to the facts, but there may reasonably be a difference of opinion as to the inferences and conclusions deducible therefrom, it is the province of the jury to determine the question.

Connell v. McLoughlin, 28 Or. 230; *Hedin v. Suburban R. Co.* 26 Or. 155; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107; *Warner v. Baltimore & O. R. Co.* 168 U. S. 339, 43 L. ed. 491; *Pyle v. Clark*, 49 U. S. App. 360, 79 Fed. Rep. 744, 25 C. C. A. 190; *Union P. R. Co. v. Novak*, 15 U. S. App. 400, 61 Fed. Rep. 573, 9 C. C. A. 629; *Sullivan v. New York, N. H. & H. R. Co.* 154 Mass. 527; *Cherokee & P. Coal & Min. Co. v. Britton*, 8 Kan. App. 292; *Croswell, Electricity*, § 284.

A nonsuit is properly refused unless plaintiff's evidence, taken in its most favorable light, would not authorize the jury to find a verdict in his favor. Every intendment, and every fair and legitimate inference which can arise from the evidence, must be made in favor of the plaintiff.

Wallace v. Suburban R. Co. 26 Or. 174, 25 L. R. A. 663; *Hedin v. Suburban R. Co.* 26 Or. 155; *Vanbeber v. Plunkett*, 26 Or. 562, 27 L. R. A. 811; *Brown v. Oregon Lumber Co.* 24 Or. 315; *Herbert v. Dufur*, 23 Or. 462; *Salomon v. Cress*, 22 Or. 177; *Great Northern R. Co. v. McLaughlin*, 44 U. S. App. 189, 70 Fed. Rep. 669, 17 C. C. A. 330.

The jury viewed the bridge and saw the wires in question, and their situation, and that 40 L. R. A.

of the bridge. What they saw there had an important bearing on the question of contributory negligence, and this is entitled to consideration on the question of the propriety of refusing a nonsuit.

Jones, Ev. § 412; *Tully v. Fitchburg R. Co.* 184 Mass. 499.

Courts incline to greater liberality in cases of death by wrongful act in allowing the questions of the negligence of the defendant, and of the contributory negligence of the plaintiff, to go to the jury upon slight evidence.

Tiffany, Death by Wrongful Act, § 189; *Maguire v. Fitchburg R. Co.* 146 Mass. 879; *McDermott v. Iowa Falls & S. C. R. Co.* (Iowa) 47 N. W. 1087; *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272.

Deceased had a right to assume that the place to which he was sent was safe.

Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L. R. A. 43; *Illingsworth v. Boston Electric Light Co.* 161 Mass. 588, 25 L. R. A. 552; *Gulf, C. & S. F. R. Co. v. Kelly*, (Tex. Civ. App.) 84 S. W. 140; *Newark Electric Light & P. Co. v. Garden*, 39 U. S. App. 416, 78 Fed. Rep. 74, 23 C. C. A. 649; *Johnston v. Oregon Short Line R. Co.* 23 Or. 94; *Consolidated Kansas City Smelting & Ref. Co. v. Tinchert*, 5 Kan. App. 130; *Cherokee & P. Coal & Min. Co. v. Britton*, 3 Kan. App. 292; *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 964, 7 L. R. A. 172, and note; *Bunker Hill & S. Min. & C. Co. v. Oberder*, 48 U. S. App. 339, 79 Fed. Rep. 726, 25 C. C. A. 171; *Croswell, Electricity*, § 266.

As between deceased and appellant, deceased assumed those risks only to which, having actual knowledge thereof, he voluntarily and unnecessarily exposed himself. He was under no duty toward appellant, and was under no obligation or duty to know or ascertain the danger in the wires.

Illingsworth v. Boston Electric Light Co. 161 Mass. 588, 25 L. R. A. 552; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L. R. A. 43; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 596; *Newark Electric Light & P. Co. v. Garden*, 39 U. S. App. 416, 78 Fed. Rep. 74, 27 L. R. A. 725, 23 C. C. A. 649; *Croswell, Law of Electricity*, §§ 285, 256.

Deceased was not a trespasser in working on the bridge and handling appellant's wires, nor even a licensee, but was an employee of the bridge owner, by whose license appellant's wires were placed and maintained on the bridge. He was rightfully there, engaged in a lawful occupation, and appellant owed him the duty of so conducting its dangerous business that he might not be injured.

Ennis v. Gray, 87 Hun. 355; *Griffin v. United Electric Light Co.* 164 Mass. 492, 32 L. R. A. 400; *Illingsworth v. Boston Electric Light Co.* 161 Mass. 588, 25 L. R. A. 552; *Newark Electric Light & P. Co. v. Garden*, 39 U. S. App. 416, 78 Fed. Rep. 74, 27 L. R. A. 725, 23 C. C. A. 649.

The doctrine of fellow servant can be invoked only by the common master, and has no application in this case.

Chicago, St. P. & K. C. R. Co. v. Chambers, 32 U. S. App. 253, 68 Fed. Rep. 143, 15 C. C. A. 327, and cases cited.

The concurrent negligence of a third person is no defense in personal injury or death cases, and this is true whether the defendant and the third person were acting together or severally, or whether the two negligent acts were joint or separate and distinct.

United Electric R. Co. v. Shelton, 89 Tenn. 423; *Cartersville v. Cook*, 129 Ill. 152, 4 L. R. A. 721; *Bunting v. Hogsett*, 139 Pa. 363, 12 L. R. A. 268; *Masterson v. New York C. & H. R. R. Co.* 84 N. Y. 247, 38 Am. Rep. 510; *Barrett v. Third Ave. R. Co.* 45 N. Y. 628; *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418; *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 1 L. R. A. 693; *Lake v. Milliken*, 63 Me. 240, 16 Am. Rep. 456; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11; *Kellow v. Central Iowa R. Co.* 68 Iowa, 470, 56 Am. Rep. 858; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186; *Baltimore & O. R. Co. v. Friel*, 39 U. S. App. 451, 77 Fed. Rep. 127, 23 C. C. A. 77; *Brown v. Cox Bros.* 75 Fed. Rep. 689; *Chicago, St. P. & K. C. R. Co. v. Chambers*, 32 U. S. App. 253, 68 Fed. Rep. 148, 15 C. C. A. 327.

The jury was properly instructed as to the degree of care required of appellant.

Ahern v. Oregon Teleph. & Teleg. Co. 24 Or. 276, 22 L. R. A. 635; *McAdam v. Central R. & Electric Co.* 67 Conn. 445; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 596; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L. R. A. 43; *Illingsworth v. Boston Electric Light Co.* 161 Mass. 583, 25 L. R. A. 552; *Searle v. Kanawha & O. R. Co.* 32 W. Va. 370; *Brown v. Seattle City R. Co.* 16 Wash. 465; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, and note; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Illinois C. R. Co. v. Davidson*, 46 U. S. App. 300, 76 Fed. Rep. 517, 22 C. C. A. 306; *Croswell, Electricity*, §§ 284, 256; 28 Am. & Eng. Enc. Law, p. 1, note 1; *Illinois C. R. Co. v. Phillips*, 49 Ill. 284; *Kelly v. Hannibal & St. J. R. Co.* 70 Mo. 604; *McLaughlin v. Louisville Electric Light Co.* 18 Ky. L. Rep. 693, 34 L. R. A. 812; *Gulf, C. & S. F. R. Co. v. Brown* (Tex. Civ. App.) 40 S. W. 608; *Haynes v. Raleigh Gas Co.* 114 N. C. 211, 26 L. R. A. 810; *Cherokee & P. Coal & Min. Co. v. Britton*, 3 Kan. App. 292.

Bean, J., delivered the opinion of the court:

It is claimed at the outset that the action cannot be maintained, because the statute under which it is brought is a survival statute, and, as the complaint alleges and the evidence shows, that the death of plaintiff's intestate was instantaneous. There was no interval of time between the injury and the death within which the deceased could have brought an action for the injury, and therefore there was no right of action to survive to his personal representatives. The statute provides that a cause of action arising out of an injury to the person dies with the person, except that, "when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an

injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed \$5,000, and the amount recovered, if any, shall be administered as other personal property of the deceased person." Hill's Anno. Code, §§ 369, 371. It is agreed that at common law there was no remedy by way of a civil action for the death of a human being, and that a cause of action arising out of an injury to the person died with the person. But the practical impossibility of securing the punishment of mere carelessness by means of a criminal action induced the British Parliament in 1846 to pass what is known as "Lord Campbell's Act," by which a civil remedy is given to the personal representative of one whose death is caused by the wrongful act or omission of another for the benefit of the widow, husband, parent, or child of such person. This statute has been in substance, in one form or another, incorporated into the legislation of most of the states of the Union, and the holding is quite universal that it creates a new right of action for the wrongful death, which may be maintained whether it was instantaneous or consequential. 1 Shearm. & Redf. Neg. § 189; *Cooley, Tort*, p. 264; and *Seward v. The Vera Cruz*, L. R. 3 App. Cas. 59. But the contention for the defendant is that the statute of this state, unlike Lord Campbell's act and the statutes modeled after it, does not create a new right of action for the death, but is a survival statute under which the personal representatives of a deceased person may bring an action to recover damages for the injury which caused the death in cases where the party injured was entitled to bring such action, but died before exercising such right; and in support of this view we are referred to *Belding v. Black Hills & Ft. P. R. Co.* 3 S. D. 369; *Kearney v. Bostons & W. R. Corp.* 9 Cush. 108; *Bancroft v. Boston & W. R. Corp.* 11 Allen, 34; *Coreoran v. Boston & A. R. Co.* 133 Mass. 507; *Riley v. Connecticut River R. Co.* 135 Mass. 292; *Mutcalley v. Washburn Car Wheel Co.* 145 Mass. 281; *Maher v. Boston & A. R. Co.* 158 Mass. 36; *Illinois C. R. Co. v. Pendergrass*, 69 Miss. 425.

But the statutes under which these decisions were made are essentially different from ours. The statute of South Dakota provides (Comp. Laws, § 5498) that, if the life of any person not in the employment of a railroad company shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, his personal representatives may institute suit to recover damages in the same manner that the person might have done for any injury where death did not ensue; and (§ 5499) that, if the life of any person is lost or destroyed by the neglect, carelessness, etc., of another person, company, or corporation, etc., the widow, heir, or personal representative of the deceased shall have the right to sue and recover damages for the death of such person; and the court held, in the case referred to, that under these provisions of the law a personal representative could not recover for the loss of the life of his intestate, but that such right was conferred exclusively upon the widow or heir, and the personal representative could only recover such damages as the deceased had

suffered up to the time of his death. For that reason no action could be maintained where the death was instantaneous. The supreme court of Kentucky, however, in *Givens v. Kentucky C. R. Co.* 89 Ky. 231, reached a different conclusion under a similar statute. The statute under which the Massachusetts decisions were made provides that "the action of trespass on the case, for damages to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living" (Stat. 1842, chap. 89, § 1); and, as Mr. Chief Justice Shaw says in *Kearney v. Boston & W. R. Corp.* 9 Cush. 108, "supposes the party deceased to have been once entitled to bring an action for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising that right." It is therefore held in that state, under what Judge Cooley characterizes (Cooley, Torts, p. 264) as "a somewhat nice and technical construction of the statute," that the action will not lie when the death is instantaneous, but, if there is the slightest interval between the accident and the death, it can be maintained; and that the right does not depend upon intelligence, consciousness, or mental capacity of any kind on the part of the deceased after he is injured and before his death. The Mississippi statute declares that "executors, administrators, and collectors shall have full power and authority to commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted," and that "executors and administrators shall have an action for any trespass done to the person . . . of their testator or intestate against the trespasser, and recover damages in like manner as the testator or intestate would have had if living, and the money so recovered shall be assets and accounted for as such." Code, §§ 2078, 2079. The court held that the purpose of the statute is "to save to personal representatives the right to begin and carry on such personal actions as the deceased might have begun and carried on if he had not died," and that the personal representative can have no standing in court where the death is simultaneous with the injury, but in such cases all recoverable damages must be sought by the kindred who have sustained the loss. It thus appears that the statutes construed by the decisions relied upon by the defendant were, as interpreted by the courts, in each instance designed to prevent a cause of action accruing to the deceased in his lifetime for an injury to his person from being defeated by his subsequent death, and not to create a new cause of action for the death. But such is manifestly not the purpose or effect of our statute. It provides that when the death of a person is caused by the wrongful act or omission of another, his personal representative may maintain an action therefor,—that is, for the death,—if the deceased might have maintained an action had he lived for the injury which caused the death. The language of the statute is plain, and its meaning obvious. It clearly

creates a new right of action in favor of the personal representative for the death itself, and not an action founded on survivorship, or on any cause of action in favor of the deceased. The death, and not the injury from which the death results, is the cause of action under the statute, and the personal representatives are entitled to recover damages for the wrongful taking away of the life itself; and therefore it makes no difference whether the injured party was killed instantly or not. Nor does it matter that the damages recovered become assets of the estate, to be administered upon as other personal property of the deceased, and do not go to certain designated persons as provided in Lord Campbell's act, and in many states of this country. This is but a statutory direction as to the disposition to be made of the damages to be recovered, and does not determine the question as to whether the statute creates a new right of action or is only a survival statute. In the absence of the statute, no right of action for the death exists in favor of any person, and it was clearly competent for the legislature, in creating this new right, to make such provision as to the disposition of the damages recovered thereunder as it might see proper.

The statutes of the various states which have in substance adopted Lord Campbell's act differ widely in this respect, and it has never been suggested, so far as we are aware, that for this reason they do not give a cause of action for the death. And actions brought under § 371 have repeatedly been before this court in one form or another, and it has always been assumed that the action was for the death, and that it made no difference, either in the right to maintain it or in the amount recovered, whether the deceased was killed instantly or not. *Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450. And the same construction has been put upon the statute by the Federal courts. In *The Oregon*, 73 Fed. Rep. 846, Mr. Justice Bellinger, speaking of the effect of § 371, says: "The Oregon statute, unlike that of Louisiana, does not provide that causes of damage to another shall survive in case of death. It is substantially like Lord Campbell's act; and in the case of *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59, the view held was (Lord Blackburn concurring), not that the cause of action survived, but that 'a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym v. Great Northern R. Co.* 4 Best & S. 896, is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who, under such circumstances, suffers pecuniary loss by the death.' In the case of *Pym v. Great Northern R. Co.* cited in the foregoing quotation, it was argued in behalf of the defendant that the action maintainable under Lord Campbell's act by the personal representatives of a deceased person is 'a mere continuance of that which would have accrued to the deceased if he had lived;' but Erle, Ch. J., said: 'The statute, as appears to me, gives to the personal representatives a cause of action

beyond that which the deceased would have if he had survived, and based on different principles.' 4 Best & S. 403. And so in *The City of Norwalk* [55 Fed. Rep. 98], the court considers the right 'a new right,' which is 'none the less maritime because based upon state legislation, where the subject-matter is maritime.'" And in *Holland v. Brown*, 35 Fed. Rep. 43, Mr. Justice Deady said, concerning the same statute: "The action given by the statute is for the death simply. This includes, of course, all such losses to his estate, or creditors, and next of kin to whom it belongs, and for whose benefit the action is allowed, as may be fairly implied from the cessation of his life. The fact on which the damages are computed is death and its consequences, and not its antecedents or cause." See also *Lung Chung v. Northern P. R. Co.* 10 Sawy. 17, 19 Fed. Rep. 254, and *Ladd v. Foster*, 12 Sawy. 547, 31 Fed. Rep. 827. The statutes of Kansas and Indiana are identical with ours, except that damages are allowed to the extent of \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin. Mr. Justice Brewer, in *Hulbert v. Topeka*, 34 Fed. Rep. 510, referring to the Kansas statute, says it "gives a new right of action—one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly or lived months; whether he suffered lingering pain or not; whether or not he was put to any expense for medical attendance and nursing. None of these matters are to be considered in an action under § 422; and the single question is, How much was the wrongful taking away of his life injured his widow or next of kin? It is an action to recover damages for the death, and in no sense a survival of an action which accrued to the decedent before his death." And to the same effect, see *Martin v. Missouri P. R. Co.* 58 Kan. 475; *Eureka v. Merrifield*, 53 Kan. 794; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46; *Missouri P. R. Co. v. Bennett*, 5 Kan. App. 231.

In Indiana it has been held that, while the statute does not in terms "revive the common-law right of action for personal injury nor make it survive the death of the injured person," it does "create a new right in favor and for the benefit of the next of kin or heirs of the person whose death has been wrongfully caused." *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169. The questions determined in the adjudged cases on the right of the personal representatives of one whose death was caused by the wrongful act or omission of another to maintain an action for damages against the latter arose under such dissimilar statutes that the decisions afford but little light upon the interpretation of any particular statute at variance with the one under consideration in the given case, and hence it is useless to attempt any further examination of them at this time. However, the following authorities are more or less in point in the present discussion, and in the main tend to support our conclusion as

to the proper construction of the statute: *Shearm. & Redf. Neg.* § 189; *Cooley, Torts*, p. 264; 2 *Thomp. Neg.* 1283; *Tiffany, Death by Wrongful Act*, § 78; *Brown v. Buffalo & S. L. R. Co.* 22 N. Y. 191; *Roach v. Consolidated Imperial Min. Co.* 7 Sawy. 224, 7 Fed. Rep. 693; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Murphy v. New York & N. H. R. Co.* 30 Conn. 184; *Givens v. Kentucky C. R. Co.* 89 Ky. 281; *Conners v. Burlington, C. R. & N. R. Co.* 71 Iowa, 490, 60 Am. Rep. 814; *Worden v. Humeston & S. R. Co.* 72 Iowa, 201; *Nashville & C. R. Co. v. Prince*, 2 Heisk. 580.

It is next claimed that the complaint is defective because it does not show that the deceased left surviving him any heirs, legatees, next of kin, or creditors. Under the provisions of Lord Campbell's act, and statutes which, like it, give a right of action for the death of a person caused by the wrongful act of another for the benefit of certain designated relatives, no action can be maintained at all unless the deceased left at least one surviving relative of the class specified, and the complaint must necessarily show that fact. 1 *Shearm. & Redf. Neg.* § 185; *Stewart v. Terre Haute & I. R. Co.* 103 Ind. 44. In such case the executor or administrator, in prosecuting the action, is a mere nominal party, who sues for the benefit of the real party in interest; and such damages as he may recover do not go to the estate of the deceased, nor belong to him in his representative capacity, but to the person for whose benefit the right of action is given by the statute. *Blake v. Midland R. Co.* 19 Q. B. 93; *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189. The theory is that those entitled to the benefit of the statute have a pecuniary interest in the life of the deceased, and the recovery is to compensate them for the pecuniary loss they have sustained. In short, a new right of action is created for the benefit of certain designated persons, and consequently can be maintained only when the deceased left surviving him someone entitled to its benefit. Thus, where a statute gives a right of action for the benefit of the widow and next of kin, a husband, not being the next of kin to his wife, is not within its terms, and an action cannot be maintained if the deceased leave a husband only. *Lucas v. New York C. R. Co.* 21 Barb. 245; *Central R. & Bkg. Co. v. Dixon*, 42 Ga. 327. So, also, where the statute is for the benefit of the widow and children, no recovery can be had when the deceased left no widow or children. *Com. v. Boston & A. R. Co.* 121 Mass. 36. But it will be observed that the right of action created by our statute is not for the benefit of any particular person, but the damages recovered become assets of the estate, to be applied by the administrator to the payment of debts, or distributed as the exigencies of the estate and the laws governing the distribution of personal property may direct. Under Lord Campbell's act, and similar statutes, the damages recovered belong to the designated beneficiary, and are measured by the value of the life taken to the particular person entitled to the benefit of the statute, while under our statute they belong to the estate, and are coextensive with the value of the life lost, without regard to its value to any particular person. In the one

case the object of the action is to recover the pecuniary loss sustained by the designated relatives, and in the other the value of the life lost, measured, as near as can be, by the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life. *Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450.

It follows, therefore, that, so far as the right to maintain the action is concerned, it is immaterial whether the deceased left surviving him any relatives or creditors whatever. The right of action is given by the statute to the administrator or executor in his representative capacity, and is in the nature of an asset of the estate. The heirs, creditors, or distributees have no interest in the recovery on account of any right of action for the pecuniary injury sustained by them, but only by virtue of being creditors or of kinship; and, if the expense of the administration and debts of the deceased equal or exceed the assets, including the amount of the recovery, the next of kin would receive no benefit whatever from the right of action. It is ingeniously argued, however, that an estate of a deceased person can in no way be damaged by his death, and this is probably true if the word "estate" is to be taken in the technical sense of meaning the property left by him. But it is not so used when speaking of the measure of damages for the wrongful death of a person. It is thus used as a convenient term to distinguish the rule as to the measure of damages under our statute from the one prevailing under statutes similar to Lord Campbell's act, and in which the recovery is for the benefit of some designated individual.

This brings us to the important question whether the defendant's motion for a nonsuit should have been sustained. It is undisputed that the wires which caused the death of plaintiff's intestate were placed by the defendant in a position where they would probably be exposed to contact by persons working on the bridge, although it knew that it would be necessary to repair the structure from time to time; and it admits and alleges that it is not practicable, in the present knowledge of the science of electricity, to insulate wires so as to make them safe, and not dangerous to persons coming in contact with them when charged with the high voltage of electricity carried over the wires in question. This is, in our opinion, sufficient to make out a prima facie case of negligence, because it tends to support the main ground of recovery relied on by the plaintiff, *viz.*, that, although the defendant knew it would be necessary from time to time for the railway company to send men on top of the bridge to make needed repairs, it placed its wires to be used in the transmission of such a high voltage of electricity as inevitably to cause the instant death of any person coming in contact with two of them at the same time in such a position that it was impracticable, if not impossible, to make such repairs without doing so.

It is contended, however, that the deceased was guilty of contributory negligence (1) in going on top of the bridge to work without ascertaining from the defendant company, or

someone having knowledge on the subject, whether it would be safe to come in contact with the defendant's wires; and (2) in attempting at the time of the accident to cross from one side of the bridge to the other by walking on the top lateral braces and stepping over the wires, rather than crossing on the end strut brace and under the wires. But both of these contentions proceed on the theory that he was chargeable with knowledge of the fact that the wires were dangerous, and, having voluntarily exposed himself to the risk of contact therewith, must take the consequences of his own conduct. And, indeed, this is the underlying question on this branch of the case. The deceased was unquestionably guilty of such negligence as will preclude a recovery if he is to be charged with knowledge that the defendant's wires, although apparently harmless, were in fact dangerous; for he could have avoided coming in contact with them. But, on the other hand, it cannot be ruled, as matter of law, that he was negligent in going on the bridge to work or in crossing on the top lateral braces, if the defendant owed to him the duty of exercising reasonable care to prevent injury to him from contact with its wires while at his work. There is evidence tending to show that he acted with due care and caution, and did not heedlessly or recklessly expose himself to contact with the wires. It was only after they had been examined, and their apparent safety ascertained, that he and his fellow workmen ventured to work at a place where they would probably or necessarily come in contact with the wires; and there is evidence to the effect that the usual and customary way for men employed in the construction or repair of a bridge of the character in question to cross from one top chord to the other is by walking on one of the top lateral braces. Unless, therefore, the case should have been withdrawn from the jury on the ground that the deceased was bound, at his peril, to ascertain whether the wires were in fact dangerous before working at a place on the bridge where he would be likely to come in contact with them, there was no error in denying the motion for nonsuit, and submitting the issue of negligence as respects the defendant and plaintiff to the jury; and we do not think any such doctrine as the one suggested can be maintained either upon reason or authority. It is not claimed that the deceased had any more knowledge of electricity or its effects than such as is possessed by persons of average intelligence. He knew that there is such a force carried by wires and used in driving cars and lighting streets and houses, and that the wires in question were used for that purpose; but he supposed, as is the common understanding, that the insulating material with which such wires are covered is placed there for the purpose and with the result of making them safe. He had no knowledge of the fact, as this record discloses, that wires are used for the transmission of electricity, which, on account of the high voltage carried, cannot be insulated at any reasonable cost so as to make them safe, and that the insulating material sometimes used thereon affords no protection from injury. Nothing can, therefore, be claimed in this case on account of any special knowledge of electricity or its

effect possessed by the deceased; and there is no pretense that he knew the wires were in fact dangerous, and, as he was not the agent or servant of the defendant company, he was not, in our opinion, chargeable with such knowledge, nor did he assume any risk on account of the wires unless he knew the danger and voluntarily exposed himself to it. He was not a trespasser or licensee bound to take the premises in the condition in which he found them, but the servant of the railway company, lawfully on the bridge, engaged in an employment which, according to the testimony, necessarily required him to come in contact with the wires of the defendant company. These wires were visible, insulated, and to all appearances perfectly harmless. There was nothing in their appearance to warn the deceased of the great force being carried over them, or that there was any danger in coming in contact with them. The danger was a hidden and secret one, and the insulation of the wires deceptive. The familiar rule that one who deliberately goes into a place of known or apparent danger and is injured must take the consequences of his hardihood can have no application here, because there was in fact no apparent danger, but, on the contrary, so far as the deceased—a nonexpert—could ascertain from an examination, the wires were entirely safe, and in perfect condition. He had a right therefore, to believe that the place was safe, and to assume that the defendant company had exercised due care and caution to prevent injury to him, and had not placed on the bridge, in such a position that he would likely come in contact with them, wires which it knew to be dangerous. It was using the bridge by permission of the railway company for the support of wires used in the transmission of a highly dangerous, subtle, and invisible force, and was, therefore, chargeable with the duty of placing and keeping them, as far as practicable, in a condition to avoid injuring the servants of the railway company while at their work. Its duties and responsibilities in this respect are similar to those of an electric company which, by permission of the owner, places its wires over the roof, or attached to a house or building; and in such case the rule is quite universal that the company is liable to the owner and his servants for an injury received through its negligence by contact with such wires when making needed repairs or improvements to the building, if the injured party is in the exercise of due care and caution at the time.

The question respecting the care required of electric companies under such circumstances first came before the courts in the case of *Clements v. Louisiana Electric Light Co.* (decided in 1892) 44 La. Ann. 692, 16 L. R. A. 48. In that case the plaintiff's intestate—a tinsmith engaged to assist in repairing the roof—was killed while at his work by coming in contact with the wires of the defendant company, placed 2 feet 4 inches above the roof. The wires were insulated, and to all appearances safe, but there was a defect in the insulation, which caused his death while he was either attempting to step over or go under the wires, in trying to reach the gutter. The court held, after mature deliberation, that the company

was responsible. And although there was involved in the case a failure to comply with a municipal ordinance requiring electric light companies to have the splices of their wires perfectly insulated, it was considered that this ordinance added nothing to the duty or liability of the company. The court says, in speaking upon this matter, that "it [the wire] passed over a roof to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean the roof. It was the duty of the company, independent of any statutory regulation, to see that their lines were safe for those who, by their occupation, were brought in close proximity to them." And in answer to the objection that the deceased was guilty of contributory negligence it said: "The deceased, Clements, was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with the defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in so doing he incurred any greater risk. The wires were visible, and to all appearances were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact. He had a right to believe it was safe, and that the company had complied with its duties specified by law. He was required to look for patent, and not latent, defects. Had he known of the defective insulation and put himself in contact with the wire he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of insulation and the negligence of the defendant. He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact, there was no apparent danger." So, also, in *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 596, the plaintiff was sent on top of a building by the owner to adjust a sign which was about to be blown down by the wind, and, coming in contact with an electric light wire, placed along and near the roof, was injured and it was held that the failure of defendant to place its wires a sufficient distance above the roof to enable persons lawfully thereon to pass under them was sufficient proof of negligence to justify the verdict, and that plaintiff was not guilty of contributory negligence by going on the roof. The court says: "Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there

would not come in contact with them. Not to do so was sufficient proof of negligence to justify the verdict. If there was any excuse for not so locating the wires, it is on the claim that they were so covered that there was no danger in coming in contact with them. The accident itself proves that this was not sufficient, *res ipsa loquitur*. The point most insisted upon here is that plaintiff was guilty of contributory negligence; that he knew, or ought to have known, of the location of the wires, and should have taken care to avoid them. It is not a case where the doctrine of negligent ignorance can apply. Plaintiff owed defendant no duty, and no part of his employment required him to know, or gave him opportunity to know. Unless it can be held that he did in fact know, there was no evidence which even tended to show negligence on his part."

And again, in *Ennis v. Gray*, 87 Hun, 355, the plaintiff, a roofer, employed by the owner of a building, was injured while at his work by coming in contact with an electric-light wire of the defendant, which was attached to the building, and which the evidence tended to show was placed without proper safeguards and improperly insulated, and the court held that the issue as to the defendant's negligence and the contributory negligence of the plaintiff was for the jury. In this case the defendant tried to escape liability by claiming that there was no contractual relation or other privity between it and the plaintiff which required it to protect him while at work for the owner of the building, and while on his premises, and that as to him the construction and maintenance of electric apparatus were *res inter alios*. But the court held that the defendant was engaged in the business of supplying electricity for lighting purposes, and considering the high voltage which it was necessary to carry over its wires, the business was of a character highly dangerous and likely to result in injury to others unless conducted with care and skill; and therefore, outside of any contractual relation, the law imposed the duty upon defendant of using the necessary skill and prudence to prevent injury to persons coming in contact with its wires, not only as regards the public generally, but also with respect to any individual engaged in a lawful occupation in a place where he was entitled to be. So, also, in *McLaughlin v. Louisville Electric Light Co.* 18 Ky. L. Rep. 693, 34 L. R. A. 812, a person engaged in painting a building was injured by coming in contact with an imperfectly insulated electric wire on the side of the building, while climbing out of a window upon the cornice, and in an action against the electric company to recover damages for the injury it was held that the defendant was bound to exercise the utmost care to keep the insulation of its wires perfect at a place where people had a right to go for work, business, or pleasure, although very great care may be sufficient for wires at other places; that an apparently properly insulated wire is an invitation or inducement to such person to risk the consequence of contact with it; that the fact that the insulation of such wires is expensive or inconvenient is no excuse for failure to make such insulation perfect at places where people have a right to go; and that the plain-

tiff in the action was not guilty of contributory negligence in coming in contact with the wires unless in so doing he failed to exercise the degree of care which an ordinarily careful and prudent person usually exercises under similar circumstances, and the question whether he exercised such care was for the jury and not the court. A like principle was applied in *Illingsworth v. Boston Electric Light Co.* 161 Mass. 583, 23 L. R. A. 552. The plaintiff was employed in the fire-alarm system of the city of Boston. The city used for the lines of its system structures erected by the defendant electric company for the support of its electric wires. While the plaintiff was in the performance of its duties and descending one of such structures, the pliers in his belt caught in a wire belonging to the defendant, and in reaching around to clear them he received injury by the contact of his hand with a wire of the defendant not properly insulated; and it was held in an action against the company for damages, that the defendant's negligence in leaving the joints of its wires without insulation at such place, and the question whether the plaintiff was in the exercise of due care, should have been submitted to the jury. So, also, in *Griffin v. United Electric Light Co.* 164 Mass. 492, 32 L. R. A. 400, a tinsmith, while engaged in placing an iron conductor on a building, was injured by receiving a shock from an electric-light wire running along the side of the building, about 12 feet from the ground, by reason of the conductor which he was handling coming in contact with a place on the wire where the insulating material had been worn off, and it was held that the question of defendant's negligence and of due care on the part of plaintiff were for the jury, and that it could not be said, as a matter of law, that the condition of the wire was so apparent that the plaintiff must or ought to have seen it although the accident happened in the forenoon; and that, while an expert might consider it dangerous to touch any wire unless he knew it was a harmless one, no such degree of care could be required of the plaintiff, who was not an expert, but that the question of his want of care was for the jury. Applying the doctrine of these cases, and the underlying principles by which they are controlled, to the case in hand, it is clear that no error was committed in overruling the motion for nonsuit. It is true that in the cases referred to the actions were grounded on negligence in using improperly insulated wires, but in each instance the judgment of the court proceeds on the theory that it is a want of due care for a company handling and transmitting the highly dangerous force of electricity to use a wire known, or which reasonably ought to have been known, to be dangerous, at a place where others are lawfully entitled to be; and it is assumed in each instance that, but for the insufficient insulation, the wires would have been safe. The same principle governs here. Although the wires of the defendant company were insulated, it is admitted that such insulation was no protection whatever to persons coming in contact with them, and hence the negligence of the defendant is equally as great, if not greater, than if the danger had been from insufficient or want of insulation..

The apparently perfect insulation was calculated to deceive, and to cause one unfamiliar with the facts to suppose the wires safe. It acted as an invitation to persons at work in and among the wires to risk the consequences of contact therewith. And such was the effect in this case. But for the insulation, and the belief of safety caused thereby, it is not at all probable that the deceased would have exposed himself to the risk of a contact with the wires in question. The defendant, however, knew that the insulation afforded no protection, and yet, with knowledge of that fact, put its wires in a place where the servants of the railway company might come in contact with them while in the performance of their duties, and without giving any warning or notice of the danger whatever. Under such circumstances a jury would certainly be justified in finding that it did not exercise due care and caution in so doing. Electric companies, of course, are not bound to have perfect apparatus or perfect construction, but they are required to exercise a degree of care and prudence in the construction and maintenance of their wires commensurate with the danger; and where their wires are designed to carry a strong and powerful current of electricity, so that persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence to prevent such injury; and whether such care has been exercised in a given case is ordinarily for the jury. *Croswell, Electricity*, § 234.

The cases cited and relied upon by the defendant are not in point in this contention. In *Beck v. Vancouver R. Co.* 25 Or. 82; *Salem-Beafield Stone Co. v. Hobbs*, 11 Ind. App. 27; *Salem-Beafield Stone Co. v. O'Brien*, 12 Ind. App. 217, and *Flood v. Western U. Teleg. Co.* 131 N. Y. 603,—the danger was open and visible, and could have been ascertained by the complainant if he had exercised his faculties. In *Hector v. Boston Electric Light Co.* 161 Mass. 558, 25 L. R. A. 554, the facts are that a lineman of a telephone and telegraph company was sent to attach a wire to a standard owned by the defendant on the roof of a building. Instead of entering this building, and going out on the roof, he went up on a building some distance away, passed over the several intervening structures until he came to the building adjoining the one on which the standard was placed. While stooping down to see how he could get from this building to the place of his destination, he came in contact with the wires of the defendant company, and was injured by reason of the insulation being worn off. The case was decided in favor of the defendant on the ground that it owed no duty to the plaintiff to maintain an effective insulation at the place where he was injured, where he was not sent to work, and where he had no right to be. The same is true of the case of the boy who was killed by coming in contact with the wire of an electric company while searching on top of a building for a lost ball. *Sullivan v. Boston & A. R. Co.* 156 Mass. 378. In both cases the injured party was a trespasser, and at a place where he had no right to be, and where the company was under no obligation to protect him from in-

jury. But in the case at bar the deceased was rightfully at the place where he was injured. In *McMullan v. Edison Electric Illuminating Co.* 13 Misc. 392, the defendant company had disconnected its service wires, carrying a low current of electricity, which could not cause death or great bodily harm, from the distributing wires in the cellar, 8 feet above the ground, in order that the owner might make certain repairs, but failed to "tape" the ends of the wires, and it was held that it was not liable for an injury to a workman while engaged in making such repairs, because no reasonable person would, under the circumstances, have anticipated "that any person would have entered this cellar, mounted upon a box, and, after seeing these wires, taken hold of at least two of them at the same time, in such a manner as to make a short circuit, or bring the two wires in contact with his hand near the same point, and thus burn his hand." In *Burt v. Edison General Electric Co.* 89 Hun, 498, the evidence shows that the deceased deliberately chose a way of known danger to go from one part of a cellar to another, when a perfectly safe way was open to him, and the court held that he must take the consequences of his own hardihood.

It only remains to notice briefly the assignments of error based upon the giving and refusal of instructions by the trial court. The defendant requested in writing some fourteen different instructions, which were refused, except as given in substance in the general charge. All of these, except one, present different phases of the questions already considered, and therefore require no further notice. By the eighth request the court was asked to charge the jury that, if they should find for the plaintiff, they could not estimate nor give exemplary or vindictive damages nor any damages as a solatium for the grief or anguish of the surviving relatives, or the pain or suffering of the deceased. And while this instruction embodies a correct principle of law, and might, with propriety, have been given (*Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450), its refusal was not reversible error. Neither exemplary damages nor damages for the suffering of the deceased or any of his relatives were asked in the complaint, nor, so far as the record indicates, claimed at the trial. The allegations of the complaint and the proof were confined to the earning capacity, habits, and probable length of life of the deceased, and no instructions were given under which the jury could have understood that they had a right to consider any other matters in arriving at the amount of the verdict. By the instruction as given they were told, in effect, in assessing damages, if they found in favor of the plaintiff, to consider the earning capacity, habits, and probable length of life of the deceased, and thus determine what would probably have been his accumulations if he had lived the ordinary course of his life; and no question is made as to the soundness of this rule. The entire charge of the court as given seems to have been separated into paragraphs, in some instances without special reference to the context, and objections made and exceptions saved to the giving of each; and while the charge, which was given orally, is perhaps

open to some criticism on account of the verbal inaccuracy of the language used, to which the attention of the trial court was not specially called at the time, it, however, in our opinion, exhibits no reversible error, but, when taken as a whole, fairly and accurately presents the law as applicable to the facts of this case. The definition of "negligence" as given is not open to the criticism made, nor did the court withdraw the question of plaintiff's intestate's contributory negligence from the jury, but told them expressly that what he had said in regard to the defendant's liability must be taken with the proviso that the plaintiff's intestate did not himself contribute by his own negligence to the injury from which he died, and then proceeded with the charge in detail on that phase of the case. The statement that the words "care" and "diligence," when used in reference to the duty of the defendant, are not absolute, but relative, terms; "that, when the danger is great, the care and vigilance to escape the consequence of danger must be proportionately great. In matters of this sort, where people are dealing with electricity (one of the most subtle, powerful, and wonderful agencies known to man; an agency that is very destructive to human life, even when carefully and properly handled and treated).—I instruct you that in such a case as this due care would be the highest care and vigilance of which a man is capable, and which the condition of

science makes known at the time. And this is the degree of care which was demanded of the company: to so conduct itself in regard to the wires on that bridge as that the diligence and care should be proportionate to the danger which there existed,"—is but, in effect, an application to the case in hand of the rule that the care demanded of electric companies must be commensurate with the danger, and that, where their wires are carrying a highly dangerous current of electricity, as is admitted to have been carried over the wires which caused the death of plaintiff's intestate, the law imposes upon the company the utmost degree of care in their construction, inspection, and repair, so as to keep them harmless at places where persons are liable to come in contact with them. *Croswell, Electricity*, § 284; *Haynes v. Raleigh Gas Co.* 114 N. C. 208, 26 L. R. A. 810; *City Electric Street R. Co. v. Conery*, 61 Ark. 381, 31 L. R. A. 570; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 596, and authorities heretofore cited.

The questions in this case are important, and many of them of first impression in this state, and therefore we have given to the case that consideration which its merits deserve; but, finding no error in the record, *the judgment must be affirmed*, and it is so ordered.

Rehearing denied June 20, 1898.

PENNSYLVANIA SUPREME COURT.

Bridget MOONEY

v.

LUZERNE BOROUGH, *Appt.*

(186 Pa. 161.)

1. Negligence of a city causing the death of a person by contact with an abandoned telephone wire is a question for the jury, where the wire had been unused for several months, crossing a charged electric-light wire in close proximity thereto, and after sagging so as to interfere with public travel, was cut by a member of the borough council, and wrapped around a post within easy distance of pedestrians, and with one end resting on the ground or in the water.

2. The liability of a city for neglect of its duty to exercise care and supervision over electric wires suspended over its streets is not lessened by the fact that individuals or corporations are subjected to a like duty and liability.

(May 18, 1898.)

APPPEAL by defendant from a judgment of the Court of Common Pleas for Luzerne County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiffs' son. *Affirmed.*

NOTE.—As to liabilities for injuries by electric wires in highways, see *Denver Consol. Electric Co. v. Simpson* (Colo.) 81 L. R. A. 586, and *note*; also *Newark Electric Light & P. Co. v. Garden* (C. C. App. 3d C.) 37 L. R. A. 725; *Atlanta Consol. Street* 40 L. R. A.

The facts are stated in the opinion.

Messrs. D. O. Coughlin and George R. Bedford for appellant.

Messrs. William R. Gibbons and William S. M'Lean, for appellee:

It was the duty of the defendant to supervise and control the erection and maintenance of electric wires suspended over its streets.

Allentown v. Western U. Teleg. Co. 148 Pa. 117.

The maintenance and repairs of the same demand constant and rigid supervision, and every municipality owes such duty of rigid inspection to its citizens.

McKeesport v. McKeesport & R. Pass. R. Co. 2 Pa. Super. Ct. 242.

The negligence of the defendant was the proximate cause of the death of plaintiff's son. The contact of the wires was unquestionably a concurrent cause, but it was a cause not extraordinary, and therefore likely to be foreseen.

Schaeffer v. Jackson Twp. 150 Pa. 145, 18 L. R. A. 100; *Kieffer v. Hummelstown*, 151 Pa. 304, 17 L. R. A. 2; *Ewing v. North Versailles Twp.* 146 Pa. 309.

Sterrett, Ch. J., delivered the opinion of the court:

The appellant borough not only complains

R. Co. v. Owings (Ga.) 33 L. R. A. 798; *Willey v. Boston Electric Light Co.* (Mass.) 37 L. R. A. 723; and *Bergin v. Southern New England Teleph. Co.* (Conn.) 39 L. R. A. 192.

of the manner in which the case was submitted to the jury, but it challenges the right of the court to submit it to them in any form. The evidence bearing on all the disputed questions was quite sufficient to carry the case to the jury. It would have been manifest error to have affirmed defendant's third point. The fact that the telephone wire had been maintained in the same place for fifteen years without accident was no reason why it should continue there indefinitely without inspection. Directly the opposite conclusion was warranted, but it was for the jury. Taking into view the fact that the telephone wire had been in the same place for fifteen years, in connection with the further facts that the telephone line had been unused and abandoned for several months; that it crossed a charged electric-light wire, in close proximity thereto; and, finally, that a few months before the accident the old telephone wire sagged to such an extent as to interfere with public travel on the streets, and we have a condition of affairs that was at least sufficient to admonish the municipality that more than ordinary care should be exercised in the supervision of the overhead wires in question. When, under such circumstances, the sagging wire is cut by a member of the borough council, and one end wrapped around a post within easy distance of pedestrians on the highway crossing the bridge, with the end resting on the ground or in the water, the defendant has no just reason to complain that the question of its alleged negligence was submitted to the jury. The evidence was quite sufficient to justify the latter in finding that the accident which resulted in the sudden death of plaintiff's son was the natural and probable consequence of the manner in which the telephone wire was fastened to the post.

The only remaining question that requires notice is one presented by the second specifica-

tion. Defendant contends that, while a municipality is invested with police supervision of the wires of corporations occupying its streets, such supervision does not involve pecuniary responsibility, and, if an accident happens from a failure to maintain the wires in a safe and proper condition, the corporation owning the wires, and not the municipality, is alone responsible for resulting injuries; and *West Chester v. Apple*, 85 Pa. 284, is cited as authority for the position. While language used in the opinion in that case may justify the conclusion sought to be drawn therefrom, it was not necessary to the decision, and it has been expressly disapproved in *Philadelphia v. Smith*, 28 W. N. C. 242. In that case it was held by this court that the liability of a municipality for damages for injuries caused by defective sidewalk is not relieved against by the fact that the property owner is also liable. The same rule applies to dangerous defects or obstructions in the highway, whether overhead or at grade. The duty and liability of the municipality is in no way lessened by the fact that individuals or corporations are subject to a like duty and liability. The learned trial judge was therefore right in affirming plaintiff's point that "it is the duty of a municipality to exercise a careful supervision over the adjustment and regulation of the electric wires suspended over its streets," and that it is liable for injuries resulting from neglect of such duty. In view of the multiplicity of overhead wires carrying deadly currents and the increasing frequency of accidents from defects in such wires, or in the manner of their adjustment, it behooves municipalities to recognize and perform their duties in the premises in more than a perfunctory manner, if they would escape the consequences of negligence. Neither of the specifications of error is sustained.

Judgment affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS

Levy WILLIAMS, Admr., etc., of John M. Williams, Deceased, *Plff. in Err.*,

v.

THACKER COAL & COKE COMPANY.

(.....W. Va.....)

*1. It is the duty of an operator or agent of a coal mine to employ a competent mine boss under and according to the provisions of § 11, p. 995, Code 1891, Append., and, having done so, he has discharged his duty to his employees in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss.

2. A mine boss so employed is such a fellow servant as, in case of an injury to other employees through his negligence, the master is not responsible.

*Headnotes by MCWHORTER, J.

NOTE.—For a similar case of a statute regulating the employment of a mine boss, see *Durkin v. Kingston Coal Co. (Pa.)* 29 L. R. A. 808.
40 L. R. A.

(April 2, 1906.)

ERROR to the Circuit Court for Mingo County to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Goodykoontz, Marcum, Simms, & Enslow for plaintiff in error.

Messrs. Rucker, Keller, & Hamill, for defendant in error:

There is no evidence showing, or tending to show, that the plaintiff's intestate was authorized or invited to go into the air course when and where the accident occurred, unless he was so authorized or invited by virtue of a custom, or usage, among the miners to borrow and return each other's mining tools, the existence of which is attempted to be shown by plaintiff.

It is true that miners not supplied with tools of their own sometimes borrow such tools from other miners. This is conceded; but this practice or habit of the miners did not constitute a "custom," or "usage," in the legal sense

of these words, so as to bind their employer, the defendant, or render it liable for the consequences of their indulgence in such practice.

2 Am. & Eng. Enc. Law, p. 708, note 4.

The relation of master and servant does not exist "where the servant is at the time on a private errand of his own."

1 Lawson, Rights, Rem. & Pr. § 324.

The duty to use care in keeping his premises in safe condition does not devolve upon the master in regard to places where the servant goes voluntarily, for purposes of his own, without being required or authorized so to do.

1 Shearm. & Redf. Neg. § 190; *Neff v. Broom*, 70 Ga. 256; *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L. R. A. 385; *Woolwine v. Chesapeake & O. R. Co.* 36 W. Va. 329, 16 L. R. A. 271; *Belford v. Canada Shipping Co.* 35 Hun. 847; *Wright v. Rawson*, 52 Iowa, 329, 35 Am. Rep. 275; *Doggett v. Illinois C. R. Co.* 34 Iowa, 284.

A trespasser or mere licensee cannot recover damages for injuries resulting from negligence of the owner of premises where injury occurred, there being no legal duty due from the owner to the trespasser to keep the premises safe.

Cooley, Torts, pp. 659 *et seq.*; 3 Lawson, Rights, Rem. & Pr. § 1149; 14 Am. & Eng. Enc. Law, p. 907; 16 Am. & Eng. Enc. Law, pp. 111 *et seq.*, and notes; *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L. R. A. 215; *Woolwine v. Chesapeake & O. R. Co.* 36 W. Va. 329, 16 L. R. A. 271.

Under the Pennsylvania act of April 18, 1877 (Pub. Laws, 58), it is the duty of a mining company to provide a mining boss, and such company is not liable for any injury resulting from his negligence, if proper care has been exercised in his selection.

Redatone Coke Co. v. Roby, 115 Pa. 364; *Reese v. Biddle*, 112 Pa. 72; *Waddell v. Simson*, 112 Pa. 567.

In order to hold the master responsible for the act or omission of the servant, it must appear that the act or omission was, in contemplation of law, the act or omission of the master.

Baker v. Kinsey, 38 Cal. 684; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 845, and note; *Durkin v. Kingston Coal Co.* 171 Pa. 198, 29 L. R. A. 808.

McWhorter, J., delivered the opinion of the court:

On the 18th day of February, 1895, John M. Williams was in the employ of the Thacker Coal & Coke Company in Mingo county, engaged in mining or digging coal in said company's mines in room No. 11. About noon of that day he went into room No. 12, where two other miners were at work, to borrow from them a tampering bar and needle, which it seems it was necessary for him to have in the proper prosecution of his work in getting out his coal. In about an hour thereafter he returned the tools to the person from whom he borrowed them in room No. 12, and as he had turned, and was again leaving the last-named room, and before he had gotten entirely out of it, about 25 feet from the mouth of the room, he was crushed and killed beneath a large piece of slate 15 feet long, 5 or 6 feet wide, and 9 to

10 inches thick, which fell from the roof of the mine upon him. Said room No. 12 was a haulway, then being driven and constructed, and was intended to be, when completed, an air course. This room was further in the mine than room No. 11. Levy Williams, administratrix of John M. Williams, deceased, brought her action of trespass on the case against said the Thacker Coal & Coke Co. in Mingo circuit court, and filed her declaration at August rules, 1895, laying her damages at \$10,000. And at a term of said court, on the 16th day of September, defendant entered its qualified appearance, and moved to quash the summons and return of service, which motion was overruled, and the defendant then appeared, and demurred generally to the declaration, and to each count thereof, which was also overruled by the court. The defendant then pleaded not guilty, and on the 19th day of September a jury was impaneled and sworn to try the issue, and, after hearing all the evidence adduced by the plaintiff, the defendant moved the court to exclude such evidence, and direct the jury to render a verdict for the defendant, which motion the court overruled, to which ruling the defendant excepted. The defendant then introduced its testimony, and after the evidence had been introduced as well for the plaintiff as for the defendant, the defendant filed a demurrer to the evidence of the plaintiff, and the plaintiff entered her joinder therein, and the jury was directed to inquire what damages the plaintiff had sustained by reason of the matters shown by her in evidence in case judgment should be given for her upon the evidence, and the jury returned a special verdict for plaintiff for \$8,000, and the court having considered the defendant's demurrer to the evidence, sustained the same, and rendered judgment for defendant for costs, to which rulings of the court plaintiff excepted, and obtained from this court a writ of error and supersedeas, and assigned the following errors: "First. The court erred in sustaining the defendant's demurrer to the plaintiff's evidence in the case and giving judgment thereon against the plaintiff, because the evidence clearly establishes that the deceased, Williams, was killed while in the discharge of his duty as a miner in the defendant's coal mines, and without any fault or negligence upon his part whatever, by the falling of a large piece of overhanging slate that had been in an unsafe and insecure condition for at least two weeks prior to the day of the accident, and that its dangerous, unsafe, and insecure condition was known to the mine boss and mine propper for at least two weeks prior to the day of the accident; that the said mine boss and mine propper's attention had been called to it by Graves and White, the two miners working in said room No. 12, where the accident occurred, at least two weeks before the same did occur. Second. Because it was error upon the part of the court to refuse to overrule the defendant's demurrer to the plaintiff's evidence and to render judgment upon said demurrer in favor of the plaintiff."

Section 11, p. 995, Code 1891, Append. provides that, "in order to better secure the proper ventilation of every coal mine, and promote the health and safety of persons employed therein, the operator or agent shall employ a

competent and practical inside overseer, to be called "mining boss," who shall be a citizen, and an experienced coal miner, or any person having two years' experience in a coal mine;" and in prescribing the duties of such mining boss it provides that he "shall see that as the miners advance their excavations, proper break-throughs are made as provided in § 10 of this act, and that all loose coal, slate, and rock overhead in the working places, and along the haulways, be removed or carefully secured so as to prevent danger to persons employed in such mines," etc. This statute is taken from the statute of Pennsylvania. The latter requires the "owner or agent [of any coal mine] to employ a competent and practical inside overseer to be called 'mining boss' and then prescribes his duties, similar to those prescribed by our statute, while ours prescribes that such mining boss "shall be a citizen and an experienced coal miner, or any person having two years' experience in a coal mine." Under the Pennsylvania statute, in *Reese v. Biddle*, 112 Pa. 79, Justice Paxson, in the opinion of the court, says: "It was plain error to instruct the jury that the defendants below were responsible for the negligence of their mine boss. There was no evidence that he was not competent to perform his duties, and hence no negligence can be imputed to defendants for employing him. It has been repeatedly held that a mining boss is such a fellow servant as, in case of an injury to other employees through his negligence the master is not responsible."—and cites *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *Delaware & H. Canal Co. v. Carroll*, 89 Pa. 374; and *Keystone Bridge Co. v. Newberry*, 96 Pa. 246, 42 Am. Rep. 543. "The operator of a coal mine fulfils the measure of his duty to his employees if he commits his work to careful and skilful bosses and superintendents, who conduct the same to the best of their skill and ability. *Waddell v. Simson*, 112 Pa. 567, syl. point 3. The statute requires that the operator or agent of every coal mine shall employ a competent and practical inside overseer. For what purpose? To better secure the proper ventilation of the coal mine, and promote the health and safety of persons employed therein. Operators and agents are not supposed to have the practical knowledge necessary to look after these matters which are of so much importance to the interests of the miners and employees in and about the mines; therefore the legislature, with proper solicitude for the welfare of those who brave the dangers of the mines in order to make a living for those dependent upon them, asserts its prerogative, and so far interferes with the private business of the capitalist who engages in the mining business as to require him to take into his employment a person whose experience in the business and sound judgment equip him for such management and oversight of the conduct of the mine as to reduce the dangers thereof to a minimum. The operator is left no choice—no discretion—in the matter. Although he may himself be a practical miner, possessed of all the qualifications of a mine boss, yet under the statute he is compelled to employ such person. Did the appellee in this case comply with the statute? The record shows that Thomas Litefoot, a

man thirty-nine years of age, a practical miner of nearly thirty years' experience in "digging coal and doing everything in a coal mine," was at the time of the injuries complained of, and had been for some months prior thereto, the mine boss in the employ of appellee. What more could be required of appellee than compliance with the strict provisions of this statute for the protection and safety of the miners and other employees of the mines? There is no evidence tending to show incompetence of the mining boss, or negligence of appellee in employing him in that capacity; none whatever to prove, or tending to prove, that appellee knew or had notice of any part of the mine being in a dangerous condition. "Where a person or corporation is compelled by law to employ an individual in a given matter, no liability attaches for his tortious or negligent acts." 14 Am. & Eng. Enc. Law, p. 809. "When the law compels the corporation to give out a contract for grading a street to the lowest bidder, it takes away from the corporation the responsibility arising from the acts of the person taking the contract." *James v. San Francisco*, 6 Cal. 528, 65 Am. Dec. 626; Story, Agency, § 456; *Milligan v. Wedge*, 12 Ad. & El. 757. In *Waddell v. Simson*, 112 Pa. 567, Justice Gordon says in the court's opinion: "Moreover, as the defendants had complied strictly with the 8th section of the act of 3d of March, 1870, in providing a practical and skilful inside overseer or mining boss, as they had thus fulfilled the duty imposed upon them by the general assembly, it is not for this or any other court to charge them with an additional obligation. . . . 'It is too plain for argument that, if the defendants have not violated said act they are not responsible.' To this doctrine we must adhere, and the more so that it is just and reasonable. The act is one of great practical utility to the miner, and lays upon the proprietors of mines all the burdens they ought of right to bear. They must provide capable overseers for their works, and they must furnish what, by such overseers, is required for the safety and welfare of the men engaged in those works. More than this they cannot do, for upon the judgment and skill of these practical agents they must depend quite as much as any of the men who are engaged in their mines. Bosses, however well intentioned and skilful, cannot always be on the watch; occasionally they will fail in judgment, and at times may even be negligent; but of this the workman is quite as well aware as his employer, and in entering upon the employment of mining he must assume the risks that are ordinarily incident thereto, among which are those accidents that may result from the negligence of coemployees, of whom, as we have seen, the mining boss is one." In all the cases decided in Pennsylvania under the statute requiring operators of mines to employ mine bosses, it is held that these mine bosses are fellow servants with the miners and employees in the mines. An act of the general assembly of Pennsylvania, passed in 1891, "to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania, and for the protection and preservation of property connected therewith," provided what qualifications a mine foreman or assistant mine fore-

man should possess, and provided for a board of examiners for such foremen and that none should be employed as such who was not certified by such board; and further provided "that for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any mine foreman, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid, a right of action shall accrue to the widow or lineal heirs of the person whose life shall be lost for like recovery of damages for the injury they shall have sustained." In the case of *Durkin v. Kingston Coal Co.* 171 Pa. 193, 29 L. R. A. 808, it is held that this act, "in so far as it imposes liability on the mine owner for the failure of the mine foreman to comply with

the provisions of the act which compels his employment and defines his duties is unconstitutional and void."

The duty of the operator or agent is to employ a competent mine boss according to the provisions of the statute, and when he has done so he has discharged his duty to his employees in relation to those duties which the statute prescribes shall be performed by such mine boss and the operator or agent is not liable for injuries arising from the negligence of the mine boss, who is not a vice principal, as his duties are not delegated to him by his employer, but are prescribed by statute: and he is a fellow servant, as in case of an injury to other employees through his negligence the master is not responsible.

The court did not err in sustaining the demurrer to the evidence, and the judgment must be affirmed.

WASHINGTON SUPREME COURT.

David BETTMAN, *Appt.*,

v.

H. T. COWLEY, *Resp.*

(..... Wash.)

1. **The right of action on a judgment exists at common law, in the absence of a statute to the contrary.**
2. **The restriction of the lien or charge of a judgment against the estate or person of the judgment debtor, to six years from its rendition, by act of March 6, 1897, and the prohibition of the renewal of such judgment for more than one year after the act takes effect, so far as the act applies to pre-existing contracts, is an unconstitutional impairment of their obligation.**
3. **It is a matter of common knowledge that young men who are intelligent, industrious, and frugal, although absolutely penniless, obtain money upon the credit of their future earnings and accumulations.**

(*Reavis and Gordon, JJ., dissent.*)

(April 9, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County setting aside a default judgment and letting defendant in to defend in an action brought upon a judgment. *Reversed.*

The facts are stated in the opinions.

Mr. Will G. Graves, for appellant:

Appellant's right of action upon this judgment was a common-law right. An act modifying or repealing the remedy of a party by action or suit will not be construed to affect actions brought prior to its passage, unless it takes away the jurisdiction or right previously existing.

NOTE.—For judgments as contracts within the constitutional provision against impairment of obligation, see *Rockwell v. Butler* (Colo.) 17 L. R. A. 611, and *note*.

40 L. R. A.

Endlich, *Interpretation of Statutes*, § 482.

The earlier writers classified a judgment as a contract by specialty—the highest form of contract.

8 Bl. Com. p. 160; Chitty, *Contr.* p. 2; 1 Parsons, *Contr.* 7th ed. p. 8.

This classification has been approved in recent decisions by courts of the highest standing.

Carr v. Rischer, 119 N. Y. 117; *Gutta Percha & R. Mfg. Co. v. Houston*, 108 N. Y. 278; *Taylor v. Root*, 4 Keyes, 335; *Johnson v. Butler*, 2 Iowa, 585; *Cox v. Mariatt*, 36 N. J. L. 389, 18 Am. Rep. 454; *Butler v. Rockwell*, 17 Colo. 290, 17 L. R. A. 611.

As to whether or not a judgment is a contract under all circumstances is an open question.

Louisiana, Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 986; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 198; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925.

No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights.

Von Hoffman v. Quincy, 4 Wall. 585, 18 L. ed. 403.

Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void.

Bronson v. Kinzie, 1 How. 319, 11 L. ed. 146; *M'Cracken v. Haywood*, 2 How. 608, 11 L. ed. 397; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Gunn v. Barry*, 82 U. S. 622, 21 L. ed. 215; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 98; *Louisiana, Nelson v. Police Jury*, 111 U. S. 720, 28 L. ed. 576.

At the time of the rendition of this judgment, and, it must be presumed, at the time of the making of the contract, the judgment creditor, by a statutory proceeding, could re-

vive and continue the lien of his judgment from time to time. The length of the time for which the lien of the judgment might thus be extended was not limited.

2 Hill's Code, §§ 462, 463.

In addition he had a right of action as upon a debt upon his judgment in the court where it was rendered, or in any other court.

Comyns, Dig. title *Debt*, A, 2; *Proctor v. Johnson*, 1 Ld. Raym. 670; *Hickman v. Macon County*, 42 Fed. Rep. 759; *Clark v. Goodwin*, 14 Mass. 287; *O'Neal v. Kittredge*, 3 Allen, 470; *Linton v. Hurley*, 114 Mass. 76; *Wilson v. Hatfield*, 121 Mass. 551; *White River Bank v. Downer*, 29 Vt. 332; *Whittemore v. Carlin*, 53 N. H. 576; *Greathouse v. Smith*, 4 Ill. 541; *Albin v. People*, 46 Ill. 872; *Burnes v. Simpson*, 9 Kan. 658; *Hummer v. Lamphear*, 32 Kan. 439, 49 Am. Rep. 491; *Ames v. Hoy*, 12 Cal. 11; *Stuart v. Lander*, 16 Cal. 872, 76 Am. Dec. 538; *Haven v. Baldwin*, 5 Iowa, 503; *Simpson v. Cochran*, 23 Iowa, 81, 92 Am. Dec. 410; *Kingsland v. Forrest*, 18 Ala. 519, 52 Am. Dec. 232; *Palmer v. Glover*, 78 Ind. 529; *Davidson v. Nebaker*, 21 Ind. 394, 83 Am. Dec. 350; *Denison v. Williams*, 4 Conn. 402; *Ives v. Finch*, 28 Conn. 112; *Stewart v. Peterson*, 63 Pa. 230; *Gardner v. Henry*, 5 Coldw. 458; *Hale v. Angel*, 20 Johns. 343; *Smith v. Mumford*, 9 Cow. 26; *Headley v. Roby*, 6 Ohio, 521; *McDonald v. Butler*, 3 Mich. 558.

When a statute gives a new remedy for a matter which was actionable at common law, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two.

Sutherland, Stat. Constr. § 339; *Dean v. Eldredge*, 29 How. Pr. 221; *Lane v. Salter*, 51 N. Y. 6.

The statutory revival is but a continuation of the former suit. It is, in fact, nothing more than a provision for the common-law writ of scire facias put into statutory form, and the relief given by it is no greater than that given by the common-law writ.

1 Black, Judgm. § 482.

The judgment creditor is not restricted to the proceedings by scire facias, but may have his action upon the judgment as upon any other demand.

Haven v. Baldwin, 5 Iowa, 503; *Simpson v. Cochran*, 23 Iowa, 82, 92 Am. Dec. 410; *Albin v. People*, 46 Ill. 374; *Denison v. Williams*, 4 Conn. 403.

And the principle is not changed because the statute has provided a method of revival.

Burnes v. Simpson, 9 Kan. 658; *Hummer v. Lamphear*, 32 Kan. 439, 49 Am. Rep. 491.

The term "property," as used in the constitutional prohibition, includes every right to the use, possession, enjoyment, or recovery of land, goods, or money which the law will vindicate if assailed, or can be enforced as a defense or cause of action.

2 Hare, Am. Const. Law, p. 823; *Cooley*, Const. Lim. p. 445; *Angle v. Chicago*, St. P. M. & O. R. Co. 151 U. S. 19, 38 L. ed. 64.

A judgment is property of the highest order. By the rendition thereof certain rights are vested in the creditor. Among the vested rights so secured is the right to the pursuit of the remedy given by the law when the judg-

ment was recovered. With such rights the legislature cannot interfere, and any attempt to do so, if enforced by the courts, would be a taking of property without due process of law.

Gunn v. Barry, 82 U. S. 622, 21 L. ed. 214; *Bates v. Kimball*, 2 D. Chip. (Vt.) 88; *Stratford v. Sharon*, 61 Vt. 126, 4 L. R. A. 500; *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 309.

Messrs. Blake & Post, for respondent:

A judgment is not a contract, within the meaning of the Constitution.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925; *Freeland v. Williams*, 181 U. S. 405, 33 L. ed. 193; *Louisiana, Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648.

A contract is an agreement in which a party undertakes to do, or not to do, a particular thing, which in this case was to pay a sum of money on a day named. The laws of the land bind him to perform his undertaking, and this is, of course, the obligation of his contract. These cannot be changed whether they relate to the remedy or the right, to such an extent that the creditor may not have a reasonable opportunity after the maturity of the contract to satisfy the same out of the property of his debtor.

The power of the legislature to cut off the remedy, after giving reasonable time in which to enforce it, must have been contemplated by the parties. Within these limitations the remedy is completely within the discretion of the legislature.

Drury v. Henderson, 143 Ill. 315.

A change of the remedy for the violation of a contract, or a change in the method of enforcing it, does not impair its obligation.

Merchants' Ins. Co. v. Hill, 86 Mo. 472; *Tennessee, Bloomstein v. Sneed*, 96 U. S. 74, 24 L. ed. 612; *Bronson v. Kinzie*, 1 How. 319, 11 L. ed. 146; *Sanger v. Nightingale*, 123 U. S. 176, 30 L. ed. 1105; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Rezford v. Knight*, 11 N. Y. 308; *People v. Turner*, 117 N. Y. 227; *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808; *Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513; *Wheeler v. Jackson*, 137 U. S. 245, 34 L. ed. 659; *Phalen v. Virginia*, 8 How. 168, 12 L. ed. 1080.

The matter of the statute of limitations is so far within the discretion of the legislature that a legislative enactment that removes the bar which the statute enables a debtor to interpose to prevent the payment of a debt does not deprive the debtor of any constitutional right.

Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483; *Gittings v. Stearns*, 19 Ill. 876; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737; *Barker v. Jackson*, Henry, 1 Paine, 559; *Jackson, Lepper v. Griswold*, 5 Johns. 139; *Stephens v. St. Louis Nat. Bank*, 43 Mo. 885; *Bell v. Roberts*, 13 Vt. 582; *Butler v. Palmer*, 1 Hill, 324.

If the law is a statute of limitations, the principle which supports such laws against the objection that they impair the obligation of contracts is equally efficient in this case.

Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659; *Louisiana, Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Freeland v. Williams*, 181 U. S. 405, 33 L. ed. 193.

A common-law action upon a judgment

cannot be maintained as a matter of strict right.

Pitzer v. Russel, 4 Or. 124; 2 Freeman, Judgm. 4th ed. § 449; 1 Freeman, Executions, chap. 8; *Abernethy v. Medical Lake*, 9 Wash. 112.

Since it does not appear but that appellant may be able to satisfy his claim by the issuance of an execution, the maintenance of an action upon the judgment is not a matter of strict right, and the same is not, therefore, property within the meaning of the constitutional provision under consideration.

An act of Congress which authorizes the solicitor of the treasury to issue a warrant of distress against the property of a revenue officer, for the amount found due in adjusting his accounts in the treasury department, is constitutional, and not obnoxious to the objection that it is not due process of law.

Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 872; *Springer v. United States*, 102 U. S. 586, 26 L. ed. 258; *Hilton v. Merritt*, 110 U. S. 97, 28 L. ed. 88.

The sources of jurisdiction are to be found in the laws conferring the power to adjudicate matters as between litigants, and when it has been found that courts have gone beyond the limits of such power, or directly violated the laws conferring such power, the judgment is held to be void.

Ex parte Lange, 18 Wall. 168, 31 L. ed. 872; *Re Snow*, 120 U. S. 274, 30 L. ed. 658; *Seamster v. Blackstock*, 83 Va. 232; *Fithian v. Monks*, 43 Mo. 502; 1 Black, Judgm. §§ 216, 240-242; *Howell v. Tacoma*, 3 Wash. 711; *Spokane Falls v. Browne*, 3 Wash. 92; *Kline v. Tacoma*, 11 Wash. 198; *Vancouver v. Windler*, 8 Wash. 378.

Dunbar, J., delivered the opinion of the court:

This is an action upon a judgment. Service of the summons and complaint was made, default of the respondent was noted, and judgment entered against him on August 28, 1897. Thereafter respondent moved to set aside the default and judgment entered against him, which motion was sustained. It is stipulated that the respondent has no defense to the action other than the act of the legislature of 1897, approved March 6, 1897, entitled "An Act Relating to the Duration of Judgments and Repealing §§ 462 and 463, 2 Hill's Code of Washington." The act is as follows:

"Sec. 1. After the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor.

"Sec. 2. No suit, action, or other proceeding shall ever be had on any judgment rendered in the state of Washington by which the lien or duration of such judgment, claim, or demand shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment.

"Sec. 3. When the lien of any judgment, as specified in § 1 of this act, has run six years, or its duration will be less than one year by reason of this act, then the lien of such judgment shall continue for one year from and after the taking effect of this act.

"Sec. 4. Sections 462 and 463 of volume 2, 40 L. R. A.

Hill's Code of Washington, relating to a renewal of judgments, are hereby repealed."

And it is claimed that the act is unconstitutional, as applied to judgments in existence at the time of the passage of the act. It is also contended by the appellant that the title of this act is not sufficient, in that it embraces more than one subject, and the subject is not expressed in the title of the act. We do not think there is any substantial merit in this objection. In presenting our views in relation to the constitutionality of the act, it is not necessary to pass upon the other objections raised by the appellant. It is contended by the appellant that the application of this law to judgments already in existence is violative of § 10 of article 1 of the Constitution of the United States, and of § 23 of article 1 of the Constitution of the state of Washington, in that it is a law which impairs the obligation of contracts; and of article 5 and of § 1 of article 14 of the Constitution of the United States, and of § 8 of article 1 of the Constitution of the state of Washington, in that it would deprive the appellant of his property without due process of law. We think that, in any event, as applied to contracts existing at the time the law was enacted, its enforcement would be an impairment of such contracts. It is insisted by the respondent that the United States Supreme Court has decided this question adversely to appellant's contention in *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, in that it has decided that a judgment is not a contract, but we do not think that the court decided that contractual rights, when merged into a judgment, could not be enforced. The facts before the court must be ascertained to determine the principles of law which the court decides in a given case. The facts in that case were substantially as follows: An action was brought in the supreme court of New York by John S. Prouty against the Lake Shore & Michigan Southern Railway Company *et al.* to compel the specific performance of a certain contract. It was adjudged in January, 1878, that the company pay the plaintiff out of its net earnings \$53,184.88, together with interest thereon from the entry of said judgment. It was also adjudged that, if the company within the time specified failed to pay to the plaintiff the above-specified sum and such interest, the plaintiff might have execution therefor against the defendant. By the statutes of New York in force when this judgment was rendered, 7 per cent was the legal rate of interest. Afterwards, in 1879, the legislature reduced the rate of interest to 6 per cent. The question came up on the right of the legislature to reduce the rate of interest on a judgment rendered when the rate was higher, and the court held, in substance, that where a judgment is obtained on a contract which contains no provision for interest, the allowance for interest on the judgment is a matter within the legislative discretion that the judgment is not a contract, and the law reducing the rate of interest thereon does not impair the obligation of contracts, within the meaning of the Federal Constitution. It simply was determined by the court that in that case, where the judgment did not arise out of contract, the interest which was al-

lowed by the state was allowed as damages for the nonperformance of a payment of the judgment,—damages which the state had a right to estimate and enforce; that no contractual obligation existed, so far as the question of interest was concerned, but that, the interest allowed having been allowed by the state as damages, the amount of such damages was within the control of the state, and therefore no obligation was impaired. Even in that case there was a very able dissenting opinion by Justice Harlan, which was concurred in by Justice Field and Justice Brewer, holding that it was not only an impairment of a contract, but that the judgment was property, and that the rate of interest which the judgment drew was property within the meaning of the Constitution, and that the Constitution was violated by the changing of the rate of interest by the legislature. But it is not necessary in this case to go to the extent to which the dissenting judges did in the case just reviewed. Reference was made in that case to *Louisiana, Folsom, v. New Orleans*, 109 U. S. 285, 27 L. ed. 986, which shows that the court was considering, and considering only, judgments which did not arise out of contract, and had no element of contract in them, and this is one of the cases also relied upon by the respondent in this case. This was an action brought by the holders of judgments recovered in the courts of Louisiana for damages done to the property of the plaintiffs by a mob or riotous assemblage of people in the year 1873. A statute of the state made municipal corporations liable for damages thus caused within their limits. At the time the injuries complained of were committed the city of New Orleans was authorized to levy and collect a tax upon property within its limits of \$1.75 upon every \$100 of its assessed value. Afterwards, by the Constitution of the state, the power of the city to impose taxes on property within its limits was restricted to 10 mills on the dollar of the valuation, and it was asserted that the effect of this last limitation was to prevent the relators, who were not allowed to issue executions against the city, from collecting their judgments, as the funds receivable from the tax thus authorized to be levied were exhausted by the current expenses of the city, which must first be met, and this action was to compel the authorities of the city to provide for the payment of these judgments by a levy of an additional tax. Judge Field, in writing the opinion of the court in this case (and it may be noted that he was one of the judges who dissented in the *Morley Case*, and therefore it cannot be concluded that he intended to lay down a doctrine which would be opposed to the doctrine of the dissenting opinion, *viz.*, that the judgment was property, the taking of which without due process of law would fall within the inhibition of the Constitution), said: "The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. Municipal corporations are instrumentalities of the state for the convenient adminis-

tration of government within their limits. They are invested with authority to establish a police to guard against disturbance; and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should have repressed. . . . But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the legislature may see fit to make, either in the extent of liability or in the means of its enforcement. And its character is not at all changed by the fact that the amount of loss in pecuniary estimation has been ascertained and established by the judgments rendered. The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously." And this was the sole ground upon which this case was decided. And, as showing conclusively that a contractual relation would have compelled a different decision from this, the opinion proceeds: "The cases in which we have held that the taxing power of a municipality continues, notwithstanding a legislative act of limitation or repeal, are founded upon contracts; and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts existing when they were made have been by such legislation impaired. The usual mode in which municipal bodies meet their pecuniary contracts is by taxation. And when, upon the faith that such taxation will be levied, contracts have been made, the constitutional inhibition has been held to restrain the state from repealing or diminishing the power of the corporation so as to deprive the holder of the contract of all adequate and efficacious remedy." And the court cites approvingly the cases of *Wolff v. New Orleans*, 103 U. S. 328, 26 L. ed. 395, and *Louisiana, Southern Bank v. Pillsbury*, 105 U. S. 278, 26 L. ed. 1090, saying: "In both cases by the unanimous judgment of the court, the legislation in that respect is subject to this qualification, which attends all state legislation,—that it shall not conflict with the prohibitions of the Constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly, as a consequence of legitimate measures taken, as will sometimes happen, but directly, by operating upon those means, is prohibited by the Constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which

alone they could be performed." Justice Bradley, in his concurring opinion, makes it especially clear that he concurred in the opinion simply upon the ground that "remedies against municipal bodies for damages caused by mobs, or other violators of law, unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. . . . But," said he, "an ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured, stands upon a very different footing. Such a judgment is founded upon an absolute right, and is as much an article of property as anything else that a party owns; and the legislature can no more violate it without due process of law than it can any other property. To abrogate the remedy for enforcing it, and to give no other adequate remedy in its stead, is to deprive the owner of his property within the meaning of the 14th Amendment. The remedy for enforcing a judgment is the life of a judgment, just as much as the remedy for enforcing a contract is the life of the contract."

So it will be seen from these cases, which are the principal and most pertinent cases cited on this question, not only by the opinions of the court but also by the dissenting opinions in each case, that it was not the intention of the Supreme Court to lay down the rule that the destruction of a judgment in which a contract was merged by the legislature was not an impairment of the contract, and was not a deprivation of property, within the meaning of the 14th Amendment. But the Supreme Court has with uniformity spoken with no uncertain sound concerning the sacredness of contract rights, and of the protection of property under the constitutional guaranty referred to. These cases, without especially enumerating them, are many of them reviewed in the late case of *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, where the first quotation is from *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143, where the court, in discussing a question of what was a right and what was a remedy, said: "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by the acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution." Citing, also, *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397, where it was said: "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right; compels one party to perform the thing contracted for, and

gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence, any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." And as showing the construction which must have been placed by the court itself on the opinion in *Louisiana, Folsom, v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, the court in this case quotes approvingly the case of *Seibert v. Lewis*, 122 U. S. 284, 30 L. ed. 1161, where it was announced that it was the settled doctrine of the court that "the remedy subsisting in a state, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void;" and that the legislature of Missouri having by act of March 23, 1868, to facilitate the construction of railroads, enacted that the county courts should levy and cause to be collected in the same manner as county taxes a special tax in order to pay the interest and principal of any bond which might be issued by a municipal corporation in the state on account of the subscription authorized by the act to the stock of the railroad company, which tax should be levied on all the real estate within the township making the subscription in accordance with the valuation then last made by the county assessors for county purposes, it must be held that it was a material part of this contract that such creditor should always have the right to the special tax, to be levied and collected in the same manner as county taxes at the same time might be levied and collected. Here the action of the party came into effect. He entered into this contract on the strength of the law of the state of Missouri, and, having entered into it with reference to that law, the supreme court will not allow the state to pass any law which impairs that obligation or in any way lessens the value of the contract. And in *Louisiana, Ranger, v. New Orleans*, 102 U. S. 203, 26 L. ed. 182, Mr. Justice Field, in the opinion of the court, said: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

The language of the learned judge might well be applied in the interest of the appellant in this case. The means provided by the law for the enforcement of the contract at the time the contract was made and by which it could be enforced has been taken away by the legislature. The action of the legislature has not only tended to lessen the efficacy of the means which then existed, it has not only tended to retard the enforcement of the contract, but it has destroyed the means of its enforcement al-

together, and has supplied no other means in its stead. It is the contention of the respondent, however, and, indeed, that is his main contention, that this act of the legislature is a statute of limitation in effect, and numerous cases are cited where statutes of limitation have been sustained, but we think there is a vast difference between the act in question here and the acts which were construed in the cases cited by respondent. The governing principle in this case is altogether different from the principle underlying statutes of limitation. Statutes of limitation are statutes of repose intended to put at rest controverted questions of fact, to insure to a degree certainty in testimony by compelling its production before it is affected by the infirmities of memory, thereby giving value to contracts. Such statutes are in the interest of morals, serving to prevent perjuries, frauds, and mistakes; hence they subserve public interests, and fall within the special authority of the legislature, which in the exercise of its discretion can regulate them, providing always that, where a statute of limitation is shortened, a reasonable time must be allowed to commence the action or present the claim. This constitutes no deprivation of a substantial right. It does not even change the remedy. It is a mere change in the time at which the remedy is to be applied, which can go no further than a possible inconvenience, and it is upon this theory that the shortening of the statutes of limitation is sustained. The creditor's rights are in no wise impaired. He is deprived of no remedy. His substantial right, *viz.*, to collect his debt, remains. It is true he must reduce his claim to a judgment sooner than he was required to do, but when it is so reduced he can perpetuate his judgment, and the time for collecting the fruits of the judgment is not shortened. In this case, when the original judgment was obtained, the creditor had a right to perpetuate his judgment, either by a suit on the same, or by keeping it alive under the provisions which the law under consideration repeals, and the shortening of the time in which he could bring his action, as we have seen, in no wise rendered his judgment less valuable; for, notwithstanding the shortening of the statute of limitations, there was no shortening of the life of the liability. If the creditor or claimant does not obey the law when a reasonable time is given him in which to act, his loss is attributable to his own laches, and not to matters which are beyond his power to control. But altogether another principle is involved in the shortening of the life of or of the actual demolition of the liability. If the debtor happens to be execution proof just at this time the creditor is helpless. No amount of diligence or industry will avail him. His judgment, which, before the passage of the law, had at least a prospective value, is now rendered absolutely valueless, and the future acquisitions which he had a right to rely upon he is now deprived of. The proposition is too well settled to call for discussion that there is read into every contract the law which was in existence when the contract was entered into, or, in other words, that the parties to a contract have the right to rely upon the law governing the contract at the time it was made, and that law which could

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reasonably have been taken into consideration will be presumed to have been taken into consideration. It is a matter of common knowledge that many young men in this country where the avenues of wealth are open to all who are intelligent, industrious, and frugal, who are known to be absolutely penniless, if they are known to possess the qualities mentioned above, can obtain money upon the strength and credit of their future earnings and accumulations, and the right to look to these future earnings and accumulations, under the law as it existed at the time the credit was given, is a valuable right, and may well be said to have been taken into consideration when the credit was given. A special review of all the authorities cited by the respondent showing that this act is in the nature of a statute of limitation, will be profitless, for we think that none of them are cases of this kind. Here a right to a remedy—a remedy which is essential to the recovery of a debt—is not postponed, is not shortened, but is virtually destroyed, and we think without any question that the obligation is impaired, if, indeed, the judgment is not properly which under this law could be taken without due process of law. We therefore hold that the act in question is unconstitutional so far as it refers to contracts which were in existence at the time the law was enacted. We should have stated in the beginning that, so far as the common-law right to sue on a judgment is concerned, especially in this state where the common law is the law of the state in the absence of statutory enactment, the right is so overwhelmingly sustained by the authorities that it is profitless to discuss it.

The judgment is reversed and the cause remanded, with instructions to overrule the motion to set aside the default and judgment.

Scott, Ch. J., and Anders, J., concur.

Reavis, J., dissenting:

The act of the legislature under consideration and set out in the opinion of the majority of the court in § 4 expressly repeals the former law of the state relating to a renewal of judgments. I do not understand that the opinion questions the power of the legislature to make this repeal, and that it is a valid act of the legislature, but to decide only that it cannot relate to contracts in existence before the enactment of the law. The only constitutional questions, then, are whether the law approved March 6, 1897, impairs the obligation of contracts or takes property without due process of law. No case from any court has been presented by counsel for appellant which, in my judgment, aids in the solution of the controversy, excepting those from the Supreme Court of the United States, which are also cited by respondent. It is claimed that the case of *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, does not decide that when contractual rights are merged into a judgment they cannot be enforced, and the facts before the court are referred to to sustain this view. The facts in that case seem to be plain. It was a suit to compel the specific performance of a contract, and a money judgment was entered thereon in pursuance of the

contract, and, if the defendant did not pay the sum specified and interest specified, plaintiff might have execution against the defendant. When the judgment was rendered, the legal rate of interest was 7 per cent. This rate was afterwards reduced by the legislature to 6 per cent. The court held that the judgment was obtained on a contract which contained no provision for interest, and that the allowance of interest was a matter of legislative discretion. Now, the point mentioned by appellant, that interest on the judgment was in the nature of statutory damages, and was therefore no part of the contract upon which judgment was obtained, was one decided in the case. But I think the question was also clearly raised, and a precise declaration of opinion, at any rate, that a judgment obtained upon a contract is not a contract within the protection of the Constitution. The court said: "It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute; but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. . . . Where the transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition. *Garrison v. New York*, 21 Wall. 196, 203, 22 L. ed. 612, 614. It is true that in *Louisiana Southern Bank v. Pittsury*, 105 U. S. 278, 26 L. ed. 1090, and in *Garrison v. New York*, the causes of action merged in the judgments were not contract obligations, but in both those cases, as in this, the court was dealing with the contention that the judgments themselves were contracts *proprio rigore*." It will be observed in this case the Supreme Court discussed the very question of the distinction between judgments on torts, and which it had theretofore held were not contracts within the constitutional prohibition, and judgments on contracts, and held that the judgment is not a contract because the most important elements of a contract are wanting, *i. e.*, the *aggregatio mentium*. Now, the cases cited by counsel for appellant sustaining Blackstone's definition of "judgments" are not at this day entirely correct. The very refined theories upon which Blackstone's definition is sustained are merely interesting from an antiquarian and historical standpoint. See *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193; *Louisiana, Folsom, v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648.

The appellant (plaintiff below) holds the contract of the defendant to pay a certain sum of money. Unquestionably the law for the enforcement of the contract, or rather the

remedy existing at the time the contract was entered into, cannot be impaired by the state. But what was the remedy existing at that time? It was the right of action against the defendant for his breach of the contract,—his failure to pay the note when due,—and to recover a judgment against defendant upon which an execution could issue against all his property not exempt from execution. And by the then existing law the judgment so recovered against defendant was a lien, and the judgment and the lien existed together for six years. It was written in the law creating this judgment that its existence, together with that of the lien thereunder, was for six years. At the end of that time, by the law of its creation, the judgment was dead. It is true that another statute provided for the revival of the judgment. The latter statute, I think, was merely a voluntary act of the legislature, and not founded on any contract, but solely a question of public policy, and I do not think that by any force of reasoning it can be held that the parties in entering into the original contract had in mind such a remedy, and it was no part of the original contract. And so, too, with the lien which the original judgment here gave the plaintiff. It was strictly a part of the remedy confined to the original judgment. The plaintiff having brought his action and obtained his judgment, the contract then became absolutely merged in the judgment, and all the legislature has done in the act of 1897 is to take away the sanction of the state to a resurrection and revivification of a dying judgment. I think, also, the statute of 1897 is in the nature of a law of limitation. Limitation may be applied to remedies as well as to rights of action. They are alike in principle. *Drury v. Henderson*, 148 Ill. 315; *Merchants' Ins. Co. v. Hill*, 86 Mo. 466; *Tennessee, Bloomstein, v. Sneed*, 96 U. S. 74, 24 L. ed. 612; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143; *Sanger v. Nightingale*, 122 U. S. 176, 30 L. ed. 1105; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 865.

In the last case the Supreme Court of the United States discussed the reasonableness of the time before the bar of limitations attached, and said: "Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts. . . . The business interests of the entire people of the state had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference, within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon or an abandonment claimed. That, as we think, has been done here, and no more." In that case a note was barred within nine months and seventeen

days, *i. e.*, a nine-months limitation was upheld. *Rexford v. Knight*, 11 N. Y. 808; *People v. Turner*, 117 N. Y. 227; *Jackson, Hart, v. Lamphire*, 3 Pet. 280, 7 L. ed. 679. In *People v. Turner*, 117 N. Y. 227, six months was held a reasonable limitation within which to do an act after the passage of the law. *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808. In *Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513, it was said: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force." And in *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808, the same court said of the state statute: "It is in its nature a statute of limitations. The right of the state to prescribe the time within which existing rights shall be prosecuted, and the means by and conditions on which they may be continued in force, is, we think, undoubted. Otherwise, where no term of prescription exists at the inception of a contract, it would continue in perpetuity, and all laws fixing a limitation upon it would be abortive. Now, it is elementary that the state may establish, alter, lengthen, or shorten the period of prescription of existing rights, provided that a reasonable time be given in future for complying with the statute." But a distinction is drawn between the limitation on the right to commence an action and the limitation on the right to issue an execution or the duration of a lien. I can see no difference. The judgment creditor has his full six years under his judgment in which to make his levies. If he does not, then his right may or may not be renewed, in the discretion of the legislature. It is not a matter of contract. As said in *Louisiana, Folsom, v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, also mentioned in the opinion of the majority: "A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it."

Thus, the legislature of 1897 did not attempt to destroy the contract, if any existed, between plaintiff and defendant, but did withdraw a contingent remedy upon such contract, but which was not a part of the original contract. The contract, if one please, may be said to exist, but without remedy to enforce its moral obligation. *Phalen v. Virginia*, 8 How. 163, 12 L. ed. 1030; *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483; *Gettings v. Stearns*, 19 Ill. 376; *Bell v. Roberts*, 13 Vt. 582.

It is questionable whether the common-law right to bring an action on judgments exists as a strict matter of right in this state. This right to institute an action has been frequently questioned by the ablest jurists, and many courts upholding the right have granted it with reluctance, and it has been denied by some authorities. It seems, upon principle, to be a useless and expensive proceeding to allow a plaintiff to commence an action upon a judgment.

ment the day after it has been entered, and thus to put it within his power to accumulate costs and distress the defendant unnecessarily. It would seem that the courts should have the power to restrain the abuse of such action, and this evidently was the view held by this court in *Abernethy v. Medical Lake*, 9 Wash. 112, where the court refused to allow an action to be maintained upon a municipal warrant for the reason that any judgment obtained thereon could only be satisfied by the issuance of a like warrant, and that, therefore, there was no necessity for nor advantage growing out of such action. The principle decided in that case was surely the same as that in a suit upon a judgment, because the judgment creditor in all cases has the right to his execution on the first judgment, and it is the only right he obtains by his action upon a judgment and the recovery of the second judgment. See *Pitzer v. Russell*, 4 Or. 124; 2 Freeman, Judgm. 4th ed. § 449; 1 Freeman, Executions, chap. 8,—which are in consonance with the views expressed here. And I do not think the common-law right to commence an action on a judgment in this state is a strict one, but more in the nature of a permissive one. I cannot conclude that the statute of 1897 under discussion is unconstitutional when applied to existing or prior judgments at the time of its enactment.

Gordon, J.: I concur in the views expressed by Justice Reavis.

D. R. NOBLE *et al.*, *Respts.*,
v.
City of SEATTLE, *Appt.*

(..... Wash.)

Parents are not "heirs" within the meaning of 2 Hill's Code, § 138, giving a right of action to the widow and children of a man killed in a duel, and to the heirs or personal representatives of a person whose death is caused by wrongful act or neglect; but the word "heirs" is limited to the widow and children.

(Dunbar, J., dissents.)

(March 24, 1898.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiffs in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. John K. Brown and F. B. Tip-ton for appellant.

Mr. G. H. Fortson, for respondents:

2 Hill's Code, § 138, gives a right of action to the widow or widow and her children, or child or children, if no widow, of a man killed in a duel; to the "heirs or personal representatives" of a person whose death is caused by the wrongful act or neglect of another, and to the "heirs or personal representatives" of a

NOTE.—For the similar question of the meaning of the word "heirs" in an insurance policy, see note to *Hubbard v. Turner* (Ga.) 30 L. R. A. 594.

person whose death is "caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf," etc.

In *Givens v. Kentucky C. R. Co.* 89 Ky. 231, which is a case brought under § 1, chap. 57, Ky. Stat. in discussing the question, the supreme court says: "The action will be regarded as under the 1st section, and the recovery limited to compensation, and neither the widow nor the child can maintain such an action, but it must be instituted in the name of the personal representative." And also says that the personal representatives would hold the amount recovered like other assets left by the intestate.

In *Conley v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 402, which is an action brought by the personal representative for the recovery of damages for negligently causing the death of a person over the age of twenty-one years, who having never been married and left neither wife nor child, the supreme court of Kentucky held that the action could be maintained under said § 1.

Newport News & M. Valley Co. v. Dentzel, 91 Ky. 42; *Morris v. Louisville & N. R. Co.* 11 Ky. L. Rep. 698.

Other states having statutes somewhat similar to those of Washington allow recoveries by parents of adult children.

Denver, S. P. & P. R. Co. v. Wilson, 12 Colo. 20; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; *Barnum v. Chicago, M. & St. P. R. Co.* 30 Minn. 461; *Schwarz v. Judd*, 28 Minn. 371; *Southern P. Co. v. Lafferty*, 15 U. S. App. 193, 57 Fed. Rep. 536, 6 C. C. A. 474; *Ohio & M. R. Co. v. Wangelin*, 152 Ill. 138; *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255; *Missouri P. R. Co. v. Henry*, 75 Tex. 220; *Gulf, C. & S. F. R. Co. v. Southwick* (Tex. Civ. App.) 80 S. W. 592.

The object and purpose of these statutes is to provide a remedy whereby the family or relatives of the deceased, who might naturally have expected maintenance or assistance from the deceased had he lived, may recover compensation from the wrongdoer commensurate with the loss sustained, etc.

Hedrick v. Iwaco R. & Nav. Co. 4 Wash. 403.

Section 138, 2 Hill's Code, gives right of action to heirs for death by wrongful act of an adult, and § 139, 2 Hill's Code, gives right of action to father or mother and guardian for death by wrongful act of a minor or ward.

Atrops v. Costello, 8 Wash. 149.

The words "heirs or personal representatives," contained in § 138, should have and receive their natural and ordinary construction. The word "heir" is usually and generally held to mean one upon whom the law casts his ancestor's estate immediately on the death of the ancestor.

9 Am. & Eng. Enc. Law, 1st ed. p. 357; Sutherland, Stat. Constr. § 253.

It includes all that would take an interest in the deceased's estate by a statute of distribution.

Illinois C. R. Co. v. Barron, 5 Wall. 90, 18 L. ed. 591; *Redfield v. Oakland Consol. Street R. Co.* 110 Cal. 277.

The statutes of this state give parents a special interest in the savings and earnings of 40 L. R. A.

their children, in providing that children shall support their indigent parents.

See 1 Hill's Code, §§ 3088, 3089.

Supreme courts of other states have so held under similar statutes.

Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860; *Denver S. P. & P. R. Co. v. Wilson*, 12 Colo. 20.

Gordon, J., delivered the opinion of the court:

The respondents, father and mother, respectively, of Judson D. Noble, deceased, brought this action to recover damages for his death, claiming that it was caused by the negligent, careless, and wrongful act of the city in not keeping one of its streets in a safe condition for public travel. It appears from the record that in passing over a street in the city of Seattle, known as "Railroad Avenue," which runs along the water front, the deceased fell through the planking, and was drowned. The deceased, at the time of his death, was over the age of twenty-one years, had never been married, and left neither wife nor child. Respondents have been divorced for a number of years, and reside in different states. By way of an affirmative defense, the answer contained the following allegation: "And for a further answer, and as new matter, constituting a second affirmative defense to said second amended complaint, the defendant alleges that said Judson D. Noble, at the time of his death, was over the age of twenty-one years, and that he left surviving him no widow or child or other descendant." A demurrer to this defense was sustained by the lower court, and this ruling constitutes one of the errors argued and assigned on this appeal. Section 138 of 2 Hill's Code is as follows: "Section 138. The widow, or widow and her children, or child or children, if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as under all circumstances of the case may to them seem just." Section 139, Id., gives the right of action to a father or mother or guardian for death, by a wrongful act, of a minor or ward. It is the contention of the appellant that the word "heirs" as used in § 138, does not include parents or collateral relatives, but only includes the widow and child or children of the person whose death is caused by the wrongful act of another. In support of this contention it is pointed out that, by the plain terms of the statute, the right of action is specifically limited to the widow and child or children of a man killed in a duel; and it is urged that there can be no

sound reason for denying it as to the parents in that case, and conferring it upon them in the case of death by wrongful act. As pointed out by this court in *Atrops v. Costello*, 8 Wash. 149, the first part of § 138, as contained in the present Code, was enacted in 1873, and the remainder of the section, as now found in the Code, was not enacted until 1875, when the legislature enacted it as an additional section. The question here presented has never been decided by this court, and, because of the dissimilitude between the various statutory provisions on the subject, the cases decided elsewhere are of little value. There is a greater similarity between these provisions of our own statute and those of the state of Kentucky relating to the same subject than we have been able to find elsewhere; and in a long line of decisions in that state it is held that the word "heirs" does not include parents or collateral relatives. *Henderson v. Kentucky C. R. Co.* 86 Ky. 389; *Jordan v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 40; *Henning v. Louisville Leather Co.* 11 Ky. L. Rep. 544; *Louisville & N. R. Co. v. Coppage*, 12 Ky. L. Rep. 200. Ky. Gen. Stat. chap. 57, § 3, provides that, "if the life of any person . . . is lost or destroyed by the wilful neglect of another person, . . . company, or . . . corporation, . . . then the widow, heir, or personal representative of the deceased shall have the right to sue," etc. Commenting upon this statute, the court in *Henderson v. Kentucky C. R. Co.* 86 Ky. 389, say: "No others sustain as near relation to, are so dependent upon, or have the same legal right to look for a support to, a person as his wife and children, especially those of the latter who may be minors. Therefore the injury resulting from his death, at the hands of another, to them is actual and direct, while to his collateral heirs it is remote and not immediate, and as to creditors it may not exist at all. We are unable to perceive any reason for giving to the widow and minor child the exclusive right to sue for and recover damages for the loss of the life of a person in a duel, or by the careless or malicious use of firearms, that does not apply with equal force when it is destroyed by wilful neglect. In each case the widow and child have been deprived of the society and support of the husband and father by the criminal or quasi criminal act of another. And, whether the injury has been done in one or another of the three modes denounced in the statutes, the consequences to them are the same; and it would seem they ought to be entitled to the same reparation. Therefore, looking to the reason for the statutory right to sue and recover damages for the destruction of the life of one person by the act of another, and to the necessity, when it can be properly done, of so construing each part of the General Statutes as to preserve the consistency of the whole, we are of the opinion that the widow and child or children have the prior right to sue for, and the exclusive right to, what may be recovered, in an action authorized by § 3, chap. 57. And, though the right to institute such an action is given to the personal representative, we think, for the reasons indicated, he can exercise that right only for the use and benefit of the widow and child, if there be any. It is, we think, 40 L. R. A.

also evident that the word 'heir' was intended to mean 'child,' and not to apply to any other description of person. What proportion of the amount recovered the widow and children may be respectively entitled to, whether the right belongs to adult as well as minor children, and whether the personal representative may maintain such an action in case there be neither widow or child of the person whose life has been so destroyed, are questions not involved in this case, and not decided." In *Jordan v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 40, the action was by the administrator; and in the answer it was pleaded in bar of the recovery that deceased left no widow or child. To this the plaintiff replied that the deceased left, as heirs, a father, mother, sister, and brother. Upon the question thus presented the court says: "No person has a legal cause of action against another for a wrongful or negligent act, and it may be safely said legislative power to give it does not exist, unless he has sustained pecuniary injury by it. For the foundation of every action for a tort is actual pecuniary injury, without which there can be legally assessed neither compensatory nor punitive damages. It seems to us clear it was not intended that creditors of the deceased should have any part of what may be recovered under § 3, chap. 57, and that the personal representative can maintain an action for the cause therein mentioned only for the use of the widow and heir. . . . As, then, the widow is entitled to maintain such action, and, as a necessary consequence, to share with the heir what is recovered, the single question to be determined is, what meaning the legislature intended to be given to the word 'heir,' as therein used. It must be either so limited as to mean 'child,' or so extended as to include collateral kindred of the deceased, however remote, if it can be fairly applied to them at all; for the right to sue for and recover punitive, which presupposes also compensatory damages, is given by the statute, without condition or qualification." And the court concludes that the word "heir," as used in their statute, means "child," and "does not include parents or collateral relatives."

We have quoted at length from these cases, because, in our judgment, they are peculiarly applicable to the one we are considering, and we have been unable to find any others that are. It is familiar law that interpretation may contract as well as expand the meaning of words used in a statute, when the harmony of the legal system so requires. That it was the intention of the legislature to limit the right of action in cases like the present to those heirs, and only to those heirs, to whom the deceased, while living, owed the legal duty of support, is further evidenced by § 148, 2 Hill's Code, which is as follows: "Sec. 148. No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of such death if he have a wife or child living, but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children." It is true that that part of § 138 which gives rise to the present controversy was passed subsequent to

§ 148, *supra*; but we do not think that the latter section was thereby repealed. In the first place there are no express words of repeal, and it ought not to be construed as working any change further than its direct terms require. There is no direct conflict between the acts, and "presumption has no room to work." We do not think that §§ 8088 and 8089, 1 Hill's Code, have any bearing on this case. In substance, they require children to support their indigent parents. The obligation which these sections impose do not extend to all heirs, but only those in close relationship with the indigent person. For instance, a nephew is not required to support his uncle, and yet if the word "heirs," as used in § 188, *supra*, is to be rendered literally, not only nephews, but many other heirs, can maintain actions like the present. While, in general, the term "heirs" includes collateral kindred and those who take under the statute of distribution, we think that, in view of the entire legislation upon the

subject, it never was intended that parents or remote ancestors might maintain actions like the present, and that the word "heirs," as used in § 188, should be held to include only those persons who are thereinbefore specifically mentioned, *viz.*, "the widow, or widow and her children, or child or children, if no widow." It follows that the demurrer was improperly sustained. The other assignments require no attention.

The judgment appealed from is reversed, and the cause remanded, with direction to the lower court to overrule the demurrer.

Scott, Ch. J., and Anders and Reavis, JJ., concur.

Dunbar, J., dissenting:

I dissent. I think the right is conferred by the plain language of the statute, which is not susceptible of construction.

WISCONSIN SUPREME COURT.

Emily SLAUSON, *Appt.*,

v.

GOODRICH TRANSPORTATION COMPANY, *Respt.*

(.....Wis.....)

1. To succeed in an action of ejectment plaintiff must connect himself with the govern-

NOTE.—Effect of prior decision on statutory new trial in real actions.

In *Smyth v. Neff*, 128 Ill. 310, it was held that a holding on appeal that a tax deed was valid and sufficient, and should have been held good, precludes any objections to its validity on a subsequent trial which were before made, or might have been made, on the record.

And in *Roberts v. Baumgarten*, 126 N. Y. 336, it was held that a stipulation on an appeal to the court of appeals on which an order is affirmed, that in case of affirmance judgment absolute should be rendered against the party making it in an action of ejectment, precludes such party from claiming a new trial as a matter of course, upon payment of costs and damages awarded against him under the New York statute.

So, in Ohio any defendant between whom and the plaintiff an issue of fact had been joined, which either party thereto has the right to have tried by a jury, has the right to a second trial, and the perfecting of his right to such trial by one of several defendants sued jointly does not open for retrial the issues which have been found between the plaintiff and the other defendants who have not taken a second trial. *Sprague v. Childs*, 16 Ohio St. 107.

And where the losing party in an action for the recovery of real property, tried on appeal in the district court, is entitled to a new trial of course in the same manner as in the court below, in estimating the number of trials to which he may be of right entitled in the district court no regard will be had to the number or to the result of the trials had in the court below. *Marietta v. Emerson*, 5 Ohio St. 288.

The general rule supported by a preponderance of authority, however, which would appear to be 40 L. R. A.

ment title, or with some grantor who was the common source of title of both parties.

2. When any document is offered in evidence and excluded, it must be brought into the record to have its competency determined on appeal.

3. An appellate court can take notice of papers which are not part of the judgment

analogous to that of the principal case, is that where a statutory new trial is granted in an action of ejectment it stands as though there had never been a trial or judgment so far as the subsequent trial is concerned, and the action is fully open to be tried *de novo*. *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316; *Donahue v. Klassner*, 22 Mich. 252; *Sheldon v. Van Vleck*, 106 Ill. 45.

The only difference being that after such trial and judgment the plaintiff cannot, as a matter of right, demand another new trial under the statute. *Sheldon v. Van Vleck*, 106 Ill. 45.

The awarding of a new trial as matter of right, in an ejectment suit, wipes out the verdict so that no judgment can be rendered on it, and prevents it from being a bar to a second ejectment suit. *Edwards v. Edwards*, 22 Ill. 121.

The granting of a statutory new trial in an action to recover the possession of land operates as a vacation of the former judgment without any special order setting it aside. *Maxwell v. Campbell*, 45 Ind. 390.

Thus, a judgment declaring a lien entered on a cross-complaint in a suit to quiet title is not a bar to a further prosecution of the suit in a case in which a new trial, as a matter of right, has been granted on the issue joined on the complaint. *Bisel v. Tucker*, 121 Ind. 249.

And a verdict and judgment in an action of ejectment is not conclusive on the parties, and the plaintiffs therein are not precluded on the second trial from controverting the evidence on the former trial on which a recovery was had; and where title depends upon a question of relationship, the verdict and judgment in the former trial do not establish the fact in the subsequent trial. *Gehr v. Miller*, 20 W. N. C. 367.

Nor is a judgment against the plaintiff, in an action of ejectment, after the rendition of which he

roll only when they have been preserved and properly identified in the bill of exceptions.

4. A deed calling for land in a certain block, in a plat on file in a certain office, cannot be extended by parol evidence to embrace land not in that block as shown by the plat.

5. On a new trial in an ejectment suit, taken by the defeated party as matter of right under the terms of a statute allowing it, rulings upon the admissibility of evidence have no binding force.

(March 22, 1898.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Racine County in favor of defendant in an action brought to recover possession of certain real estate. *Affirmed.*

Statement by **Bardeen, J.:**

Ejectment. The complaint is in the ordinary form, alleging that plaintiff is the owner and entitled to the possession of the premises described, and that defendant unlawfully withholds possession. The answer is a general denial and a further defense that plaintiff nor her ancestors or grantors had been possessed of the premises within twenty years preceding the commencement of the action. A judgment for plaintiff on the merits was affirmed in this court. 94 Wis. 642. Within the time limited by statute, defendant paid the costs, and took a new trial. At the opening of the trial, plaintiff's counsel made the following statement: "It is conceded for the purposes

of this trial that Isaac Taylor, in his lifetime, owned all the lands between Second street and Root river that lay east of a point 140 feet east of the east line of Chatham street." Counsel for defendant responded: "I will examine the abstract of title and the deeds of the lands referred to, and I will inform you [addressing Mr. Fish, plaintiff's counsel] to-morrow morning whether I will agree to your requested stipulation or not." No further reference to this stipulation appears in the bill of exceptions. Plaintiff's counsel then offered in evidence a deed from one Taylor and wife to William Waterman, said to describe a piece of land immediately west of the lands in controversy. The date or place of record of this deed does not appear. Next, the will of Isaac Taylor, in which Emeline Taylor is named as devisee, was offered. Then followed a deed from Emeline Taylor to James H. Kelly, George Murray, and George W. Slauson. This deed purports to convey parts of block 7 of the original plat of Racine, and is assumed by plaintiff's counsel to cover the land in suit, but there is no evidence in the bill of exceptions from which this fact can be definitely determined. Plaintiff's counsel then called a witness for the purpose of showing "where Root river was at the time this deed was made." This testimony was objected to, and the objection sustained. Plaintiff's counsel then offered to make further proof along that line, and to show title from Kelly and Murray, through mesne conveyances, to plaintiff, of the property claimed in her complaint. References were made to plat No. 1 and map No. 8, which

obtains a new trial under the statute and brings in a new party defendant by amendment, and, before a second trial, dismisses his suit, a bar to a second action brought by him against the defendant thus brought in. *Sheldon v. Van Vleck*, 106 Ill. 45.

So, an amendment to an answer in an action of ejectment, made after the granting of an application for the vacation of a former judgment, and for a new trial under Wis. Rev. Stat. § 3082, setting up an equitable counterclaim for the reformation of a deed under which the defendant claimed so as to make it convey only the undivided half of the premises therein described according to the intention expressed in a limiting clause therein contained, alleging a mistake in the granting clause in that respect, where the court decided on the previous trial that the deed conveyed the whole tract, is not inconsistent with the defense relied upon on the former trial, and the decision in the former case does not estop the plaintiff from setting up such mistake and asking for reformation. *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316.

And under the Texas law that a judgment against a plaintiff in an action for the possession of real property is conclusive, unless he commences a second action within a year, the grantees of such a plaintiff are not precluded by the judgment in the original action from setting up their claim to the land in an action commenced within the year by the former defendant against them. *Brownsville v. Cavazos*, 100 U. S. 138, 25 L. ed. 574.

The doctrine of *res judicata* has no application to an action of ejectment where a second trial is provided for by statute, providing that at any time within a designated time after judgment either upon default or upon verdict the party against whom it is rendered, his heirs or assigns, upon the payment of all costs shall be entitled to have the judgment vacated and a new trial granted. *Hammond v. Carter*, 161 Ill. 621. *40 L. R. A.*

And the rule that where the United States Supreme Court renders its decision, and remands the case to the court below with directions to enter the appropriate judgment, the judgment thus entered becomes in effect the judgment, not of the court to which it was remanded, but of the supreme court, and that it is not within the power of the lower court to change its results or directions in any respect, does not apply to an action of ejectment where the party is entitled by the law of the state in which the action arose to a new trial without showing cause, and in regard to which the trial court possessed no discretion. *Smale v. Mitchell*, 143 U. S. 99, 36 L. ed. 90.

In *Hammond v. Carter*, 161 Ill. 621, *supra*, *Smyth v. Neff*, 123 Ill. 310, *supra*, was distinguished upon the ground that it nowhere appears in that case that a new trial had been granted under the statute, and also that evidence not introduced on the first trial was introduced and considered on the second.

So, two verdicts and judgments in an ejectment suit, in one of which an undivided moiety of the land in question was recovered, and in the other the whole was recovered, are only conclusive so as to bar a third ejectment as to the undivided moiety, under a statute permitting two new trials as of course. *Kinter v. Jenks*, 43 Pa. 445.

And in *Ives v. Leet*, 14 Serg. & R. 301, it was held that one verdict and judgment, and one award of arbitrators, under Pa. act March 20, 1810, in favor of the same party, are not a bar to another ejectment by the other party under a statute, the intention of which is that to bar the right there must not only be two verdicts but a judgment on each, and not only two judgments but a verdict preceding each.

So, where, after a new trial under the statute has been awarded in an action of ejectment, the plaintiff dismisses his suit, all proceedings in the cause

were offered by plaintiff, but which are not preserved in the bill of exceptions. Plaintiff thereupon rested her case. A nonsuit was granted, and judgment was entered for defendant, from which this appeal is taken.

Messrs. Quarles, Spence, & Quarles for appellant.

Mr. Thomas M. Kearney, for respondent:

When a judgment has been vacated it ceases to exist for any purpose, and the parties are relegated to the same position that they would have been in if the action had never been tried. Any estoppel created by the judgment as entered, or arising from it while existing, ceases with the order setting aside the judgment.

2 Black, Judgm. § 683, and cases cited; *Green Bay & M. Canal Co. v. Hewitt*, 55 Wis. 96, 42 Am. Rep. 701; *Hewitt v. Wisconsin River Land Co.* 81 Wis. 546; *Edwards v. Edwards*, 22 Ill. 121; *Sheldon v. Van Vleck*, 106 Ill. 45; *Preachers' Aid. Soc. v. England*, 106 Ill. 125; *Hawley v. Simons*, 102 Ill. 116; *Hammond v. Carter*, 161 Ill. 626; *Donahue v. Klassner*, 22 Mich. 252; *Gehr v. Miller*, 20 W. N. C. 387; *Eichert v. Schaffer*, 161 Pa. 519; *Brownsville v. Cavazos*, 100 U. S. 138, 25 L. ed. 574; *Butterfield v. Walsh*, 25 Iowa, 263; *Smale v. Mitchell*, 143 U. S. 99, 36 L. ed. 90; Newell, Ejectment, p. 833.

The original plat of Racine as recorded, having been referred to in the deed, and the land therein described having been conveyed according to it, the plat becomes an essential part of the description, to the same extent as though it were in fact incorporated therein.

3 Washb. Real Prop. 5th ed. p. 459; *Lampe*

v. Kennedy, 45 Wis. 28; *Shufeldt v. Spaulding*, 37 Wis. 662; 2 Devlin, Deeds, ¶ 1020; *Powers v. Jackson*, 50 Cal. 429; *Alton v. Illinois Transp. Co.* 12 Ill. 88, 52 Am. Dec. 479; *Baxter v. Arnold*, 114 Mass. 577; *Noonan v. Lee*, 2 Black, 499, 17 L. ed. 278; *Doe, Miller, v. Cullum*, 4 Ala. 576; *Llewellyn v. Earl Jersey*, 11 Mees. & W. 183; *Heaton v. Hodges*, 14 Me. 66, 30 Am. Dec. 731; *Magoun v. Lapham*, 21 Pick. 185; 1 Greenl. Cruise Real Prop. p. 223; *Kenyon v. Knipe*, 2 Wash. 394, 13 L. R. A. 142, and note.

If it be true that the description in the deed, read in connection with the plat, does not include the lands intended to be conveyed, then the plaintiff should seek reformation of the conveyance in equity before instituting this action.

Elofrson v. Lindsay, 90 Wis. 203; *Miller v. Tracera*, 8 Bing. 244; *Gillespie v. Sawyer*, 15 Neb. 536; *Jones v. Johnston*, 18 How. 150, 15 L. ed. 320; Newell, Ejectment, p. 556; *Michigan Land & Iron Co. v. Thoney*, 89 Mich. 226; *Muldoon v. Deline*, 135 N. Y. 150; *Holcomb v. Mooney*, 13 Or. 503; *Campbell v. Johnson*, 44 Mo. 247; *Prentice v. Northern P. R. Co.* 154 U. S. 63, 38 L. ed. 947.

Parol evidence is inadmissible in an action in ejectment to vary the boundaries shown in a plat to which express reference is made in a deed for the boundaries of the premises conveyed, or to give construction thereto.

Davidson v. Arledge, 88 N. C. 326; *Orton v. Harvey*, 23 Wis. 99; *Chapman v. Polack*, 70 Cal. 487; *Wood v. West Boston & C. Bridge Comrs.* 122 Mass. 395; *Proprietors of Kennebec Purchase v. Tiffany*, 1 Me. 219, 10 Am. Dec. 60; *Jones v. Johnston*, 18 How. 150, 15 L. ed.

up to that time are wiped out, and are as if they never had been, and the judgment thus wiped out cannot be pleaded or given in evidence for any purpose in any subsequent suit. *Preachers' Aid Soc. v. England*, 106 Ill. 125.

And a record showing that the plaintiff in an ejectment suit filed his declaration in ejectment according to law against the defendant seeking to recover the possession of certain premises, alleging his seisin and ouster, is not admissible in evidence on a statutory new trial in an action of ejectment. *Edwards v. Edwards*, 22 Ill. 121.

So, restitution of the premises in question obtained on a former judgment in ejectment, does not change the burden of proof on a new trial, and compel the defendant to prove his own case. *Donahue v. Klassner*, 22 Mich. 252.

And a judgment in an action of ejectment, founded upon a stipulation of the attorneys for the respective parties as to the facts affecting the title, rendered by direction of the court, does not affect the right of the defeated party to contend upon a second trial that the facts admitted did not warrant a judgment against him. *Hewitt v. Wisconsin River Land Co.* 81 Wis. 546.

And a party to an action of ejectment applying for a new trial may be relieved from the effect of the stipulation of facts made by his counsel so that it will not be allowed to operate against him on the second trial. *Hewitt v. Wisconsin River Land Co.* 81 Wis. 546.

In *Hewitt v. Wisconsin River Land Co.* 81 Wis. 546, *supra*, *Roberts v. Baumgarten*, 128 N. Y. 336, *supra*, was distinguished upon the ground that in that case the unsuccessful party was held to have waived his right to a new trial under the statute by having stipulated, in order to maintain an ap-

peal, that in case the judgment should be against him on the whole controversy, judgment absolute should be entered against him.

So, in *Hawley v. Simons*, 102 Ill. 115, it was held that a judgment in an action of ejectment in favor of the defendant, based on want of legal title in the plaintiff, is no bar to a second suit in ejectment by him upon a title subsequently acquired, the two titles not being the same; but it does not appear whether the second trial was a statutory new trial or not.

And in *Eichert v. Schaffer*, 161 Pa. 519, it was held that the fact that the defendants in an ejectment suit had testified in a previous ejectment suit that a testatrix under whom they claimed was *non compos mentis* does not estop them from changing their ground and insist that she was of sound mind at the time the deed under which they claimed was made; but in this case it does not appear whether the subsequent trial was a statutory new trial or not.

In some of the states it is provided by statute that upon a new trial granted as prescribed by law the defendant may show any matter in an ejectment suit which he might show to entitle him to recover the possession of the property, if he was plaintiff in the action. See N. Y. Code Civ. Proc. § 1530; Mich. Comp. Laws, § 6244.

But the provisions of Mich. Comp. Laws, § 6244, that upon a new trial in ejectment the defendant may show any bar of a recovery in matters which, if he were plaintiff, he might show to entitle him to possession, is applicable only to cases where the plaintiff has taken possession, by virtue of a recovery, and a new trial is had under the statute, *Cook v. Bertram*, 37 Mich. 124.

F. H. B.

820; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Arnold v. Elmore*, 16 Wis. 509.

A description of a block of land by number, according to the official map, will prevail over a description of the block by metes and bounds or courses and distances, if there be a conflict.

Masterson v. Munro, 105 Cal. 481. See also *Hudson v. Irwin*, 50 Cal. 460; *Wolfe v. Scarborough*, 2 Ohio St. 362; *Birmingham v. Anderson*, 48 Pa. 253; *Gillespie v. Sawyer*, 15 Neb. 536.

Messrs. Dodge & Fish also for respondent.

Bardeen, J., delivered the opinion of the court:

We are placed at some disadvantage by reason of a dispute having arisen between counsel as to the actual facts that were before the trial court at the time the motion for nonsuit was granted. A reference to the bill of exceptions, however, seems to settle the contention adversely to the claims of appellant. Neither have we been favored by any definite assignment of error upon which appellant relies, unless it be the broad statement that the court erred in the granting of a nonsuit. This requires an examination of the evidence received and offered on the trial, and the rulings of the court thereon. A party claiming title and right to possession of land, under a very familiar rule, must recover upon the strength of his own title, rather than upon the weakness of the title of his adversary. Ordinarily, the plaintiff must connect himself with the government title, unless both parties claim from a common source, as was the case in *Sexton v. Rhames*, 18 Wis. 99. But here neither the pleadings nor the proof offered show a common grantor. There is not a whisper in the evidence indicating from what source respondent claims title. Neither does the answer disclose any information from which a deduction can be made as to the source of respondent's title, nor does the evidence received or offered show that respondent was, or ever had been, in possession of the land. Such being the state of the record, it became necessary for the appellant either to connect herself with the government title or with some grantor who was the common source of title. Such necessity seems to have been in the mind of counsel for appellant when he asked for the stipulation referred to in the statement of facts. The stipulation not having been consented to, and there being a failure of appellant to connect herself with the original title, it follows, as a necessary conclusion, that her title failed, and the nonsuit was properly ordered.

Still further, there was no evidence that appellant or her grantors had ever been in possession of the disputed premises, so as to give rise to any presumptions which such possession might give. *Ablard v. Fitzgerald*, 87 Wis. 516. But, if this were not so, there is still another reason why, under the situation presented, the conclusion of the trial court was right. When evidence was offered to show the condition of things at the time of the execution and delivery of the deed from Emeline A. Taylor to Kelly, Murray, and Slauson, counsel referred to a certain plat marked "Plat

No. 1," and a map "No. 8," which were ruled out. These papers, taken in connection with this deed, it is argued, would have shown the condition of the land at the time the deed was executed, and were essential to plaintiff's case. Whether this be so or not, the failure to preserve them in the bill of exceptions leaves us powerless to determine their competency. When a document is offered and excluded, it must be brought into the record, in order that the court, on appeal, may determine its competency. *Elliott, App. Proc.* § 748. Map No. 8 seems to have been a paper that was used on the hearing of this case in this court on the former appeal. At the trial it does not appear to have been marked or identified, nor is it attached to or referred to in the bill of exceptions on this appeal, any further than has been stated. This court can take cognizance of papers or documents which are not a part of the judgment roll only when they have been reserved and properly identified in the bill of exceptions. The deed from Emeline A. Taylor to Kelly, Murray, and Slauson purports to convey a tract of land being "part of block 7 according to the original plat of the village, now city, of Racine, made by Moses Vilas, surveyor, and recorded in the office of the register of deeds of said Racine county." Respondent's counsel objected to the reception of this deed unless the plat referred to therein was produced. Appellant's counsel refused to produce the plat, because "it did not show the condition at the time the deed was made." The deed was admitted. A witness was then produced, who testified that Root river flowed into Lake Michigan at different places at different periods. Counsel announced that the purpose of this testimony was to show where Root river was at the time the deed was made. Further testimony along this line was objected to because the tract conveyed by the deed was in block 7, while the land sought to be recovered was not included therein, but was adjacent to block 87. In the colloquy which ensued between the court and counsel it must be assumed that, if the plat referred to in the deed should govern, the deed conveyed no portion of the disputed premises. This was the conclusion of the trial court, and upon which he sustained the objection. With this decision we certainly agree. The deed in question purported to cover only a portion of block 7, according to the original plat made by Moses Vilas, surveyor. "A deed containing a description, and referring to a map having lines drawn upon it, and marking natural boundaries, and the natural objects delineated on its surface, should be considered as giving the true description of the land, as much as if the map were marked down in the deed." 2 Devlin. Deeds, §§ 1020, 1021; *Chapman v. Polack*, 70 Cal. 487. And see *Masterson v. Munro*, 105 Cal. 481; *Schenley v. Pittsburgh*, 104 Pa. 472. In this case, the deed calling for a tract of land in block 7, according to a specific survey, cannot be extended to cover land in some other block by the evidence received or offered at the trial. If the deed in question does not convey the disputed tract when read with reference to the plat, then the grantee should seek its reformation. The fact, if it be a fact, that this deed was offered and received in evidence

on the former trial, cuts no figure in this case. Under Rev. Stat. § 8092, respondent was entitled to a new trial upon compliance with its terms. When the judgment was vacated, the action stood for trial as if it had never been tried. *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316; *Hewitt v. Wisconsin River Land Co.* 81 Wis. 548; *Edwards v. Edwards*, 23 Ill. 121; *Hammond v. Carter*, 161 Ill. 621; *Dona-hue v. Klassner*, 22 Mich. 253; *Eichert v. Schaf-fer*, 161 Pa. 519; *Brownsville v. Cavazos*, 100 U. S. 188, 25 L. ed. 574.

The view we have taken of this case renders it unnecessary to determine the motion of respondent to strike out a part of the record sent to this court. The provisions of rule 7½ are plain, and easily understood, and at this late day there is no excuse for a violation of it.

The judgment of the Circuit Court is affirmed.

Anna BECKER, *Respt.*,

v.

City of LA CROSSE, *Appt.*

(.....Wis.....)

A city cannot accept a grant from another state to operate a toll road beyond its limits and the limits of its own state, or be held liable for defects in such road if operated by it, when it is not authorized to do so by the laws of its own state, although the toll road is made to connect with a city toll bridge that the city has constructed under lawful authority.

(May 3, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for La Crosse County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Bardeen, J.:**

Chapter 37, Laws 1889, authorizes the city of La Crosse to construct a bridge across the Mississippi river from some point in the corporate limits to some point in the county of Houston, in the state of Minnesota, opposite the city, with all necessary approaches thereto, and to charge and collect a reasonable rate of toll. By chapter 825 of the Special Laws of Minnesota for the year 1889, the city of La Crosse was authorized to construct and maintain a wagon road commencing at any point on a lawful highway in the said county of Houston north of the south line of the Pine Creek road, and extending thence, by the most feasible route, to the boundary line between Minnesota and Wisconsin, opposite the corporate limits of the city, and to charge a reasonable rate of toll for travelers thereon. By § 5 of said act it was also provided that the city should be liable for all damages sustained by any person traveling upon said road caused by the improper construction of said road or want of reasonable diligence in keeping the same in repair. The city accepted the provisions of

the act, and built a road, with the necessary bridges, from a point within its corporate limits westward to a point in Minnesota, a distance of about 2½ miles. The road runs across the Mississippi river bottom lands, and is built on a grade from 8 to 16 feet above the adjoining land. At the point where the accident to plaintiff is alleged to have occurred, which is about 65 feet west of the main bridge, the roadway is on a grade 16 feet above the adjoining land, 20 feet wide on the top, with a descending slope of about 1 foot perpendicular to 1½ feet horizontal, and without any rail or guard at the sides. On March 23, 1896, the plaintiff and her husband passed over this road from La Crosse to La Crosse, driving a single horse and buggy. Upon their return, the plaintiff was driving, seated on the left side of the buggy. Near the place of the accident they met two teams loaded with what is known as "Minnesota fencing." The first team was passed in safety, but, as they met the second team, the horse shied at a man wearing a fur overcoat, walking immediately in the rear of the wagon, cramped the buggy suddenly, and backed off the embankment. In attempting to jump out, the plaintiff was caught in the buggy in some way, and was dragged down the embankment, and injured. Notice was duly given to the city, and this action was commenced in the circuit court of La Crosse county, to recover damages for the injury sustained. The place of the accident is admitted to have been outside the corporate limits of the city, and within the boundaries of the state of Minnesota. The liability of the city is based upon the manner in which the road was constructed and maintained, there being no railing or barriers along the sides thereof. The jury found a verdict for plaintiff for \$1,000. From a judgment entered thereon the defendant appeals.

Mr. Martin Bergh, for appellant:

This state cannot exercise any authority or jurisdiction over the territory of the state of Minnesota, nor can it authorize a municipality to exercise any such authority or jurisdiction.

If the officers of a municipality assume to act in excess of the authority conferred by the legislature, the municipality cannot be rendered liable for the results of such unauthorized action, either in contract or in tort.

See *Tiedeman*, Mun. Corp. § 338, p. 676; *Albany v. Cunliff*, 2 N. Y. 165; *Morrison v. Lawrence*, 98 Mass. 219; *Cavanagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716.

The language of a statute imposing liability upon a municipality for damages in an action of this nature will not be extended by implication.

Detroit v. Putnam, 45 Mich. 268; *Facs v. Ionia*, 90 Mich. 104; *Bogie v. Waupun*, 75 Wis. 1, 6 L. R. A. 59.

The only act of negligence upon which the plaintiff claims a right of action is the failure to erect and maintain guard-rails or barriers along the side of the roadway.

Negligence is the proximate cause of an injury only when the injury is the natural and probable result of it, and, in the light of attendant circumstances, it ought to have been foreseen by a person of ordinary care.

NOTE.—The question involved in the above case seems to be here decided for the first time.

40 L. R. A.

Deisenrieter v. Kraus-Merkel Malting Co. 92 Wis. 164; *Andrews v. Chicago, M. & St. P. R. Co.* 96 Wis. 348; *Beall v. Athens Twp.* 81 Mich. 536; *Kingsley v. Bloomington Twp.* 109 Mich. 340; *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L. R. A. 365; *McGowan v. Chicago & N. W. R. Co.* 91 Wis. 147; *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L. R. A. 654; *Hawes v. Fox Lake*, 33 Wis. 438; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Huber v. La Crosse City R. Co.* 92 Wis. 686, 31 L. R. A. 588; *Schillinger v. Verona*, 96 Wis. 456.

If the proximate cause of the accident to the plaintiff, in this case, was attributable to anything else than the negligence of the defendant in failing to erect barriers or guards along the road in question, the plaintiff would not be entitled to recover.

Beall v. Athens Twp. 81 Mich. 536.

Messrs. Higbee & Bunge, for respondent:

If the horse of a traveler upon a highway becomes momentarily frightened and out of his control, and the traveler is injured by reason of a defect, the traveler is entitled to recover.

Hein v. Fairchild, 87 Wis. 265; *Titus v. Northbridge*, 97 Mass. 258, 93 Am. Dec. 91; *Oleón v. Chippewa Falls*, 71 Wis. 558.

All voluntary enterprises, and those from which the city derives profit, such as gas works, docks, waterworks, wash houses and ferries, are held to be within the corporate sphere of municipal enterprise.

2 Dill. Mun. Corp. 3d ed. § 964.

And for its negligence in reference to the conduct of such business it is liable in the same manner as private persons and corporations.

15 Am. & Eng. Enc. Law, § 1141; *Mulcairns v. Janesville*, 67 Wis. 24; *Wilkins v. Rutland*, 61 Vt. 336; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Hill v. Boston*, 122 Mass. 344, 28 Am. Rep. 332; *Murphy v. Lowell*, 124 Mass. 564; *The Giovanni v. Philadelphia*, 59 Fed. Rep. 303; *Guthrie v. Philadelphia*, 73 Fed. Rep. 688; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 780; *Augusta v. Hudson*, 88 Ga. 599; *The F. C. Latrobe*, 28 Fed. Rep. 378; *Philadelphia v. Gavagnin*, 17 U. S. App. 642, 62 Fed. Rep. 619, 10 C. C. A. 552; *Sherlock v. Alling*, 93 U. S. 108, 23 L. ed. 822.

Bardeen, J., delivered the opinion of the court:

From the statement of the facts involved in this litigation, it will be observed that the accident to the plaintiff happened on an embankment, some little distance west of the west end of the bridge across the Mississippi river, outside of the corporate limits of the city of La Crosse, and beyond the limits of this state; and it is insisted that the city of La Crosse built and maintained the road in question without any charter or legislative authority from the legislature of this state. It is not claimed that the charter gives the city any authority or power in the premises. The only power granted by the legislature is such as is contained in chapter 37, Laws 1889. 1 Dillon on Municipal Corporations, 4th ed. § 89, says: 40 L. R. A.

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable." This declaration of the law meets with express approval in *Trester v. Sheboygan*, 87 Wis. 496. It is also a rule of law as universal in its application that the agents, officers, or even the city council of a municipal corporation cannot bind the corporation by the assumption of powers beyond those granted by the sovereign authority, except within the limitations above stated. It would seem like a truism to state that the legislature cannot grant authority to a municipal corporation to assume obligations or to charge itself with permanent duties to be performed outside of the state limits. Section 1, art. 9, Wis. Const., declares that "the state shall have concurrent jurisdiction on all rivers and lakes bordering on this state, so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same." The boundary line between this state and Minnesota is the main channel of the Mississippi river. Const. art. 2, § 1. In the exercise of its "concurrent jurisdiction" over the Mississippi river, this state saw fit, by chapter 37, before mentioned, to grant to the city of La Crosse the right to construct a bridge across the river to some point in Minnesota with all necessary approaches thereto. Admitting that this authority was properly conferred, for the purposes of this suit, the act referred to did not and could not grant the right to the city to build and maintain a highway 2½ miles long, on the bottom lands of the river in the state of Minnesota. There is therefore nothing in the charter of the defendant city, or in chapter 37, giving it authority to keep up, or making it its duty to maintain, the highway upon which the plaintiff was injured.

The question, then, recurs: Had the city the authority or right to accept the privilege granted it by the state of Minnesota? We have been referred to no case, and after careful search we are not able to find one, in which this precise question has been determined. Such a decision may be in the books, but the industry of both counsel and court has been unavailing to find it. While it may be admitted that the maintenance of this bridge and highway may be of material advantage to the city, and may add largely to the commerce of its inhabitants, it cannot be said to be of such paramount importance as to require any stretch of legal principles to sustain that right. It is true that municipal corporations are often granted proprietary or private rights, which they may exercise under the same perils and obligations as a private person; but these rights can only come from the source that gave it corporate existence. By the acceptance and exercise of these rights, the corporation assumes the same obligations and responsibilities, and the same duty to so exercise them as not to invade the rights of others, as fall upon private persons. The distinction between the

rights which the corporation possesses in its governmental or public character, and those which fall to it in its proprietary or private character, originated in the courts, to promote justice, and has been frequently applied to escape technical difficulties, in order to hold such corporation liable to private actions. 1 Dill. Mun. Corp. § 67. The general doctrine is clear that such corporations cannot usually exercise their powers beyond their own limits. The right to exercise extraterritorial powers can only arise by express grant of authority, as indicated in *Thompson v. Moran*, 44 Mich. 602, or by necessary implication from other powers granted, as is pointed out in *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601. And the powers so exercised must be directly within the range of corporate purposes. Considerations of local policy, no doubt, induced the legislature to grant the city of La Crosse the right to build the bridge mentioned. The movers in this enterprise evidently appreciated the serious difficulties attending the erection and management of expensive public works situated partly in this state, and partly in Minnesota. It was to remove, in some degree, these difficulties, that the legislation referred to was obtained from the state of Minnesota. The corporation of La Crosse exists only by the grace of the legislative grant of this state. As before suggested, it possesses no power and can assume no obligations except such as may come from the original source. To permit it to accept rights, and to assume duties beyond the power of its creator to enforce or to regulate, would be an innovation we are not prepared to sanction. From the very necessities of the situation, it would have no power to regulate or protect its erections in a foreign jurisdiction. The noted case of *Bailey v. New York*, 3 Hill, 531, and 3 Denio, 438, illustrates some of the complications that might arise in that regard. To permit the city, no matter how desirable it may be, to expend its money, and to obtain rights and privileges beyond its own limits and beyond the limits over which its creator has jurisdiction, would be unwise and dangerous, to say the least, and against public policy. Its acts in this regard being *ultra vires*, the municipality cannot be held liable therefor, or for failure to perform such acts, to the injury of others. *Tiedeman, Mun. Corp.* § 338. And see *Trester v. Sheboygan*, 87 Wis. 496; *Cavanagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716.

In arriving at this conclusion, we have not overlooked the rule laid down in the celebrated case of *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274, to the effect that a corporation created by one sovereignty may, by comity; do business, hold property, and sue in the courts of other sovereignties of the Union, nor the line of decisions that hold that a city may take and hold the title to property outside of its corporate limits. In the first instance, the rule must be confined to trading or commercial corporations in contradistinction to municipal corporations; and, in the second line of cases referred to, the decisions are based upon the rule that the right to own property is not a sovereign right, and that the title to property may vest in the municipality even though it

may not exercise the rights of sovereignty over it. *Lester v. Jackson*, 69 Miss. 887; *Re New York*, 99 N. Y. 569. And see *McDonogh v. Murdoch*, 15 How. 867, 14 L. ed. 732. We therefore hold that the city of La Crosse was without authority, under its charter or the law of this state, to accept privileges or assume duties and obligations to be performed outside of the limits and beyond the jurisdiction of this state, and, owing no duty to the plaintiff with reference to this highway, cannot be held liable in this action.

The cases of *The Giovanni v. Philadelphia*, 59 Fed. Rep. 308, and *Guthrie v. Philadelphia*, 73 Fed. Rep. 698, cited to support the plaintiff's recovery, are quite unlike the case at bar. We have no quarrel with the proposition that, when a municipal corporation engages in things not municipal in their nature, it acts as an individual, and is responsible accordingly. In each of these cases the corporation defendant engaged in the performance of duties strictly within its chartered powers, and the recovery against it was based entirely on that ground.

There is another feature of this case that raises a most serious question,—Should the liability of the city to keep up this highway be conceded? The road in question was 20 feet in width on the top, in perfect condition, and, so far as the evidence shows, with ample room for the accommodation of the public, in view of its use. The only imperfection in the highway is the alleged failure to erect and maintain guards or barriers along this embankment. The city is not an insurer of travelers on its streets. It is only required to keep its highways in a reasonably safe condition for travel. Here, the way was broad and ample for the passage of teams, and it may reasonably be claimed, as a matter of law, that this highway met all the conditions required in such cases. That question however, we leave for future determination.

The judgment of the Circuit Court is reversed, and the cause is remanded with directions to dismiss the complaint.

Mary O'BRIEN, *Respt.*,

v.

City of LA CROSSE, *Appt.*

(.....Wis.....)

An examination by instruments to determine the condition of plaintiff's bladder, in an action for injury thereto, cannot be ordered without abusing the discretion of the court, where the purpose of it is to empty the bladder, and the evidence of plaintiff's physicians is that the examination would not be prudent, and that of defendant's physicians is that it would be safe if the bladder was healthy.

NOTE.—For the question of compelling a physical examination of the plaintiff, see also *McQuigan v. Delaware, L. & W. R. Co.* (N. Y.) 14 L. R. A. 466, and note; *Lyon v. Manhattan R. Co.* (N. Y.) 25 L. R. A. 402; *Graves v. Battle Creek* (Mich.) 19 L. R. A. 641; *Carrico v. West Virginia, C. & P. R. Co.* (W. Va.) 24 L. R. A. 50; *Hall v. Manson* (Iowa) 34 L. R. A. 207; and *Cleveland, C. C. & St. L. R. Co. v. Huddleston* (Ind.) 36 L. R. A. 681.

but would be absolutely dangerous in some conditions.

(May 3, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for La Crosse County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Martin Bergh, for appellant:

Trial courts have the right to order an examination of plaintiff by physicians, in personal injury cases.

White v. Milwaukee City R. Co. 61 Wis. 536, 50 Am. Rep. 154.

The power to compel a physical examination of the plaintiff in an action for personal injuries has been likened to the power to compel the opposite party to produce books and papers.

Walsh v. Sayre, 52 How. Pr. 384.

A majority of the courts which have expressed an opinion upon the question are, doubtless, in favor of recognizing the existence of such right and power.

Alabama G. S. R. Co. v. Hill, 90 Ala. 71, 9 L. R. A. 442, 31 Cent. L. J. 376, and note 379; *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375; *Devanbagh v. Devanbagh*, 5 Paige, 554, 28 Am. Dec. 443; *Anonymous*, 89 Ala. 291, 7 L. R. A. 425; *McQuigan v. Delaware, L. & W. R. Co.* (N. Y.) 14 L. R. A. 466, note; *Baynton's Trial*, 14 How. St. Tr. 634; *Reg. v. Wycherley*, 8 Car. & P. 262, note; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 473, 44 Am. Rep. 665; 10 Am. & Eng. R. Cas. 791, note; *Newell v. Newell*, 9 Paige, 25; *Le Barron v. Le Barron*, 35 Vt. 865; *Anonymous*, 35 Ala. 226; 2 Bishop, Mar. & Div. §§ 590 et seq.; 1 Thomp. Trials, § 551; *Hess v. Lake Shore & M. S. R. Co.* 7 Pa. Co. Ct. 565; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *St. Louis S. W. R. Co. v. Dobbins*, 60 Ark. 481; *Miami & M. Turnp. Co. v. Bailly*, 37 Ohio St. 104; *Richmond & D. R. Co. v. Childress*, 82 Ga. 721, 3 L. R. A. 808; *Graves v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641; *Langworthy v. Green Twp.* 95 Mich. 93; *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 190, 53 Am. Rep. 14; *Loyd v. Hannibal & St. J. R. Co.* 53 Mo. 509; *Sidekum v. Wabash, St. L. & P. R. Co.* 93 Mo. 400.

In some cases courts have refused the examination on the ground that the application therefor was not made at the proper time, or in a proper manner, or because of objections to the physicians who were proposed for the work, and not because they did not possess such power, and the right to exercise it in proper cases.

St. Louis Bridge Co. v. Miller, 138 Ill. 465; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542; *Missouri P. R. Co. v. Johnson*, 72 Tex. 95; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724.

Messrs. Higbee & Bunge, for respondent:

The combined testimony of all the experts called in the case is that under such a condition as was found, the introduction of a catheter is dangerous and liable to produce cystitis. Plaintiff's attending physician regarded the

operation as dangerous, and advised that it should not be permitted. The medical authority upon this subject is abundant and overwhelming.

Eichhorst, Professor of Pathology and Therapeutics, of Zurich, vol. 2, p. 326.

In courts which have been most pronounced in favor of the right of a defendant to require an examination, whenever the question as to the limitations of the examination have come before such court they have universally denied that the right extends to the application of any tests, or to the performance of any operation.

Schroeder v. Chicago, R. I. & P. R. Co. 47 Iowa, 375; *Shepard v. Missouri P. R. Co.* 85 Mo. 629, 55 Am. Rep. 390; *Strudger v. Sawd Beach*, 107 Mich. 496; *Chadron v. Glover*, 43 Neb. 732.

Cassoday, Ch. J., delivered the opinion of the court:

This is an action for a personal injury sustained by reason of a plank in an alleged defective sidewalk suddenly flying up and striking plaintiff across the abdomen, and throwing her down and permanently injuring her bladder, or muscles connected with the bladder. Issue being joined, and trial had, the jury returned a verdict in favor of the plaintiff and assessed her damages at \$500. From the judgment entered thereon the defendant brings this appeal.

There is plenty of evidence to support the verdict. The principal contention is that it was error for the court not to compel the plaintiff to submit to further examination by physicians on the part of the defendant to ascertain the exact nature of her injuries and how long they had existed. When the first medical witness on behalf of the plaintiff was sworn, the defendant asked that before he should be examined, the defendant's experts should be allowed to make a personal examination of such injuries. It was then agreed, without any objection being made, that an arrangement would be made for such examination after the evening adjournment of the court. It appears that a full and complete examination was had by the defendant's physicians before the opening of the court the next morning, except that the plaintiff, under the advice of her physicians, refused to permit the introduction of a catheter into her bladder, for the reason that it would endanger her health. After the defense had sworn and examined four witnesses, the defendant asked for an order compelling the plaintiff to submit to an examination by instruments, to determine the condition of her bladder. A statement having been made as to the examination which had in fact been made, the court stated that, while the court had power to order an examination, it had no power to determine the extent of such examination. No exception was made to such ruling. The defendant's physicians testified to the effect that their object was to withdraw all the urine from the bladder; that, in a healthy bladder it was safe to do so; that there were conditions of the bladder where it was absolutely dangerous to withdraw all the urine therefrom at one time, and by so doing the walls of the bladder were certain to come together, and excite inflamma-

tion; that a coming in contact with the urine in the bladder would produce decomposition, and the decomposition had the effect of producing cystitis,—a cause that was very frequent. The plaintiff's physician testified to the effect that he objected to the introduction of a catheter, because he did not consider it prudent; that cystitis (inflammation of the bladder) was liable to follow. After the defendant rested its case, and the plaintiff's rebutting testimony had been put in, the defendant renewed its motion for an order that the plaintiff be compelled to submit to such further examination, which request was denied by the court, and the defendant excepted; and this is the only exception in the record on that subject. Was such refusal error? This court has held that "in an action for personal injuries, the court may, in a proper case, at the trial, direct the plaintiff to submit to a personal examination by physicians on behalf of the defendant."

White v. Milwaukee City R. Co. 61 Wis. 537, 50 Am. Rep. 154. It seems that courts differ widely as to the absolute right to such personal examination, in the absence of statute, by physicians or experts of the opposite party. Some courts deny the right altogether. Some hold that an absolute right to such examination exists at common law. Such differences of opinion may be accounted for in part by the difference in the circumstances under which such examinations were requested. The better opinion, in our judgment, makes the right, in the absence of statute, to rest in the sound discretion of the trial court. *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L. R. A. 442; *Shepard v. Missouri P. R. Co.* 85 Mo. 629, 55 Am. Rep. 390; *Sidekum v. Wabash, St. L. & P. R. Co.* 98 Mo. 400; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169; *St. Louis S. W. R. Co. v. Dobbins*, 60 Ark. 485, 486; *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 8 L. R. A. 808; *Graves v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641; *Strudgeon v. Sand Beach*, 107 Mich. 496; *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 180, 53 Am. Rep. 14; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Terre Haute & I. R. Co. v. Brunner*, 128 Ind. 542; *Chadron v. Glover*, 48 Neb. 782.

In some of these cases the application was refused because not made in time to avoid the interruption of the ordinary course of the trial. In the case at bar there was no abuse of discretion. On the contrary, it would have been an abuse of discretion to force the plaintiff to submit to such an experiment with instruments, under the circumstances stated. There is no reversible error in the record.

The judgment of the Circuit Court is affirmed.

Mary J. FOSTER, *Respt.*,
v.

FIDELITY & CASUALTY COMPANY of
New York, *Appt.*

(..... Wis.)

1. Notice of an accident causing death.

NOTE.—On the question of forfeiture of insurance by failure to furnish proofs of loss immediately, see also *Ermentrout v. Girard F. & M. Ins. Co.* (Minn.) 30 L. R. A. 346.

For failure to furnish within time stipulated, see 40 L. R. A.

given to an insurance company twenty-nine days after knowledge of the facts was obtained, is not "immediate" within the meaning of the policy.

2. Waiver need not be specially pleaded in order to admit evidence thereof, but can be shown under an allegation of performance.

3. Correspondence and affidavits are not admissible to prove the fact of accident or cause of death, in an action on an insurance policy, although admissible to show compliance with or waiver of a condition as to furnishing proofs of death.

4. An opinion of a physician that death was occasioned by injuries, based on evidence before him, cannot be allowed, when the action does not show the facts upon which the opinion was based.

(May 3, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for Portage County in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Reversed.*

Statement by Winslow, J.:

This is an action to recover upon an accident insurance policy issued by the defendant. The policy was in the principal sum of \$1,600, and was issued June 29, 1895, to one Thomas F. Foster, a car repairer by occupation, in favor of his mother, the plaintiff, Mary J. Foster, in case of his death resulting from bodily injuries sustained through external, violent, and accidental means. The policy also contained a provision for the payment of weekly indemnity to the assured himself, resulting from injuries not producing death. The clauses of the policy which are material upon this appeal are as follows: "Against bodily injuries sustained through external, violent, and accidental means, as follows: If death shall result within ninety days from such injuries, independently of all other causes, this company shall pay the principal sum of this policy to Mrs. Mary J. Foster, his mother, if surviving, or, in event of her prior death, to the legal representatives of the assured; (a) or, if the loss by actual separation at or above the wrist or ankle of both hands or both feet, or of one hand and one foot, or the irrecoverable loss of the sight of both eyes shall so result within ninety days, the company shall pay the assured the principal sum before named, which payment shall terminate the policy; (b) or if the loss by actual separation at or above the wrist or ankle of one hand or of one foot shall so result within ninety days, the company shall pay the assured one half the principal sum before named, which payment shall terminate the policy." "This insurance does not cover disappearances, nor war risks, nor voluntary exposure to unnecessary danger, nor injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled; nor injuries, fatal or otherwise, received while or in conse-

Steele v. German Ins. Co. (Mich.) 18 L. R. A. 85, and note; also *Tripp v. Provident Fund Soc.* (N. Y.) 22 L. R. A. 432; *Cooper v. United States Mut. Acci. Asso.* (N. Y.) 16 L. R. A. 138.

quence of having been under the influence of, or affected by, nor resulting, directly or indirectly, from intoxicants, anaesthetics, narcotics, sunstroke, freezing, vertigo, sleepwalking, fits, hernia, or any other disease or bodily infirmity." Among the conditions to which the policy was made subject were the following: "(4) Any medical adviser of the company shall be allowed to examine the person or body of the assured in respect to any alleged injury as often as he requires. (5) Immediate written notice must be given said company at New York city of any accident and injury for which a claim is to be made, with full particulars thereof, and full name and address of the insured. Affirmative proof of death, or loss of limb or of sight, or of duration of disability must also be furnished the said company within two months from the time of death, or of loss of limb or of sight, or of the termination of disability. Legal proceedings for recovery hereunder may not be brought till three months from date of filing proof at this company's home office, nor brought at all unless begun within six months from time of the death, loss of limb or sight, or the termination of disability. Claims not brought in accordance with the provisions of this clause shall be forfeited to the company." The insured died on the 5th of September, 1895, at Hurley, in this state, being then in the employ of the Wisconsin Central Railway Company as car repairer. The complaint alleged that he died by reason of injuries received by him by an accidental fall from a freight car at Hoyt's station, on or about August 31, 1895; and, further, that the said insured in his lifetime, and the plaintiff after his death, each fulfilled all the conditions of the policy; and that the plaintiff, on the 15th of October, 1895, and more than three months before the commencement of this action, gave the defendant notice in writing of the said injury to and death of Thomas F. Foster. The answer admitted that Foster died at Hurley, September 5, 1895, and that the defendant received from the plaintiff notice of such death on October 17, 1895, and not before, and further alleges that Foster died of disease and infirmities, and not by accident, and that no affirmative proof that his death was caused by accident has ever been furnished. At the time of the death of the insured, the plaintiff lived at Stevens Point, Wisconsin, and was not present when her son died. His death took place at an hotel in Hurley, and apparently as a result of a severe attack of cholera morbus. There was no direct evidence that the insured had met with an accident, but bruises were found upon his back, and certain testimony was given by the physician who attended him which, it was claimed, was sufficient to entitle a jury to find that his death was caused by an accident or fall which produced the bruises. A motion for nonsuit was made at the close of the plaintiff's evidence, which was denied, and a motion to direct a verdict for the defendant at the close of the entire evidence was also denied. A verdict was returned for the plaintiff for the full amount of the policy, and a motion to set the same aside upon exceptions, and because contrary to the law and the evidence, was denied. From judgment for the plaintiff upon the verdict the defendant appeals.

40 L. R. A.

Messrs. Curtis, Reid, & Smith, for appellant:

The giving of "immediate notice" was a condition precedent to the right of action.

Blakeley v. Phoenix Ins. Co. 20 Wis. 206, 91 Am. Dec. 388; *Knudson v. Hekla F. Ins. Co.* 75 Wis. 198; *Inman v. Western F. Ins. Co.* 12 Wend. 459; *Harriman v. Queen Ins. Co.* 49 Wis. 71; *Carberry v. German Ins. Co.* 51 Wis. 605; *Scheiderer v. Travelers' Ins. Co.* 58 Wis. 18, 46 Am. Rep. 618; *Heilner v. China Mut. Ins. Co.* 45 N. Y. S. R. 578, 28 Jones & S. 362; *Quinlan v. Providence Washington Ins. Co.* 39 N. Y. S. R. 820.

Such a construction should be placed upon the word "immediate" as not to fritter away the substantial rights of the parties, nullify contracts, and promote fraud. The word "immediate," in this connection, is construed to mean such "convenient time as is reasonably requisite for doing the thing."

Richardson v. End. 43 Wis. 318; *Stevens v. Breen*, 75 Wis. 599; *Kentzler v. American Mut. Acci. Asso.* 88 Wis. 589; *Harnden v. Milwaukee Mechanics' Ins. Co.* 164 Mass. 382.

It means as soon as possible, with due diligence.

Note to *Ostrander*, *Fire Ins.* p. 519; *Baker v. German F. Ins. Co.* 124 Ind. 490; *Home Ins. Co. v. Davis*, 98 Pa. 280; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Griffey v. New York Cent. Ins. Co.* 100 N. Y. 417, 53 Am. Rep. 202.

Where the facts are undisputed, it is a question of law for the court, whether the notice given was "immediate."

Peele v. Provident Fund Soc. 147 Ind. 543; *Pickel v. Phoenix Ins. Co.* 119 Ind. 291; *Railway Pass. Assur. Co. v. Burwell*, 44 Ind. 460; *Mellen v. Hamilton F. Ins. Co.* 17 N. Y. 606; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Baker v. German F. Ins. Co.* 124 Ind. 490; *Insurance Co. of N. A. v. Brim*, 111 Ind. 281; *McFarland v. United States Mut. Am. Asso.* 124 Mo. 204; *Bennett v. Lycoming County Mut. Ins. Co.* 67 N. Y. 274; *Springfield F. & M. Ins. Co. v. Brown*, 128 Pa. 392.

An unexcused delay of any length approaching forty days is not "immediate," and avoids all claim.

Niblack, *Ben. Soc.* 416; *Inman v. Western F. Ins. Co.* 12 Wend. 452; *Trask v. State F. & M. Ins. Co.* 29 Pa. 198, 72 Am. Dec. 622; *Railway Pass. Assur. Co. v. Burwell*, 44 Ind. 460; *Mellen v. Hamilton F. Ins. Co.* 17 N. Y. 606; *Quinlan v. Providence Washington Ins. Co.* 39 N. Y. S. R. 820, 183 N. Y. 356; *Weed v. Hamburg-Bremen F. Ins. Co.* 183 N. Y. 894; *Whitehurst v. North Carolina Mut. Ins. Co.* 52 N. C. (7 Jones, L.) 485, 78 Am. Dec. 246; *Edward v. Lycoming County Mut. Ins. Co.* 75 Pa. 340; *Inland Ins. & Deposit Co. v. Stauffer*, 33 Pa. 402; *LaForce v. Williams City F. Ins. Co.* 42 Mo. App. 518; *Pickel v. Phoenix Ins. Co.* 119 Ind. 291; *Green Bros. v. Northwestern Life Stock Ins. Co.* 87 Iowa, 358.

It was error to admit in evidence, against defendant's special objections, the long line of correspondence between plaintiff's attorneys and the defendant which took place after plaintiff had submitted her proofs of death.

Where a waiver of conditions precedent to a

right of action is relied upon it must be pleaded.

Home Ins. Co. v. Lindsey, 26 Ohio St. 848; *Warren v. Bean*, 6 Wis. 120; *Warder v. Baldwin*, 51 Wis. 450; *Freeland v. Ritz*, 154 Mass. 257, 12 L. R. A. 561; *Baker v. German F. Ins. Co.* 124 Ind. 490; *People's Bank v. Etina Ins. Co.* 42 U. S. App. 81, 74 Fed. Rep. 509, 20 C. C. A. 680; *Cott v. Miller*, 10 Cush. 49; *Pomroy v. Gold*, 2 Met. 500; *Palmer v. Sawyer*, 114 Mass. 1; *Diehl v. Adams County Mut. Ins. Co.* 58 Pa. 443, 98 Am. Dec. 807; *Gill v. Rice*, 13 Wis. 549.

The defendant must be guilty of occupying inconsistent positions, or of calling upon the plaintiff for something causing trouble and material expense to the plaintiff while leading the plaintiff to believe the policy still valid, in order to effect a waiver.

Kidder v. Knights Templars & M. Life Indemnity Co. 94 Wis. 588; *Knudson v. Hekla F. Ins. Co.* 75 Wis. 198; *Engbretson v. Hekla F. Ins. Co.* 58 Wis. 301; *Connell v. Milwaukee Mut. F. Ins. Co.* 18 Wis. 887; *Devens v. Mechanics & T. Ins. Co.* 83 N. Y. 168; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Ermentrout v. Girard F. & M. Ins. Co.* 68 Minn. 805, 80 L. R. A. 846; *Ostrander, Fire Ins. § 229*; *May, Ins. §§ 507, 508*.

Without restriction the admission of the documents was error, even though they might have been admissible for some particular purpose.

Mead v. Hein, 28 Wis. 539; *Bonner v. Home Ins. Co.* 13 Wis. 677; *Hiles v. Hanover F. Ins. Co.* 65 Wis. 585, 56 Am. Rep. 637; *Kalk v. Fielding*, 50 Wis. 389.

An expert opinion can be based only on facts given in evidence, and those facts must be definitely specified or pointed out by the question calling for the opinion, or by the opinion given.

Rogers, Expert Testimony, 2d ed. § 86; *Maitland v. Gilbert Paper Co.* (Wis.) 72 N. W. 1124; *Bennett v. State*, 57 Wis. 69, 46 Am. Rep. 26; *Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 158; *VanDeusen v. Newcomer*, 40 Mich. 120; *Burns v. Barenfield*, 84 Ind. 43; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409.

No "immediate" notice of death was given to the defendant at New York city, and a verdict for defendant should have been directed on that ground.

There could be no reason for the delay other than to allow the body of the deceased to decompose and thus destroy the last means of determining with certainty the cause of the death. No argument can bolster up the claim that a period of thirty days was "reasonably requisite" to enable the plaintiff to do so simple an act as giving notice to the defendant.

A nonsuit should have been granted because the plaintiff gave no evidence as to the manner in which the insured received the bruises alleged to have caused his death, nor as to any of the circumstances thereof, and consequently did not show that his death was caused by such an accident as was covered by the terms of the policy.

Sohier v. Norwich F. Ins. Co. 11 Allen, 886; *Coburn v. Travelers' Ins. Co.* 145 Mass. 226; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572; 40 L. R. A.

LaPoint v. Cady, 2 Pinney, 515; *Central Bridge Corp. v. Butler*, 2 Gray, 180; *Bremmer v. Green Bay, S. P. & N. R. Co.* 61 Wis. 114; *Bennett v. Chicago & N. W. R. Co.* 19 Wis. 146.

Messrs. Cate, Sanborn, Lamoreux, & Park, for respondent:

When immediate notice is required by the policy, how far the notice given complies with the conditions of the policy is a question for the jury.

1 Am. & Eng. Enc. Law, p. 92, note 4; 9 Am. & Eng. Enc. Law, p. 938; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 888; *Niagara F. Ins. Co. v. Seammon*, 100 Ill. 644.

"Immediately" means such convenient time as was reasonably required for giving the notice after discovery of death.

Kentzler v. American Mut. Acci. Asso. 88 Wis. 589.

The claim of waiver need not be pleaded in the complaint.

Zielke v. London Assur. Corp. 64 Wis. 442; *McBride v. Republic F. Ins. Co.* 80 Wis. 562; *Parker v. Amazon Ins. Co.* 84 Wis. 363; *Killips v. Putnam F. Ins. Co.* 28 Wis. 472, 9 Am. Rep. 506; *O'Conner v. Hartford F. Ins. Co.* 81 Wis. 160.

A waiver of proofs of loss may be proved under the allegation of performance.

Murphy v. North British & M. Ins. Co. 70 Mo. App. 78; *Milwaukee Mechanics' Ins. Co. v. Winfield* (Kan. App.) 51 Pac. 567.

The proofs of loss were retained by the defendant, without objections as to time or sufficiency, and afterwards the company entered into negotiations and solicited interviews with the plaintiff looking to an adjustment of the policy. The jury might find from such conduct that the appellant waived all objections to the time the notice of death proofs was furnished.

Messmer v. Niagara F. Ins. Co. 24 App. Div. 241.

The evidence before the court was sufficient to show a waiver of proofs of death and loss.

Warner v. Peoria Marine & F. Ins. Co. 14 Wis. 319; *Parker v. Amazon Ins. Co.* 84 Wis. 363; *Harriman v. Queen Ins. Co.* 49 Wis. 71; *McBride v. Republic F. Ins. Co.* 80 Wis. 562; *Faust v. American F. Ins. Co.* 91 Wis. 158, 80 L. R. A. 783; *Dyer v. Des Moines Ins. Co.* 108 Iowa, 524, 72 N. W. Rep. 681; *McCarrel v. Phenix Ins. Co.* 64 Minn. 198; *Levine v. Lancashire Ins. Co.* 66 Minn. 188; *Alston v. Phenix Ins. Co.* 100 Ga. 287; *Killips v. Putnam F. Ins. Co.* 28 Wis. 472, 9 Am. Rep. 506.

Winslow, J., delivered the opinion of the court:

There are several reasons why this judgment must be reversed.

1. The policy provides that immediate written notice must be given to the company of any accident and injury for which a claim is to be made, with full particulars thereof. This was a condition precedent to a recovery. The word "immediate," in this connection, means such convenient time as was reasonably necessary under the circumstances to do the thing required. *Kentzler v. American Mut. Acci. Asso.* 88 Wis. 596. Where the facts are uncertain or disputed, and the inferences doubtful, the question whether timely notice was given is one for

the jury under proper instructions; but, where the facts are not in dispute, and the inferences are certain, it is a question of law for the court. *Kimball v. Howard F. Ins. Co.* 8 Gray, 38; *Baker v. German F. Ins. Co.* 124 Ind. 490; *Mellen v. Hamilton F. Ins. Co.* 17 N. Y. 609. Here the facts as to the diligence used in giving the notice are not in dispute. The accident is claimed to have taken place somewhere from the 1st to the 5th of September. The death of the insured occurred September 5. The plaintiff went to Hurley to ascertain the cause of her son's death, September 14, and remained until the 17th. She herself testifies that while there she became satisfied as to the cause of his death. We have discovered nothing tending to show that she ever obtained any further information. She took no further steps until October 2, when she employed attorneys, and on October 12 one of her attorneys went to Hurley, and procured affidavits of the attending physician and the undertaker at Hurley, and returned to Stevens Point October 14. On October 16, a notice, stating that the death resulted from an accident, describing it as a fall from a box car on or about August 31, 1895, at Hoyt's station, and an affidavit showing burial of the body by an undertaker at Stevens Point, were mailed to the defendant at New York city, and received not earlier than October 17. Thus the proof is that the beneficiary knew the facts which satisfied her that her son's death was accidental as early as September 17, and gave no notice of the accident to the company until the following 16th day of October, an interval of twenty-nine days. A notice given after the lapse of such a length of time with knowledge of the facts cannot be held "immediate" notice. The decisions to this effect are numerous, and well-nigh unanimous. *Niblack, Ben. Soc.* § 416. It was argued that the requirement of notice applied only to accidents or injuries not resulting in death, but we think the plain words of the policy cannot be so construed. The provision is that immediate notice must be given of "any accident or injury for which a claim is to be made." An accident resulting in death is certainly as much one for which a claim is to be made as one resulting simply in disablement, and the necessity of a notice is certainly fully as great, if not greater. Under the proofs before us we hold, as matter of law, that the notice given was not an immediate notice.

2. In addition to the notice, the policy in suit requires affirmative proof of death to be furnished to the company within two months from the time of death. After the notice and affidavit of the Stevens Point undertaker, before mentioned, were mailed to the company, October 16, some correspondence took place between the plaintiff's attorneys and the company or its claim agents relative to the claim of the plaintiff. On December 13, 1895, the plaintiff's attorneys wrote that they had additional proofs that Foster's death was accidental, and offered to furnish them. To this the defendant's assistant examiner of claims replied that, "we would be pleased to receive any statements you may have bearing on the matter," whereupon the plaintiff's attorneys mailed to the examiner two affidavits,—one by the undertaker at Hurley, describing the bruises on the body of the deceased, and one

by the attending physician, stating his treatment of the case; also stating his belief from information received by him, and also in answer to a hypothetical question, that the death of the deceased was due remotely to injuries received by the deceased. These affidavits appear to have been received at New York about December 20, and to have been retained by the company. January 8, 1896, the examiner wrote, in effect, denying liability, because the death was not the result of accident, and calling attention to the plaintiff's failure to make her claim in accordance with condition 5 of the policy. There was also some subsequent correspondence, and the entire correspondence and the affidavits were offered and received in evidence generally against general objections of incompetency and immateriality as well as the specific objection that no foundation had been laid in the pleadings for such evidence. This evidence, if admissible at all, was admissible only to show that sufficient proofs of death had been furnished, and that the requirement that such proofs be furnished within two months after the death had been waived by the acts of the company. It is said by appellant that no waiver could be shown, because it was not pleaded, and that, if waiver was relied upon, it must be specially pleaded, and cannot be shown under an allegation of performance of conditions. This contention seems to be adversely ruled against by the decision in the case of *Zielke v. London Assur. Corp.* 64 Wis. 442, and must be overruled upon the authority of that case. But, as before stated, it could only be received to show the fact of waiver, and that the conditions of the policy as to furnishing proof had been thus substantially complied with, and we regard it as sufficient for that purpose; but it was not admissible as substantive proof of any fact as to the accident, or the cause of the death. *Hill v. Hanover F. Ins. Co.* 65 Wis. 585, 56 Am. Rep. 637. It was, however, introduced, and received generally in the case, and was used and read to the jury as proof tending to show that the death was the result of accident. Both the letters and the affidavits contained many statements of fact and opinions bearing on the cause of death which were well calculated to be regarded by the jury as substantive proof upon the question, and it was error to receive it and allow it to be used for this purpose.

8. Dr. Turner, the physician who treated the deceased, was asked the following question upon his direct examination: "State now whether, in your judgment, his death was occasioned by those injuries, from all the evidence you had before you there at that time." An objection to the question was overruled, and he answered the question affirmatively. This was error, because the question does not show the facts upon which his opinion was based. It may be that it was based largely upon hearsay. Indeed, his further examination tended to show that such was the fact. Such an opinion should be based either on his examination of the case or upon a proper hypothetical question, and not upon a question which allows the witness to base his answer upon his own idea of what is evidence and what is not evidence.

4. We cannot refrain from saying that, in our judgment, the evidence was entirely insufficient to sustain the verdict that the death of Foster was the result of accident, independently of all other causes. It would not be useful to attempt to review all of the evidence, which was very voluminous. It is sufficient to say that there was no direct proof of any accident. The body of Foster had some bruises of recent origin, and one or two small abrasions upon the back, at the crest of the pelvis, and along the spine, but how or when they were inflicted does not appear. The evidence was very strong tending to show that his death was the result of a sudden and severe attack of cholera morbus or dysentery. The medical expert evidence which it is claimed justifies a conclusion that his difficulty resulted from the injuries which produced the bruises was very unsatisfactory in its character and inconclusive. Certainly it comes short of proving that any accident, independent of all other causes, produced his death.

Judgment reversed, and action remanded for a new trial.

MILWAUKEE COLD STORAGE COMPANY, *Appt.*,

v.

Avelyn I. DEXTER *et al.*, *Respts.*

(.....Wis.....)

1. **A sale of land to a corporation by one of its promoters**, who purchased the land before anything was done toward the formation of the corporation, for less than the amount for which he transferred it to such corporation, will not be held fraudulent as to the corporation or any subscriber, in the absence of any false statement or misrepresentation, because he personally paid a commission to certain influential persons to induce them to subscribe for the capital stock, nor because he personally paid money to his grantor after the latter's subscription to the capital stock to remove his dissatisfaction at having sold the land so cheaply,—especially where his contract of purchase precluded him from transferring the land without the approval of such grantor.

2. **A statement in the prospectus of a corporation prepared by a promoter of the corporation who organized it, with the intention of transferring to it certain real estate previously purchased by him, as follows:** "Cost of ground \$40,000,"—is not a representation that the land actually cost the promoter such amount, but that it is to be estimated at that amount in the transfer to the corporation.

3. **A promoter of a corporation who transfers to it certain land purchased by him before anything was done toward the formation of the corporation cannot be held liable to the corporation for an amount received from it in excess of the amount actually paid by him, in the absence of a misrepresentation or false statement by him, although he did not disclose the amount paid by him to any subscriber, where all the subscribers had the opportunity to ascertain the condition and value of**

the land, and knew the price charged the corporation.

4. **The provision of the Wisconsin supreme court rule 9**, that in cases depending on the evidence the brief of appellant must contain a concise statement of the leading facts or conclusions which the evidence establishes or tends to prove, does not mean a recital or re-statement of the evidence, but merely that such facts or conclusions should be stated with a reference to the names of the witnesses and the places in the printed cases where the evidence which establishes or tends to prove such facts or conclusions may be found.

(April 12, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for Milwaukee County in favor of defendants in an action brought to recover profits which defendants were alleged to have made as promoters of the plaintiff company out of transactions in regard to its organization. *Affirmed.*

Statement by **Cassoday**, Ch. J.:

This action was commenced February 29, 1896, to recover from the defendants, Dexter and Godfrey, \$18,187.50, with interest thereon from February 24, 1893, and have the same declared to be a lien upon their shares of stock in the plaintiff company, and that the same be sold to satisfy the amount so found due to the plaintiff from them, or, on default, their stock, or so much thereof as may be necessary to satisfy such decree, be canceled, and that the plaintiff have judgment against them for any deficiency. The defendants separately answered, by way of admissions, denials, and counter allegations. The cause having been tried by the court, the facts found or proved and admitted are to the effect: That April 15, 1892, Lindsay Bros. had possession of the land in question, under a land contract from the Milwaukee Land Company. That on that day the defendant Dexter applied to Lindsay Bros. for the purchase of the land. That they at first asked \$30,000 for the land, but finally agreed orally to take \$22,500, on the conditions stated in a written contract to be drawn therefor. That the defendant Dexter then paid Lindsay Bros. \$1,000 as a part of such purchase price. That April 17, 1892, he paid them thereon the further sum of \$5,000. That April 20, 1892, such land contract from Lindsay Bros. was drawn up and executed by them to the defendant Dexter, and the same is to the effect that Lindsay Bros., for and in consideration of \$22,500 to be paid by the defendant Dexter as thereafter specified, and the keeping of other promises, agreements, and stipulations by him therein made and contained, thereby agreed to convey a good title to the defendant Dexter, by warranty deed or deeds, to the real estate therein described, and further agreed to procure the construction of a suitable switch for the line of the Chicago, Milwaukee, & St. Paul Railway Company on the right of way belonging to the company, so that the center of the track would be 6 feet east of the east line of

NOTE.—For duties and liabilities of promoters to the corporation, and its members, see *note* to Yale Gas Stove Co. v. Wilcox (Conn.) 25 L. R. A. 90.

40 L. R. A.

As to relations and rights of syndicate members, see *note* to Baltimore Trust & G. Co. v. Hambleton (Md.) *ante*, 218.

the land described, and suitable for receiving and shipping merchandise from the building or buildings to be erected on said land. That in consideration of such agreements the defendant Dexter did therein covenant and agree to purchase and pay for the land described \$22,500, as follows, to wit: The \$6,000 at the time of the execution and delivery of such agreement, and which had in fact already been paid, as mentioned, and \$16,500 in six equal instalments of \$2,750 each, payable on or before December 1st in each of the years 1892 to 1897, inclusive, with interest at 6 per cent per annum, payable annually, on the deferred payments. That the defendant Dexter did therein further covenant and agree that he would, on or before December 10, 1898, improve the premises by erecting thereon substantial and new buildings, machinery, and outfits, and use the same until April 20, 1899, in conducting a cold-storage business; that all such improvements should remain on the premises, and not be removed therefrom or destroyed until the final payment for the premises, and that he would promptly pay as so agreed, and would regularly pay all taxes and assessments, general or special, lawfully imposed upon the premises prior to the return thereof; that in case the defendant Dexter should fail to make the payments aforesaid, or any of them, punctually, or should fail to perform all of his agreements and stipulations aforesaid, strictly and literally (times of payment and performance being of the essence of the contract), then Lindsay Bros. were to have the right to declare the contract null and void, and all the rights and interests thereby created or then existing in favor of defendant Dexter should thereupon utterly cease and determine, and the premises, and the right to the possession thereof, should revert to and revest in Lindsay Bros. as absolutely, fully, and perfectly as if such contract had never been made. That the defendant Dexter did thereby covenant and agree that he would make no transfer of the contract, nor of his rights or interests in the premises, without the approval of Lindsay Bros. That it was thereby further mutually covenanted and agreed that the covenants and agreements therein specified should be binding upon the successors, heirs, legal representatives, and assigns of the respective parties. That April 20, 1892, the defendant Dexter entered into the possession of the real estate, and the several tenants occupying buildings on the premises thereafter attorned and paid rent therefor to him. That the defendant Dexter was then, and had been for a long time prior thereto, engaged in the business of cold-storage warehousing at Whitewater, and the same had been very profitable. That he was also the inventor of certain devices used in such business, and the owner of letters patent on the same, and had for a long time theretofore been engaged in the business of erecting and constructing cold storage warehouses, upon contract, for others. That such real estate was not purchased by the defendant Dexter for or on behalf of the plaintiff corporation, nor with the intention of turning the same over to, or disposing of the same in any manner to, the plaintiff or any corporation. That he first conceived the idea of forming a corporation for the pur-

chase of the land in question from himself, and the carrying on upon the land the business of cold-storage warehousing, May 5, 1892, and that prior to that date neither of the defendants did anything looking towards the formation of the plaintiff corporation, or any other corporation, and did not consult any person relative to the formation of the corporation, or ask any person to become in any way interested therein. That the defendant Dexter so purchased the land from Lindsay Bros. for the purpose of building and operating thereon a cold-storage warehouse himself, but after failing to dispose of some other property owned by him, from which he hoped and expected to secure funds necessary for that purpose, he, on May 5, 1892, proposed to the defendant Godfrey, who carried on a large commission business in Milwaukee, and whose patronage of such cold-storage warehouse would add much to the probable success of the enterprise, that a corporation be formed, with a capital stock of \$100,000, to take from the defendant Dexter the land, and for the sum of \$40,000, and build and operate a cold-storage warehouse thereon; that he (the defendant Dexter) would subscribe for \$60,000 of such capital stock; that in case he (the defendant Godfrey) would give his own subscription, or procure the subscription of other commission men, together with his own, to the remaining \$40,000 in capital stock, he (the defendant Dexter) would pay him (Godfrey) for such services in obtaining such subscriptions, and also (to induce the defendant Godfrey to become such stockholder, and thus secure his valuable patronage for such warehouse business) the sum of \$4,000. That a part of the \$4,000 was added to the purchase price which the projected corporation was to pay for the land, but was to be paid by the defendant Dexter, out of his own money, to the defendant Godfrey, for the consideration aforesaid. That the purpose thereof was to sell the projected business in the manner aforesaid. That after May 5, 1892, the defendant Dexter also solicited E. J. Lindsay, of the firm of Lindsay Bros., to subscribe for and take stock in the plaintiff corporation for the purpose of purchasing the land at \$40,000. That E. J. Lindsay subscribed for and agreed to take 40 shares of the stock, and pay therefor \$5,000. That some time after such subscription E. J. Lindsay claimed that, under the circumstances of the recent sale of the land by Lindsay Bros. to the defendant Dexter at such reduced price, he thought it was unfair to charge him for his interest at so high a price. That thereupon the defendant Dexter thought he would make it right, and afterwards gave him his check for \$550; that is to say, to charge him for his interest at the rate of \$30,000 for the land,—the price first exacted by Lindsay for the land. That both the defendant Godfrey and Lindsay subscribed for stock in the plaintiff corporation prior to June 4, 1892. That articles of incorporation of the plaintiff were executed May 5, 1892, and filed and recorded, as required by law, May 9, 1892. That at the time the first meeting of the corporation was held for the purpose of organization (June 4, 1892), and prior to that at that time, the following persons had subscribed to the stock of the corporation, and

agreed to take and pay for the number of shares set opposite their names, as follows:

A. I. Dexter	500 shares	\$50,000
E. R. Godfrey	100 "	10,000
E. R. Godfrey, Jr.	40 "	4,000
W. H. Stevens	20 "	2,000
I. P. Tichenor	20 "	2,000
N. L. Kneeland	20 "	2,000
G. C. Rogers	20 "	2,000
E. K. Dexter	50 "	5,000
E. J. Lindsay	50 "	5,000

Making an aggregate of 880 " am'tg to \$88,000

—That up to that time no other person had subscribed for such stock. That between May 7, and May 9, 1892, a prospectus of such proposed corporation was prepared by the defendant Dexter, to be presented to, and which was in fact presented to, each of the persons so subscribing for such stock, before making such subscription. That such prospectus stated, among other things, that the proposition was for the Milwaukee Cold-Storage Company to have capital stock to the amount of \$100,000; that the value of the capital stock to be so issued would be \$55,000; that a mortgage bond would be given for \$45,000; that the cost of the ground would be \$40,000; that the cost of building and fittings would be \$60,000. That each one of the persons so subscribing knew that the land in question belonged to the defendant Dexter; that Dexter was not purchasing, and had not purchased, the land for the projected corporation. That each one of the foregoing persons signed the subscription to the stock with the understanding that, as to him, such property should be purchased by the plaintiff corporation from the defendant Dexter for \$40,000, but without knowledge of, and without inquiry as to, what the property cost the defendant Dexter, except that the defendant Dexter and said Lindsay had such knowledge, and the defendant Godfrey and said Lindsay each had knowledge, of the payments to be made to him as aforesaid. That said Godfrey had reason to believe, and did believe, that the defendant Dexter was selling the land to the corporation for more than it cost him, though he did not know, and never inquired, what Dexter had paid, or agreed to pay, for the land, nor what profit he was making, and Dexter never told him. That at the first meeting, for the purpose of organizing the plaintiff corporation by the election of officers and the acceptance of stock subscriptions, June 4, 1892, there were present the subscribers for stock mentioned, and it was then and there voted that the plaintiff purchase the land in question for \$40,000. That the defendants Godfrey and Dexter, and also said Lindsay, with the other subscribers, attended at such meeting. That each of such nine subscribers subscribed with the understanding and agreement that the land in question should be bought by the plaintiff from the defendant Dexter for \$40,000. That neither the defendants Godfrey nor Dexter nor said Lindsay in any way acted for the plaintiff, or its subscribers, as agent to negotiate or make the purchase of said land for it or them, except by joining in the vote aforesaid. That such purchase by the plaintiff of the land in question from the defendant Dexter was authorized by a resolution passed by its board of directors. That at the time of the passage of such resolution, and sale of the land, the defendants, Dex-

ter and Godfrey, and said Lindsay, were acting directors, and then constituted a majority of such board. That the defendant Dexter was then acting as president thereof, and the defendant Godfrey as the treasurer thereof. That the defendant Dexter did not at any time disclose to the other subscribers what the land cost him, nor what profit he was making in turning the land over to the plaintiff, but never made to any of them any misstatement or misrepresentation whatever about the same. That the defendant Godfrey did not disclose to any of the other subscribers that he was to receive \$40,000 from Dexter. That Lindsay did not disclose to any of the other subscribers that he had received \$550 from Dexter. That each of the subscribers, excepting Dexter, Godfrey, and Lindsay, was ignorant of the amount of profit made by Dexter, the money so agreed to be paid by him to Godfrey, and the rebate paid by him to Lindsay, but the land was a known piece of property in the city of Milwaukee, and each of the subscribers knew the price asked, and knew, or could have ascertained, the condition and value of the land, and each agreed that the said land be taken by such corporation at the price aforesaid, without regard to what it might have cost Dexter, and without regard to what it might have cost any other subscriber for his subscription to the capital stock of the corporation. That subsequently to June 4, 1892, Carrie W. Thayer subscribed for 20 shares of such stock, and F. W. Wyman subscribed for 20 shares, Thomas & Schaus subscribed for 20 shares, A. B. Meyer subscribed for 20 shares, and William Plankinton subscribed for 40 shares, of the plaintiff's stock, which with the 880 shares obtained on and prior to June 4, 1892, made 1,000 shares, being the whole capital stock of the corporation. That the subscriptions after June 4, 1892, were obtained by E. R. Godfrey, and each one of the subscribers last referred to knew that the land in question had been purchased by the corporation for \$40,000, before subscribing, and subscribed with that understanding, and on that basis, and without being led or induced to do so by any false statement or representation whatever. That there was no intention to defraud the plaintiff, or any of the subscribers to its capital stock, by the defendants or either of them, in any or either of the transactions mentioned. That all persons who subscribed for stock in the corporation did so without relying on what others were paying, or what the land had cost any purchaser prior to its purchase by the corporation. That no proof was offered by the plaintiff, nor is in any way before the court, that the land was worth less than \$40,000 when it was bought by the corporation from Dexter, nor that at the time of the trial it was worth less than that sum. That January 30, 1898, the Milwaukee Land Company conveyed the premises to Lindsay Bros. by deed dated on that day, reciting a consideration of \$10,000, and the same was recorded February 16, 1898. That Lindsay Bros. conveyed the same to the defendant Dexter by deed dated February 15, 1898, and recorded February 24, 1898, reciting a consideration of \$25,000. That the defendant Dexter and wife conveyed the same to the plaintiff by

deed dated February 15, 1898, and recorded February 24, 1898, reciting a consideration of \$40,000. That the plaintiff corporation made calls on its subscribers to pay in their subscriptions to the capital stock,—one of 10 per cent June 4, 1892; one of 20 per cent October 29, 1892; one of 10 per cent December 13, 1892; one of 10 per cent January 14, 1893; and one of 10 per cent May 6, 1893; making 60 per cent in all,—and such calls were paid, and the plaintiff erected and completed a cold-storage warehouse on the land in question, and began and was engaged in carrying on the business of warehousing thereon in May, 1893. That the plaintiff had in January, 1893, procured a loan of \$40,000, secured by mortgage on the land in question so improved, and out of the proceeds of the loan paid the balance due to the defendant Dexter on the land in question. That May 17, 1893, and after 60 per cent had been paid in on such capital stock subscription, one John A. Hill and his father Robert Hill, began negotiations for the purchase of 350 shares of stock in the plaintiff corporation, and June 3, 1893, an arrangement was made whereby the defendants, Dexter and Godfrey, and also Thomas & Schaus, E. J. Lindsay, W. H. Stevens, and G. C. Rogers, relinquished each a part of his subscription aforesaid amounting to 350 shares in all, and said John A. Hill came in as a stockholder, although making no formal subscription, and paid the same into the treasury of the plaintiff at the rate of \$102.50 per share for said 350 shares of stock, and received said stock from the plaintiff corporation, and that subsequently the said John A. and Robert Hill purchased from the other subscribers aforesaid other stock in the plaintiff corporation, until said John A. and Robert Hill at the time of the trial owned all of the stock in the plaintiff corporation except 80 shares owned by the defendant Godfrey, and 290 shares by the defendant Dexter and his wife. That part of the stock so acquired by John A. and Robert Hill was 130 shares, which they held as the transferees of the defendant Godfrey, 50 shares as the transferee of the said E. J. Lindsay, and 310 shares as the transferee of the defendant Dexter, and the remainder of the stock so held by John A. and Robert Hill was so held by them as transferees of the subscribers aforesaid, who acquiesced in the purchase of the property as stated. That the shareholders of the corporation at the time this action was commenced, and at the time of the trial, were: E. R. Godfrey, 30 shares; the defendant Dexter and wife, 290 shares; and John A. and Robert Hill, 680 shares. That by subsequent corporate action, without the consent of the defendants, the plaintiff corporation reduced its capital stock, first to \$80,000, by making the par value of each share \$80, instead of \$100, and later, and since the commencement of this action, reduced its capital stock to \$50,000, by making the par value of each share \$50, instead of \$80. That the \$4,000 so paid by the defendant Dexter to the defendant Godfrey, and the \$550 so paid by the defendant Dexter to Lindsay, were so paid and received, in good faith, out of the funds of the defendant Dexter, and not out of the corporate funds or property belonging to the plaintiff, and the payment thereof was 40 L. R. A.

fairly compensated by the advantage derived by the corporation and its then subscribers on account of such payment, and there was never any agreement or representation to the said subscribers, or either of them, that they, or either of them, were getting their stock in the corporation upon the same terms as all the other subscribers, nor were there any misrepresentations whatever made to any of the subscribers, nor to the said John A. Hill, nor to Robert Hill, at the time he purchased it, in June, 1893, or prior thereto, or at any time: nor were the payments by Dexter to Godfrey or Lindsay, or either of them, or any part of either of them, added to the purchase price of said property paid by the plaintiff corporation, nor was the said purchase price in any way or to any extent increased or enhanced thereby. That there was no evidence before the court that the plaintiff corporation had suffered any damage or injury whatever by reason of any act or thing done by the defendants, or either of them. As conclusions of law upon the facts stated, the court found that the plaintiff could not maintain this action, and that the defendants were entitled to judgment dismissing the complaint herein, and for their costs and disbursements, and ordered judgment to be entered accordingly. From the judgment so entered the plaintiff brings this appeal.

Messrs. Quarles, Spence, & Quarles, for appellant:

If it was Dexter's duty to disclose all the facts to his principal, and he did not disclose them, there results *suppressio veri*, which is the equivalent of fraudulent concealment.

Bishop, Contr. § 660.

Such was his duty. Any subscriber to whom he presented the prospectus, showing the "cost of land," had a right to rely upon the proposition that Dexter would perform his duty, and would disclose the fact of profit, if such fact existed.

If actual fraud resulted, absence of intention to defraud is immaterial.

Chandler v. Bacon, 30 Fed. Rep. 538.

The fact that John A. Hill made no formal subscription is immaterial, inasmuch as this court has held that a subscription for stock is merely an executory contract, and unnecessary where the contract is executed by the issuance of the stock and payment therefor.

Clark v. Farrington, 11 Wis. 321.

If the defendant Dexter and his associates, being, as they were, promoters of the plaintiff (2 Cook, Stock & Stockholders, § 651; 1 Thomp. Corp. § 415), had either of them purchased the premises with the intention of unloading them upon the corporation, judgment should have gone against them for the profits secretly made.

Pittsburgh Min. Co. v. Spooner, 74 Wis. 307; *Hebgen v. Koeffler* (Wis.) 72 N. W. 745, and cases cited; *Erlanger v. New Sombren-Phosphate Co.* L. R. 3 App. Cas. 1218, 6 English Ruling Cases, 777.

It is immaterial whether Dexter conceived the idea of forming the corporation before or after his purchase.

Hebgen v. Koeffler (Wis.) 72 N. W. 745.

Defendants are liable as trustees of the plaintiff. They bought from themselves, and

made a secret profit out of their *cestui que trust*.

Chandler v. Bacon, 30 Fed. Rep. 538; *Pusey v. Senior*, 9 Wis. 370; *Re Taylor Orphan Asylum*, 36 Wis. 585; *Haywood v. Lincoln Lumber Co.* 64 Wis. 647; *Parker v. Nickerson*, 112 Mass. 195; *Michoud v. Girod*, 4 How. 503, 11 L. ed. 1076; *Bentley v. Craven*, 18 Beav. 75; *Franey v. Warner*, 96 Wis. 222; *Beatty v. Northwest Transp. Co.* 12 Can. S. C. 598; *Bennick v. Thomas*, 27 U. S. App. 765, 66 Fed. Rep. 104, 13 C. C. A. 457; *Wardell v. Union P. R. Co.* 108 U. S. 651-658, 26 L. ed. 509-511.

Messrs. Van Dyke, Van Dyke, & Carter, for respondents:

If a promoter purchased the property before he began promoting the company, he may sell to the company at an advance without disclosing his profit.

2 Cook, Stock & Stockholders, § 651; *Erlanger v. New Sombbrero Phosphate Co.* L. R. 8 App. Cas. 1218; *Gover's Case*, L. R. 1 Ch. Div. 182; *Re Cape Breton Co. L. R.* 29 Ch. Div. 795; *Ladywell Min. Co. v. Brookes*, L. R. 35 Ch. Div. 400; *Bergeron v. Miles*, 88 Wis. 397; *Whitney v. Fairbanks*, 54 Fed. Rep. 985; *Bentley v. Craven*, 18 Beav. 75; *Teachout v. Van Hoesen*, 76 Iowa, 118, 1 L. R. A. 664; *Brewster v. Hatch*, 122 N. Y. 349; *Whigham's Appeal*, 68 Pa. 194; *Simons v. Vulcan Oil & Min. Co.* 61 Pa. 202, 100 Am. Dec. 628; *Pad dock v. Fletcher*, 42 Vt. 889; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345; *Burbank v. Dennis*, 101 Cal. 90; *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219; *Brewster v. Hatch*, 122 N. Y. 349; *Hitchcock v. Barrett*, 50 Fed. Rep. 658; *Stewart v. St. Louis, Ft. S. & W. R. Co.* 41 Fed. Rep. 736; *Re British Seamless Paper Box Co.* L. R. 17 Ch. Div. 467.

Practically all of the stock which had been subscribed for was represented at the meeting when the resolution to buy the land was passed, and was voted in favor of the purchase. No one holding any of the stock which was voted at that meeting, unless that stock was voted against that purchase, can be heard to complain.

Cook, Stock & Stockholders, § 785, p. 1188; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263; *Brown v. Duluth, M. & N. R. Co.* 53 Fed. Rep. 889; *Re Syracuse C. & N. Y. R. Co.* 91 N. Y. 1.

Messrs. Timlin & Glicksman also for respondents.

Cassoday, Ch. J., delivered the opinion of the court:

The facts stated are either conceded, or found by the court to be true, and the evidence is sufficient to support the findings. Upon such facts, therefore, the rights of the parties must be determined. Counsel for the plaintiff seek to bring the case within the rulings of this court in *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345; *Franey v. Warner*, 96 Wis. 222; *Hebgen v. Koefler* (Wis.) 72 N. W. 745. In the first of these cases the rule of law applicable was tersely stated in a quotation from the opinion of a court in another jurisdiction,

as follows: "A trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on the account of another what he sells on his own account; . . . and, if he does so, the *cestui que trust* or principal, unless, upon the fullest knowledge of all the facts he elects to confirm the act of the trustee or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit." 74 Wis. 320. In the second case cited it was held that "the promoters of a corporation are accountable to it for any profits which they may receive from a violation of their duty as such." In all of them the persons held liable were promoters of the corporation, or the contemplated corporation, in the purchase and sale of the lands, or agents or trustees of such corporation in making such purchase or sale, or both. This is not such a case. The defendant Dexter had closed his contract for the purchase of the land from Lindsay Bros., and paid \$6,000 of the purchase price thereon, more than two weeks before the time when anything was said about, or done towards, the formation of the plaintiff corporation. That contract bound the defendant personally to erect and construct the buildings, machinery, and outfits necessary for the cold-storage business, and to operate the same for seven years, and to pay the balance of the contract price as agreed, and not to transfer the contract, nor his right in the premises, without the approval of Lindsay Bros. We must therefore consider the land as the property of the defendant Dexter at the time the formation of the plaintiff corporation was first contemplated by him. His original purpose of constructing such cold-storage buildings, machinery, and outfits himself, and then to operate the same for the period mentioned, was apparently changed by extraneous circumstances into a purpose of doing the same through a corporation in which he and his wife should own at least a majority of the stock. His prospectus for such corporation stated, "Cost of ground, \$40,000." It is contended that this was a representation to the contemplated subscribers for stock that the land had actually cost him that amount. A prospectus is naturally supposed to be prospective in its application. In the instant case it was the summary or outline of the plan or scheme for the proposed cold-storage undertaking. The \$40,000 named was manifestly to be the cost of the ground to the proposed corporation, not the amount which it may have cost the defendant Dexter, or some prior purchaser. It is contended that, because the defendant Dexter purchased the land of Lindsay Bros. for \$22,500, it was only worth that amount. But Lindsay Bros. had other real estate in the vicinity, and the conditions exacted by them from the defendant Dexter in the contract, to construct and operate such cold-storage plant thereon, may have been regarded as of great advantage to them, and as a sufficient inducement to accept for the land \$7,500 less than at first exacted. The location of the land may have been such as to make it of much more value for the purposes of such cold-storage business than for any other use. There is no evidence in the record as to the value of the land at the

time of the incorporation of the plaintiff, except such inferences as may be drawn from the contract price and the price exacted. It is true that the defendant Dexter did not disclose to any of the subscribers to the stock in the plaintiff corporation the amount which he had agreed to pay Lindsay Bros. for the land, and none of them knew, except E. J. Lindsay, and the defendant Godfrey had reason to believe that he was to receive more from the corporation than he had agreed to pay; but none of them made any inquiry, and it does not appear that any false statement or misrepresentation was made by Dexter to anyone. The land was open and visible, and well known to all the subscribers; and each knew the price which the plaintiff was to pay for the same, and each knew, or could have ascertained, the condition and value of the land at and prior to the time of subscribing for such stock. The defendant Dexter had large experience in the business of cold-storage warehousing, and owned letters patent on certain devices used in such business, and manifestly believed it would become a profitable enterprise. Since the defendant Dexter had obtained the land, and paid more than one fourth of the purchase price, weeks before there was anything said or done, or apparently contemplated, about the formation of the plaintiff corporation, and since the several stockholders subscribed with such knowledge or means of knowledge in respect to the value of the land, and the price the plaintiff was to pay for the same, and without being influenced by any false statement or misrepresentation, and without any breach of duty or trust on the part of the defendants, or either of them, there seems to be no foundation for claiming that the plaintiff, or any subscriber to its capital stock, was defrauded or injured, merely because the defendant Dexter personally paid to the defendant Godfrey \$4,000, to induce him, as a commission man, to subscribe, or procure the subscription of other commission men, for the balance of the \$100,000 capital stock, in order that the plaintiff might secure the valuable patronage of such commission men in the proposed cold-storage business; nor because the defendant Dexter personally paid to E. J. Lindsay, after his subscription to the stock, \$550, in order to remove his apparent dissatisfaction for having sold the land so cheaply,—especially as the contract precluded Dexter from transferring the same, to the plaintiff or anyone, without the approval of Lindsay Bros. *

The question recurs whether the plaintiff is entitled to recover from the defendants, or either of them, upon the facts stated. Certainly there is nothing said in any of the cases cited above to warrant a recovery in such a case as this. In fact, the intimation in some of those cases is strongly to the contrary. Thus, in *Francy v. Warner*, 96 Wis. 222, Mr. Justice Marshall said: "Cases cited, where a person sells his own property to a company in which he is interested, at an increased price, fairly and openly, free from representations that he is selling the property of another, have no application to this case." Numerous adjudications are there cited in support of that proposition, and it seems to be applicable to

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the case at bar. In the language of Mr. Justice Sharswood in *Densmore Oil Co. v. Densmore*, 64 Pa. 49: "That any man, or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction." The defendant Dexter was not the agent or trustee of the plaintiff or anyone at the time he obtained the land of Lindsay Bros. *Ibid.* Neither of the defendants stood in any confidential relation to any of the subscribers to the capital stock until some step was taken towards the formation of the plaintiff corporation. These views are supported by *Re Cape Breton Co. L. R.* 29 Ch. Div. 795; *Ladywell Min. Co. v. Brookes*, L. R. 35 Ch. Div. 400. Thus, in the recent case in the House of Lords the lord chancellor, Herschell, said: "It is of the very essence of such a case as this to show that the price at which the property was sold to the company was in excess of what has been called the real price, or the true value. . . . I admit that there may be considerable ground for suspicion that the price was in excess of it. But, obviously, for such a case as the appellant seeks to make out here much more than that is necessary. It is of the very essence of the case, which rests upon his proving what he claims, namely, a secret profit improperly made, that he should prove that there has been that excess which he alleges." *Bentinck v. Fenn*, L. R. 12 App. Cas. 659. There is nothing in the celebrated case of *Erlanger v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1218, in conflict with the principles stated. That case is clearly distinguishable from the one at bar upon its facts, but the principles which govern this case are recognized in that. Upon the facts found or admitted, the trial court properly held that this action could not be maintained.

The brief and supplement on the part of the defendant Dexter cover 135 printed pages, and are in violation of the rules of this court. If the printed case is incomplete or inaccurate in any substantial particular (but not otherwise), the opposite party may serve a supplemental case with references to the record, as in the principal case, making the corrections; but no costs shall be taxed for the printing of any case or supplemental case failing to comply with the rule. Rule 8 (87 Wis. V.) "The brief of the appellant or plaintiff in error must contain a concise statement of (1) the nature of the action and the issues involved; (2) the result of the trial or hearing in the court below. (3) the several errors relied upon for reversal; (4) in cases depending upon the evidence, the leading facts or conclusions which the evidence establishes or tends to prove; (5) the principles of law applicable to the case, and the authorities in support of the same." Rule 9 (87 Wis. VI.) "The 'leading facts or conclusions which the evidence establishes or tends to prove' does not mean a recital or restatement of the evidence, but merely that such facts or conclu-

sions should be stated, with a reference to the names of the witnesses, and the places in the printed case where the evidence which establishes or tends to prove such facts or conclusions may be found. The rule prohibits extended discussion upon a mere question of fact in any brief. To reprint in a brief what is printed in the case merely encumbers the record and increases the expense, without being helpful to the court. A party failing to comply with the rules takes the chances of losing costs. The defendant Dexter is only to be allowed for fifty pages of printed brief.

The judgment of the Superior Court for Milwaukee County is affirmed.

STATE of Wisconsin, *ex rel.* Edward GOEBEL, *Appl.*,
v.

S. W. CHAMBERLAIN, Treasurer of Langlade County, *Resp't.*

(.....Wis.....)

1. The English language must be used in all legal and official notifications or proceedings, in the absence of any statute authority to the contrary.

2. Publication of a delinquent tax list in the English language, but in a newspaper which is otherwise printed in the German language, is not a legal publication, when no authority therefor has been given, in accordance with Rev. Stat. § 675, by the county board.

(May 3, 1898.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Langlade County denying a writ of mandamus to compel defendant to publish the delinquent tax list in the plaintiff's newspaper. *Affirmed.*

Statement by **Pinney, J.:**

This is an appeal by Edward Goebel from an order of the circuit court for Langlade county denying the writ of mandamus prayed for in said relator's petition. The petition stated, in substance, that said relator was the proprietor, editor, and publisher of the Antigo Herold, a German weekly newspaper printed and published at the city of Antigo, in Langlade county; that said paper had been regularly and continuously published in said county for more than six years then last past, and still continued to be so published; that March 25, 1897, the number of descriptions in the list of lands to be advertised for sale by the county treasurer for the year 1896 for taxes exceeded 4,000; that the respondent, S. W. Chamberlain, then county treasurer of said county, and acting as such, March 25, 1897, delivered to and left with the relator a printed notice, notifying him, in substance, that the number of descriptions of lands to be advertised for sale for the nonpayment of taxes for the year 1896 exceeded 4,000, and that he would let by contract the publication of the list to the lowest

bidder, at his office in the court house in the city of Antigo, in said county, on April 6, 1897, at 10 o'clock in the forenoon, and that all publishers proposing to bid on such publication must comply strictly with the provisions of law concerning the same, and that no bids would be considered which failed so to do; that on the same day said Chamberlain delivered to and left with each and all the editors and publishers of papers in said county qualified to publish said tax list a similar notice; that thereafter, and prior to the time of opening said bids and letting of the contract, the said relator, as editor and publisher of the Antigo Herold, delivered to and left with the said county treasurer his bid, duly signed and sealed as by law required, agreeing to publish said list in the English language in said Antigo Herold for the sum of 18 cents for each and every description in said list contained, and at the same time, accompanying said bid, was said relator's bond for \$5,000, duly executed as provided by statute, conditioned, among other things, that the work would be properly performed, and signed by five sureties, who each justified in the sum of \$2,000. It was further alleged that the only other bid for said work was one made by John A. Ogden, editor and publisher of the Antigo Republican, who agreed to print and publish said list for 25 cents for each and every description therein, and these were the only bids submitted to said county treasurer; that, although the bid of the relator was the lowest, said county treasurer, S. W. Chamberlain, refused to act upon and accept said bid, and refused to award the publishing of said list to the relator, solely for the reason that the said Antigo Herold was a newspaper printed in the German language, and publishing said list in the English language in said paper would not be a legal publication; and that he still refused to award said relator said contract. Wherefore he prayed that a peremptory writ of mandamus might issue out of, and under the seal of, the court, requiring and commanding said S. W. Chamberlain, county treasurer aforesaid, to award said contract to the relator in accordance with his said bid. An alternative writ was issued as prayed, to which the defendant, in answer, alleged that the Antigo Herold was a newspaper printed and published in the German language, and not, in law, in the absence of the proper action of the county board of said county, authorized to bid, contract for, or publish said list, and prayed that the peremptory writ asked for be denied. Said matter coming on to be heard by the court upon argument, the court made an order that the writ prayed for be denied, without costs, from which order the relator appealed.

Mr. T. W. Hogan, for appellant:

Kellogg v. Oshkosh, 14 Wis. 623, this court held: "It was competent for the common council of the city of Oshkosh, under § 9, chap. 8, of its charter (Priv. Laws 1856, p. 230), to designate a newspaper printed in the German language as the official paper of the city, and the notice required by that section and published in such official paper was good if published therein in the English language also.

In *Wakeley v. Nicholas*, 16 Wis. 568, this

NOTE.—For official publications in foreign languages, see State, North Orange Baptist Church, v. Orange (N. J. L.) 14 L. R. A. 62, and note on page 64; also Rasmussen v. Baker (Wyo.) 33 L. R. A. 773. 40 L. R. A.

court held that the publication of a summons in a German newspaper in the English language was a legal publication.

Mr. John E. Martin, for respondent:

There is no law in the statutes requiring a county treasurer to publish the tax list in a paper printed in a foreign language.

English is the language of this country, and in the absence of a statute requiring this publication in a paper printed in a foreign language there would be no authority for such publication.

Pinney, J., delivered the opinion of the court:

The question to be determined is whether, under the statute, a delinquent county tax list can be lawfully published in a German newspaper, in the English language, if the newspaper is in every other respect lawfully qualified as a means of making such publication. Section 1130, Rev. Stat., requires the county treasurer, "on the 1st Monday of April in each year, to make out a statement of all lands upon which the taxes have been returned as delinquent, and which there remain unpaid, except public lands held on contract, and lands mortgaged to the state, containing a brief description thereof, with an accompanying notice stating that so much of each tract or parcel of land described in said statement as may be necessary therefor, will, on the 3d Tuesday of May next thereafter, and the next succeeding days, be sold by him at public auction, at some public place, naming the same, at the seat of justice of the county, for the payment of taxes, interest and charges thereon; and if in any county no seat of justice shall be established, then at such public place therein as he may select; and cause such statement and notice to be published in a newspaper printed in his county, if there be one, . . . which statement and notice shall in all cases be published once in each week for four successive weeks prior to said 3d Tuesday of May; . . . but it shall be unlawful for any county treasurer to publish such statement and notice in any newspaper in his county that has not been regularly and continuously published in such county once in each calendar week for at least two years immediately before the date of such notice, if there be a newspaper which has been so published in such county;" and any county treasurer violating the provisions of this section is subject to a specified forfeiture. The statute thus defines, in one respect, what shall constitute a legal newspaper for the publication of such statements and notices. Section 1131, Rev. Stat., provides that, "in every county where the number of the descriptions in the list of lands to be advertised for sale for the nonpayment of taxes by the county treasurer shall exceed 4,000, the county treasurer shall let by contract the publication of such list to the lowest bidder, upon a notice, written or printed, to be delivered to and left with the publisher or one of the publishers of each newspaper in his county, at least ten days prior to the time at which such contract shall be let; but no such contract shall be made to publish such list in any newspaper which has not been regularly and continuously published once in each week in such county 40 L. R. A.

for at least two years prior to the time at which such publication shall be by law required to be made, unless there be no such newspaper so published in such county." It will be observed that the statute uses the words "a newspaper," without limiting it to any particular kind of newspaper, either German or English. The only express qualification is that the paper must have been regularly and continuously published once in each week in such county for at least two years prior. By § 675 it is provided that "the county board may order public notices relating to tax sales, redemption, and other affairs of the county, to be published in a newspaper, printed in any other than the English language, to be designated in such order, whenever they shall deem it necessary for the better information of the inhabitants thereof, and it shall appear from the last previous census that one fourth or more of the adult population of such county are of a nationality not speaking the English language, and that there shall have been a newspaper published therein continuously for one year or more in the language spoken by such nationality: provided, that all such notices shall also be published in a newspaper published in the English language as provided by law. The compensation for all such publications shall be paid by the county ordering the same, and shall be the same as that prescribed by law for publication in the English language, and no extra charge shall be allowed for translation in any case." The power of the county board to make the order is discretionary, and it must appear from the last previous census that one fourth or more of the adult population of such county are of a nationality not speaking the English language, and that there shall have been a newspaper published therein for one year or more in the language spoken by such nationality; and it is also made necessary that "all such notices shall also be published in a newspaper published in the English language, as provided by law." Section 1130, *supra*, authorizes the county treasurer to use his discretion in selecting the newspaper in which he shall publish the delinquent tax list if the number of descriptions is less than 4,000, but requires him to let the printing of it to the lowest bidder when it exceeds 4,000 descriptions. He has in such case no discretion. He is required to notify each newspaper in the county to file bids; that is to say, each newspaper qualified to make such publication. The statute, when construed in the light of the common law, invites bids from only qualified newspapers, and a paper printed in the German language is not within the statute. In *Kellogg v. Oshkosh*, 14 Wis. 624, the common council, under the charter (§ 9, chap. 3, p. 230, Priv. Laws 1856), had power to designate a newspaper printed in the German language as the official paper of the city; and it was held that the notice required by that section, and published in such paper was valid, if published therein in the English language. Also, in *Wakeley v. Nichols*, 16 Wis. 588, it was held that the publication of a summons in a German newspaper, in the English language, was a legal publication. In that case the person to be served was an American, and the officer making the order for its publication directed

that it be published in a German newspaper, to wit, the Wisconsin Zeitung, published at Madison, and the summons was published therein in the English language. The court held it was a sufficient publication, and the officer granting the order had a discretion to determine in what paper it should be published. Dixon, Ch. J., rendering the opinion of the court, says: "Upon affidavit, as prescribed by statute, the court, or a judge thereof, or a court commissioner, may grant an order that the service of the summons be made by publication. Rev. Stat. chap. 124, § 10. . . . If the circuit judge who granted the order in this case, in the exercise of the discretion vested in him by the statute, directed publication in a German instead of an English newspaper, as being most likely to give notice to the person intended to be served, we see no legal objection to it." The present case is clearly distinguishable from the cases cited, in that in this case the county treasurer had no power or discretion to receive relator's bid, or award him a

contract under it. No authority had been given to him by the county board for that purpose under § 675, Rev. Stat. The English language is the language of the country, to be used in all legal and official notifications or proceedings, in the absence of any statute authority to the contrary. It does not appear that the county board had considered or acted upon the subject. We hold that this section is decisive against the validity of the relator's claim, under his bid, to the contract. The publication of said list in the English language in a German paper would not, for the reasons stated, in the absence of such authority, be a legal publication; and the county treasurer rightfully refused to award to the relator a contract for that purpose, upon his said bid. It follows from these views that the order appealed from, denying the writ of mandamus prayed for, is correct, and must be affirmed.

The order of the Circuit Court appealed from is affirmed.

IOWA SUPREME COURT.

B. F. ERB

v.

GERMAN-AMERICAN INSURANCE COMPANY of New York, *Appt.*

(98 Iowa, 606.)

1. Insurance on merchandise kept for an illegal business, such as a stock of drugs

NOTE.—Validity of fire insurance on property illegally used.

- I. General principles.
- II. Violation of excise laws.
- III. Offenses against public order and decency.
- IV. Violation of law taxing occupations.

I. General principles.

The principle applied to cases of insurance upon property alleged to be illegally used is that where the consideration is illegal, immoral, and wrong, or where the direct purpose of the contract is to effect advances or encourage acts in violation of law, it is void, and if the contract sought to be enforced is collateral and independent, though in some measure connected with acts done in violation of law, the contract is not void. *Boardman v. Merrimack Mut. F. Ins. Co.*, 8 Cush. 588.

If a contract of insurance upon property is such that its direct purpose is to effect, advance, or encourage acts in violation of law, it is void; but if it is collateral and independent, though in some measure connected with the acts done in violation of law, it is not void. *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687.

The same principles upon which it is held that goods which are carried for an illegal purpose or in an illegal manner cannot be the subject of a valid insurance against the perils of the sea apply with at least equal force to an insurance against fire upon goods which are so unlawfully kept in a store that the owner is liable to fine and imprisonment, and the store may be a nuisance, and the goods subject to seizure and forfeiture. *Kelly v. Home Ins. Co.*, 97 Mass. 288.

II. Violation of excise laws.

With relation to violations of excise laws, there 40 L. R. A.

and liquors kept by a dealer who does not have the permit required by law to sell them, is not void as against public policy.

2. A mere executory agreement to sell insured goods does not constitute any change of interest within the meaning of an insurance policy.

3. An improper statement by counsel in opening a case, which is immediately with-

seem to be two conflicting rules. Under what might be termed the New England rule, a fire-insurance policy against loss by fire on intoxicating liquors kept by the assured for sale in violation of law is for the direct purpose of enabling him to continue his offense with the greater safety, and is therefore in contravention of law, and void. *Kelly v. Home Ins. Co.*, 97 Mass. 288.

And a contract directly insuring liquors intended for illegal sale is invalid as one made to afford protection for illegal acts. *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687.

So, a fire-insurance policy on a saloon, furniture, fixtures, and stock in trade consisting principally of wines, liquors, and cigars never attaches, and is invalid where the assured was engaged in the unlawful business of selling intoxicating liquor without a license at the time it was issued and for a month afterwards. *Lawrence v. National F. Ins. Co.*, 127 Mass. 557, note.

And a fire-insurance policy containing a proviso that it shall be void if the building insured thereby shall be occupied or used for unlawful purposes is rendered invalid where for two or three months before the fire a number of barrels of intoxicating liquors were stored in the building with intent to sell, and some of which was in fact sold by retail without a license, though such acts were unknown to the owner. *Kelly v. Worcester Mut. F. Ins. Co.*, 97 Mass. 285.

And no action can be maintained upon a fire-insurance policy where the notice and proof of loss furnished to the insurers in compliance with a requirement in the policy that such notice shall show in what manner the building was occupied, state that it was occupied as a hotel, and it appears in proof that no license had been given to keep it as

drawn after an exception with an acknowledgment that it was not justified under the existing state of the record, will not be regarded on appeal as prejudicial error, if it was not so considered by the trial judge.

4. **Testimony as to the value of property** is relevant on the question of damages, under an agreement that these shall not exceed the actual cash value or the cost of repairing or replacing the property.
5. **An instruction as to the illegality of keeping liquors for sale** in the state is not made erroneous as touching a matter not in issue by adding that keeping them with intent to sell them out of the state would not be unlawful, although there may be no evidence of an intent to sell out of the state.
6. **An appellant cannot complain** of error in an instruction which was in his own interest.
7. **An estimate of the value of insured property** by the insured in his proofs of loss will not constitute fraud if he places the amount too high merely through inadvertence or mistake.

(May 27, 1897.)

APPPEAL by defendant from a judgment of the District Court for Carroll County in

a hotel, and a memorandum of special hazards annexed to the policy prohibits all unlawful business. *Campbell v. Charter Oak F. & M. Ins. Co.* 10 Allen, 213.

So, if an illegal traffic in intoxicating liquors is the principal business of a druggist insuring his stock of goods, and his other business is a mere cover for the purpose of enabling him to secrete and disguise his real business, the insurance is a contract to protect him in his illegal ventures, and is therefore void. *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687.

But a contract of insurance on a stock of drugs of one who carried on business as a druggist, using alcoholic liquors legitimately in his drug trade, and occasionally selling them in violation of law, where no legal design entered into its inception, would be so far collateral to the illegal acts as to render it valid and binding. *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687.

And whether or not the sale of intoxicating liquor by a druggist was the principal part of his business, and his dealing in drugs a mere cover to enable him to secrete and disguise his illegal traffic, so as to invalidate a fire insurance on his stock of goods, is a question of fact for the jury. *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687.

So, a policy of fire insurance upon billiard tables, balls, and cues kept by the assured without a license for the purpose of playing at billiards for hire, gain, or reward, in violation of Mass. Gen. Stat. chap. 88, § 70, and on intoxicating liquors owned and kept for sale by both persons to whom the policy issued, while only one of them had a license, and upon the fixtures, furniture, and pictures used by them in furnishing and adorning the room kept by them as a billiard saloon and a bar room, never attaches, and is illegal and void where the whole is carried on as one business. *Johnson v. Union Marine & F. Ins. Co.* 127 Mass. 555.

But insurance upon a bowling alley and pool table procured while the owner thereof had a license is valid, and recovery may be had in case of loss by fire, though the license afterwards expired and such bowling alley and pool table were continued in use for some time thereafter, where their use was discontinued before the fire. *Hinckley v. Germania F. Ins. Co.* 140 Mass. 38, 54 Am. Rep. 445.

In *Hinckley v. Germania F. Ins. Co.* 140 Mass. 38, 54 40 L. R. A.

favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. McVey & Cheshire, for appellant:

Under the laws of Iowa, the plaintiff had not the right to own, keep, or vend drugs, medicines, and poisons, because he was not a registered pharmacist.

McClain's Code, § 2580.

Niagara F. Ins. Co. v. DeGraff, 12 Mich. 124, was based largely on the fact that a statute then in force in Michigan did not intend to destroy or affect the property right of spirituous liquors.

Hibbard v. People, 4 Mich. 125; *Bagg v. Jerome*, 7 Mich. 145.

Messrs. Earle & Prouty and F. A. Charles, for appellee:

Even if there had been a sale, and possession had not been delivered, it would not have invalidated the insurance policy.

See *Kempton v. State Ins. Co.* 62 Iowa, 83.

If the insurance itself is for the express purpose of aiding and assisting in carrying on an unlawful business, then the policy is void, but

Am. Dec. 445, supra, Johnson v. Union Marine & F. Ins. Co. 127 Mass. 555, *supra*, was distinguished upon the ground that in that case the policy was on billiard tables, balls, cues, etc., kept without a license at the time the policy was issued; and *Kelly v. Home Ins. Co.* 97 Mass. 288, *supra*, was distinguished upon the ground that in that case there never was a moment when the liquors were not illegally kept, and that therefore the policy never attached, while in the case at bar the business was legal at the time the policy issued.

Upon the other hand, the rule of the principal case is that a contract of insurance upon goods susceptible of legitimate use is collateral to, and too remotely connected with, the illegal use to which such goods are put to be affected by it, where no illegal design entered into the making of the contract at its inception.

Thus, a contract of insurance upon property susceptible of lawful uses, though its sale is prohibited, is a collateral contract in which no illegal design enters, and is not affected by the character of the goods, such a contract not being illegal unless the contract itself is for a directly illegal purpose. *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124.

And spirituous liquors, though kept for sale in violation of law, may be lawfully insured against destruction by fire, as such liquors are capable of lawful use, and the insurance attaches to the property only, and the risks insured against are not the consequences of illegal acts but of accidents. *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124.

And evidence in an action on an insurance policy on the stock of a brewery, that at and before the fire the insured had no license from the government as distillers, is not admissible for the purpose of showing that he was acting in violation of law. *People's Ins. Co. v. Spencer*, 53 Pa. 363, 91 Am. Dec. 217.

So, a condition in a fire insurance policy, invalidating it if gunpowder or other articles subject to legal restriction should be kept in greater quantities or in a different manner than provided for by law, refers to articles intrinsically dangerous in their nature, liable to cause injury accidentally or from carelessness, and not to liquors the traffic in which is made illegal by law. *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124.

And the right of a person insuring saloon &c-

if it is merely collateral to or independent of the conduct of the business itself, then it does not vitiate the policy.

Carrigan v. Lycoming F. Ins. Co. 58 Vt. 418, 88 Am. Rep. 687; *Niagara F. Ins. Co. v. De Graff*, 12 Mich. 124; *Ocean Ins. Co. v. Polleys*, 13 Pet. 157, 10 L. ed. 105; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468; *Martin v. Capital Ins. Co.* 85 Iowa, 643.

Granger, J., delivered the opinion of the court:

On the 22d day of August, 1898, the defendant company issued to the plaintiff its policy of fire insurance, to the amount of \$1,200, on a stock of drugs, patent medicines, etc., at Coon Rapids, Iowa, and on the 9th day of September, 1898, said stock of goods was destroyed by fire, and this action is to recover on the policy. The following are defenses pleaded, to each of which the court sustained a demurrer: "(8) The defendant says that there was conducted, in the building described in the petition, and by means of the property insured in said policy a pharmacy, at the time said insurance was written, and up to the time of said fire, by the said B. F. Erb, and that said B. F. Erb had no

permit to do business as a pharmacist, and that this business was conducted in violation of the laws of the state of Iowa, and that this fact the plaintiff concealed from this defendant, at the time this insurance was written and at all times thereafter,—the fact that he was conducting a pharmacy contrary to the laws of the state of Iowa, and without a permit to conduct such a pharmacy, and in violation of the statutes of Iowa,—which concealment was a material fact concerning this insurance, and by the terms of the policy renders the same void. (9) Defendant further says that said Erb was engaged, at the place described in the petition, and by means of the appliances and property insured in the policy, in illegally selling intoxicating liquors, at the time said policy was written, and thereafter up to the time of the fire, and that said Erb was not a registered pharmacist, neither had he any permit to sell or deal in intoxicating liquors, and these facts were all concealed from the defendant, and which facts are each and all of them material facts concerning this insurance; and by the express terms of this policy the same is rendered void by such concealment." An amendment to the answer was filed, having reference to some particulars to

tures to recover on the policy in case of loss is not prima facie affected by the fact that he had no license to sell liquor. *Manchester F. Assur. Co. v. Feibelman* (Ala.) 23 So. 759.

The question whether spirituous liquors are included in the term "groceries" since the passage of the Michigan prohibitory liquor law, as used in a policy of insurance upon a stock of groceries kept for sale, in an action upon the policy, is one of fact for the jury. *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124.

In *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124, the lottery insurance cases were distinguished as not at all parallel, as insuring a lottery ticket requires the lottery to be drawn, which constitutes the illegal act, in order that the insurance shall attach to the risk.

III. Offenses against public order and decency.

The insurance of lottery tickets is invalid as against public policy, and under N. Y. act April 7, 1807, declaring it to be a public misdemeanor to insure tickets in lotteries, and the act of February 17, 1809, extends the provisions of that act to all lotteries whatever, whether foreign or domestic. *Mount v. Waite*, 7 Johns. 434.

But while insurance upon lottery tickets is void, the insured violates no statute, and does not stand *in pari delicto*, and is entitled to recover back the premium paid for the insurance. *Mount v. Waite*, 7 Johns. 434.

And a fire-insurance policy upon a shoe factory and the stock therein is not invalidated by the drawing of a lottery in a single room therein in which no stock was kept, with the consent and participation of the assured, where it does not appear that such drawing had anything to do with the fire, as such act was wholly independent of and disconnected from the subject-matter of the insurance. *Boardman v. Merrimac Mut. F. Ins. Co.* 8 Cusb. 583.

And the owner of property may insure it though he is a member of a trust for the purpose of controlling the price of property of that kind. *Springfield F. & M. Ins. Co. v. Cannon* (Tex. Civ. App.) 46 S. W. 875.

So, a fire-insurance policy, the application for which refers to and states that the property insured is used as the private dwelling of the applicant, which names the use, and provides that it

shall be void if used for any other purpose, is rendered invalid by the conversion of the dwelling into a house of prostitution. *Cedar Rapids Insurance Co. v. Shimp*, 16 Ill. App. 248.

The conversion of ordinary sleeping apartments into a house of assignment and prostitution kept in a disorderly manner constitutes such a change of occupancy of insured premises as will require notice to the insurer under a policy providing that failure to give notice of any change in the occupancy thereof shall invalidate it. *Indiana Ins. Co. v. Brehm*, 88 Ind. 578.

And a fire-insurance policy, the application for which states that the house to be insured was kept as a hotel, which is made a part of the policy and constitutes a warranty, is invalid, and no recovery can be had thereon where it was occupied as a house of ill-fame to the knowledge of the owner or his agent who made the representation; but if the building was leased as a hotel, and apparently used as such, and the fact that it was otherwise used was without the knowledge or consent of the owner, he can recover in case of loss. *Hall v. People's Mut. F. Ins. Co.* 6 Gray, 185.

And the fact that premises insured by the owner and occupied by a tenant were used as a place of prostitution does not invalidate the insurance thereon where the owner did not authorize and had no knowledge of such use, and the property was not rented for that purpose, and was converted to such use by the tenant. *Nebraska & I. Ins. Co. v. Christensen*, 29 Neb. 572.

So, in *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247, the fact that the premises insured were used as a house of prostitution was treated as not affecting the validity of the policy, the question of its validity being made to turn upon the question whether the suppression of that and other facts enhanced the risk.

But a policy of fire insurance on a stock of fire-works, containing a provision that it shall be null and void whenever any article shall be kept in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for, is to be construed to mean that the assured may keep only such fire-works as it is lawful to keep under municipal regulations; and where he kept dangerous colored lights contrary to the provisions of a

the defenses in question; but it deals mainly with conclusions of law, and as to facts it seems to add nothing to the sufficiency of the defenses pleaded, and hence it need not be set out.

The proposition for consideration, as presented by appellant, is: "Can there be a recovery on an insurance policy covering articles of merchandise which are owned and kept and used in violation of the laws of the state?" It is urged that to permit such a recovery would be against public policy. The line of authorities coming to our notice, to aid in the solution of the question, is quite limited. Those nearest to sustaining appellant's view are in Massachusetts. In *Kelly v. Worcester Mut. F. Ins. Co.* 97 Mass. 284, the insurance was on a building that, in violation of the conditions of the policy that the building should not be occupied or used for unlawful purposes, was used for gambling in violation of law, which avoided the policy. The case seems to have no bearing on the facts of this case. *Kelly v. Home Ins. Co.* 97 Mass. 288, is a case in which the insurance was on a stock of liquors kept by the

assured for sale in violation of law. The policy covered the liquors and casks containing them. The opinion holds the policy void, and, speaking of the assured, it closes with the words: "His contract was in contravention of law, and void as to him, because he entered into it in order to protect himself in his illegal acts." The case, as to authority, is grounded on holdings in cases involving marine insurance. In such cases the rule is announced that "the illegality of the voyage in all cases avoids the policy, and the voyage is always illegal when the goods or trade are prohibited, or the mode of its prosecution violates the provisions of a statute." In *Boardman v. Merrimack Mut. F. Ins. Co.* 8 Cush. 583, it was sought to avoid policies of insurance on a building and personal property, consisting of leather and materials for the manufacture of shoes. The evening before the fire persons assembled in a room in the building and conducted a lottery, which was a use of the room for an unlawful purpose. The rule of the case is stated as follows: "The drawing of a lottery, with the consent and participation of the assured, in a

city ordinance, which caused a fire, he cannot recover. *Jones v. Firemen's Fund Ins. Co.* 2 Daly, 807.

IV. Violation of law taxing occupations.

A policy of insurance upon the stock of goods of a merchant is a contract with reference to his business, within the meaning of Miss. Code 1892, §§ 3390, 3401, imposing a privilege tax, graded in accordance with the value of the stock of goods to be carried during the year, and providing that all contracts made with any person who shall violate that act in reference to the business carried on in disregard thereof shall be null and void so far as such person may base any claim upon them. *American F. Ins. Co. v. First Nat. Bank*, 73 Miss. 469.

And one who exercises the privilege of keeping a store without paying the price and obtaining the license prescribed by law, and effects an insurance upon the stock of goods so employed, cannot recover on the policy in case of loss, under Miss. Code, § 589, imposing a tax upon such privilege, and requiring a license for the exercise thereof, and providing that all contracts made with any person who shall violate that act with reference to the business carried on or in disregard of that law shall be null and void. *Pollard v. Phoenix Ins. Co.* 63 Miss. 244, 56 Am. Rep. 865.

So, a contract of insurance upon a stock of goods is one made with reference to the business, which will be rendered invalid by the fact that the stock insured exceeds the limits covered by the license paid under the Mississippi statute, though at the time of the payment thereof it was sufficient. *Sun Mut. Ins. Co. v. Searles*, 73 Miss. 62.

And one who with knowledge that his stock of goods would vary during the year from a value of \$2,000 to \$7,000, and intending that the stock should vary between such sums, pays a privilege tax under Miss. Code 1892, § 3390, etc., upon a basis that the stock never exceeds \$3,500, violates the provisions of that law, and a contract of insurance upon such goods is rendered invalid thereby. *American F. Ins. Co. v. First Nat. Bank*, 73 Miss. 469.

And a change, by an insurance company, of a policy issued by it, by substituting the words "as used solely for warehouse purposes" in the place of the words "it is understood and agreed that this building is to be occupied as a warehouse only during the continuance of this policy," does not create a new contract which will be rendered valid by the proper payment by the assured of the privilege tax

required by the Mississippi statute, where the policy as formerly issued had been rendered invalid by a failure to make sufficient payment. *American F. Ins. Co. v. First Nat. Bank*, 73 Miss. 469.

And where a merchant has paid the proper privilege tax under the Mississippi statute taxing occupations, but between the date of payment and the date of making a contract of insurance his stock increases and exceeds the limit covered by the license, his business instantly becomes one conducted in violation of law, and is illegal and not protected by his license, and the contract of insurance is rendered invalid thereby. *Sun Mut. Ins. Co. v. Searles*, 73 Miss. 62.

In *Sun Mut. Ins. Co. v. Searles*, 73 Miss. 62, *supra*, Sneed v. British America Assur. Co. 72 Miss. 51, *infra*, was distinguished upon the ground that that case merely held that where a merchant has paid the proper privilege tax, and his stock has been kept within the limit covered by that privilege tax up to the time he makes the contract of insurance, his business was legally licensed for the whole time from the taking out of the privilege-tax license, up to and including the day of making the contract of insurance, and it was therefore valid, and not rendered invalid by an increase of the stock over the legal limit subsequent to the making of the contract of insurance.

Insurance upon a stock of goods is not invalid, however, on the ground that the business was carried on in disregard of Miss. Code, §§ 3390, 3401, providing for a tax thereon, where at the time the contract of insurance was made the insured had paid the tax required by that statute for transacting a business with a stock of goods he then had, though before the loss occurred his stock had been so increased that thereafter he might not lawfully conduct the business without the payment of an additional tax. *Sneed v. British America Assur. Co.* 72 Miss. 51.

And a payment of a sufficient privilege tax at any time during the month has a retroactive effect, under Miss. Code 1892, § 3403, requiring a tax collector, when a privilege tax is paid during any month, but after the first day thereof, to date the license as of that day, and providing that it shall be good for one year from that day, so as to validate a contract of insurance on the stock of goods made during that month, though the tax was not in fact paid until after the contract was made. *American F. Ins. Co. v. First Nat. Bank*, 73 Miss. 469.

F. H. B.

building insured against loss by fire, as a shoe manufactory, does not avoid the policy on the building, nor on the stock therein." In the opinion is the following language: "The distinction between cases where contracts are or are not void as against law, is well stated by Marshall, Ch. J., in *Armstrong v. Toler*, 11 Wheat. 271, 6 L. ed. 472. The principle established is, that where the consideration is illegal, immoral, and wrong, or where the direct purpose of the contract is to effect, advance, or encourage acts in violation of law, it is void. But if the contract sought to be enforced is collateral and independent, though in some measure connected with acts done in violation of law, the contract is not void." This rule is followed in *Johnson v. Union Marine & F. Ins. Co.* 127 Mass. 555, in which a policy was held void. In *Niagara F. Ins. Co. v. De Graff*, 12 Mich. 124, the policy included, among other things, groceries, among which were liquors, and the policy was claimed to be void, because to sustain the policy with liquors included would be insuring an illegal traffic. The case is quite in line, on principle, with the one at bar. The case briefly treats of the rule as to marine insurance, holding it to be inapplicable, and, as suggesting a state of facts that would be applicable, it is said: "If this policy were, in express terms, a policy insuring the party selling liquor against loss by fire or forfeiture, it would be quite analogous. But this insurance attaches only to property, and the risks insured against are not the consequences of illegal acts, but of accident." In the opinion it is further said: "By insuring his property, the insurance company has no concern with the use he may make of it, and, as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected." The case cites *Ocean Ins. Co. v. Polleys*, 13 Pet. 157, 10 L. ed. 105; and *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468. It is there said: "It is difficult to perceive how public policy can be violated by an insurance of any kind of property recognized by law to exist." In *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687, the Massachusetts cases and the Michigan cases are noticed, and the case quotes much of the language we have quoted from them. The policy in that case covered a stock in trade consisting of groceries, provisions, drugs, . . . including wines and liquors. In the case at bar, as in that one, liquors are included in the terms of the policy. In that case it is said: "If the purpose of the contract in question had been to protect the assured in the sale of intoxicating liquors, it would have been null; but the greater part of the property insured consisted of goods, insurance upon which was subject to no objection. The contract was legal upon its face, nothing appearing to show that the wines and liquors were intended for illegal sale; and it is a fact, not needing proof, that in compounding medicines, liquors, especially wines and alcohol, are of daily use, and for that purpose their possession and use by druggists are legitimate.

The assured was a dealer in drugs and medicines, and in that respect legitimately and presumably using liquors. There was evidence tending to show that he illegally sold them, including those not used in compounding medicines; and the fact may have been that the latter trade was the larger and his main one. If such illegal traffic was the business of the assured, and his legal traffic and transactions with other property a mere cover, ostensibly carried on for the purpose of enabling him to secrete and disguise his iniquity, the purpose of the contract would be to protect him in his illegal ventures, and it would therefore be void; but if he carried on business, using alcoholic liquors legitimately in his drug trade, and occasionally sold them in violation of law, we think that, if no illegal design entered into the making of the contract in its inception, that it would be so far collateral to the illegal acts that it would be inconsistent, and in accordance with no well-adjudged case, to hold it null." The case of *Pollard v. Phenix Ins. Co.* 63 Miss. 244, 56 Am. Rep. 805, is determined upon a statute making contracts void, and is of no force as authority in this case. This case, in some respects, differs from any we have noticed or cited; but we think the rule of the Michigan and Vermont cases announces the correct doctrine.

The following is the property insured, as stated in the policy: "\$1,200 on his general stock of drugs, patent medicines, lamps and lamp goods, paints, oils, stationery, books, wall paper, liquors, fancy and toilet articles, and druggist's sundries." It shows much property insured, outside of liquors and drugs, for which permits to sell must be obtained. The facts to bring the policy within the rule to make it void are wanting. The drugs and the liquors are recognized property in this state, and as legitimate subjects of insurance as other property. It is the illegal use of them that gives rise to the questions before us. We have not seen a case in which, because of the mere use of property for illegal purposes, not increasing the hazard, in the absence of stipulations to that effect, a policy has been held void because of such use. It is not a case in which the contract itself is against public policy, by the parties, at the inception of it, intending it to be in aid of purposes or designs to violate the law. This case simply presents the question whether, where a party uses property for an unlawful purpose that is susceptible of legitimate use, such use will render the insurance contract void, as against public policy. We think that no authority sustains such a rule, and it does not seem to be dictated by reason.

2. A condition of the policy is that it shall be void "if any change take place in the interest, title, or possession of the subject of insurance, . . . whether by legal process or judgment, or by voluntary act of the assured or otherwise." On the 22d day of July, 1898, the plaintiff entered into a written contract with one Funk to sell to him the stock insured in exchange for land, the exchange to be effected not later than August 1, 1898. The agreement was never executed. Defendant pleads the facts setting out the contract, and to that division of the answer there was a demurrer, which the court sustained, and com-

plaint is made of that ruling. Appellant concedes that, under the holdings of this court, such a sale as is pleaded does not avoid a policy that contains a provision against the "sale of the property or exchange of title;" but it is said that this policy goes further and renders it void "if any change . . . takes place in the interest of the subject of insurance," etc., and it is urged that "to some extent" there was, by the contract, a change of interest. The conclusion of appellant's argument is that plaintiff's only liability for a failure to perform the contract would have been a judgment for damages for breach of his contract. There was no change of possession, no right of use. Speaking of the interests contemplated by the policy, we fail to imagine any change therein because of the contract. It was a simple agreement to in the future make such a change, which was never done. It is true that the policy stipulates against a change of interest, or a change of title, or a change of possession. There was not a change of either. Plaintiff's interest in the safety of the property was as great after the contract as before, for the purchase price depended on an invoice to be taken before the transfer; so that there was, because of the contract, no increase of hazard. It may be said that the only interest contemplated by the contract was that of ownership. Its terms could give rise to no contingency under which Funk would assert any other interest than that of ownership. These facts bring the case in line with the holdings under which appellant concedes the policy would be valid.

3. The following appears in the record as occurring during the opening statement to the jury by plaintiff's counsel:

What I undertake to say is this, that they have had a foreign fellow running around here with a bottle of whisky in his pocket, that they called a "detective;" that the defendants have had—

Mr. Cheshire: To this statement the defendant objects and excepts.

Mr. Prouty: If I don't prove it, it will reverse your case. What I undertake to say is this, gentlemen,—I will stand by what I said,—that I understand that they have had a fellow running around here looking up testimony.

Mr. Cheshire: And to all this the defendant excepts.

Mr. Prouty: But I undertake to say the testimony they will have, if they do have any here, that we burned this property,—that it is based upon improper motives, and is improper testimony; that there is not a particle of truth in it; that Mr. Erb, at the time the fire occurred, was at the time in bed, sound asleep, at 4 o'clock in the morning, and I guess a little bit sounder than any other man in town.

Mr. Cheshire: And to all of this statement to the jury the defendant excepts and objects.

Mr. Prouty: Upon reflection, I am inclined to think that my remarks concerning the manner of obtaining evidence on the part of the defendant were improper, under the present state of the record, and that I would not be permitted to prove the things which I attempted to say, on account of the condition of the record just now,—a matter that I did not

fully consider when making the statement,—and I therefore, in the presence of the court and the jury, withdraw all statements, at this time, as to the manner of obtaining testimony on the part of the defendant.

It is thought that the appellant was prejudiced by the statement, notwithstanding the words withdrawing it. It is true that the withdrawal does not acknowledge that the statement as to what could be proved was false, but it followed so soon after the other statement that the jury must have clearly understood that it would not be relied on as a fact, and there was a practical acknowledgment by counsel that he was wrong, in view of the record, in making the statement. It is always to be regretted when matters occur that cast suspicions on the fairness of a trial; but it was in the presence of the trial judge, who could know, better than we can, the probabilities of prejudice because of it. We are not warranted in saying that prejudice resulted. In fact, we are inclined to the view that it could not.

4. To show the damages sustained, the plaintiff was used as a witness, and, for the purposes of the examination, the stock was itemized, as goods, chemicals, syrups, etc., patent medicines, lamps, lamp goods, paints and oils, etc. The witness, under objections stated the value of the different items. The following is a provision of the policy: "The company shall not be liable beyond the actual cash value of the property at the time any damage or loss occurs, and the loss or damage shall be ascertained and estimated according to such actual cash value, with proper deductions for depreciations, and shall in no event exceed what it would cost the insured to repair or replace same with material of like kind and quality." It is urged that the questions asked did not establish the measure of damage agreed upon. We think it tended to. The witness was asked to state the value which is presumed to mean the cash value of the goods at the time of the loss; and that would include any depreciation. Such cash value would also fix, presumably, the cost of replacing, in a case where resort must be had to the markets for that purpose. A different rule as to replacing might obtain as to some classes of property.

5. The following is the second instruction given to the jury: "Plaintiff has alleged that the liquors named in the policy of insurance were not owned or possessed by him for the purpose of sale in violation of law. This question is an issue, and you are told that, before plaintiff can recover the value of such intoxicating liquors, it must appear in addition to all other necessary conditions, and that by a preponderance of the evidence, that plaintiff did not own or possess such liquors with intent to sell the same within this state. If he has not so established such facts, then you should find for the defendant on this issue. Plaintiff had the right to keep said liquors if he did not intend to sell them within this state, or if he kept them with intent to sell the same outside of the state, his ownership and possession would not be unlawful." The complaint as to the instruction is that it tells the

jury that plaintiff had the right to keep the liquors in the state with intent to sell them outside the state, and it is said that there is no evidence of an intent to sell outside of the state. There was evidence that they were kept for sale in Iowa in violation of law. The court, by the instruction, told the jury that, before there could be a recovery for the liquors, it must appear that they were not kept for sale in Iowa. It then, with a view evidently to make plain the law, informed the jury that the keeping of the liquors in Iowa with intent to sell elsewhere would not be unlawful. Conceding there was no evidence of an intent to sell elsewhere, there was no error. The instruction merely guarded the jury against an impression that keeping with an intent to sell anywhere would be unlawful. It was not, as appellant urges, submitting to the jury a question not at issue in the case.

There is a further complaint as to the same instruction, in that it holds the reverse of the holding on demurrer, wherein it is claimed the policy is void because of the keeping of liquors for sale in violation of law; and it is said that, if there could be no recovery for the liquors, there could be none on the policy, because, if it was void as to one item, it would be as to all. In view of our holding as to the demurrer, appellant cannot well complain of the instruction; for the error, if any, is in its interest by excluding from the amount of the recovery, if the facts were found, one item for which, under the ruling on the demurrer, there might be a recovery. It is not to be understood that we hold to the rule suggested, that because there might be one item of property as to which the policy would be void, on account of the acts of the assured after the policy issued, the entire policy would be void. The case in this respect is quite different from *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202, where the wrongful acts of the assured went to the inception of the policy.

6. A defense pleaded is that the plaintiff was not the sole and unconditional owner of the property. Issues were taken thereon, and the court instructed that there was not sufficient evidence to establish the defense. In this there was no error. It was an affirmative defense, and the evidence did not support it, so that a finding for defendant could have been sustained.

Another defense pleaded is that, in making the proofs of loss, the plaintiff swore falsely, with intent to defraud the defendant. The court instructed that, if he did so, he could not recover. The complaint is as to the value fixed on the property. The proofs show the value to be \$3,960. The jury found the value at \$3,600. The court said to the jury that, if the plaintiff, in the proofs of loss, placed the amount too high through inadvertence or mistake, with no intent to defraud the defendant, the statement would not necessarily defeat plaintiff's right to recover. It is urged that there is no claim that the statements were made through inadvertence or mistake. The difference between the actual value as found, and that stated in the proofs of loss, would, alone, suggest the thought and justify the instructions given. Without some such qualification of the rule as was given, the correctness of the instruction might be doubted. The very proposition to be considered was as to an intentional misstatement. The jury was very properly told what the effect would be if the statement was intentionally false, and just as properly told its effect if not intentionally so.

There are some other questions argued that we have not noticed, that are based on misapprehensions of the record, or that, we think, cannot be seriously relied on to reverse the case.

The record seems to be without prejudicial error, and the judgment is affirmed.

Rehearing denied.

UTAH SUPREME COURT.

NORTH POINT CONSOLIDATED IRRIGATION COMPANY, *Appt.*,

v.

UTAH & SALT LAKE CANAL COMPANY *et al.*, *Respts.*

(.....Utah.....)

*1. The plaintiff claimed the right to receive water through the Surplus canal, owned by a corporation, and that its purposes were irrigation and drainage, while the defendants claimed its purpose was to carry seep-

*Headnotes by ZANE, Ch. J.

NOTE.—As to disposal of water brought in unnatural quantities on land, see note to *Baltimore Breweries Co. v. Hanstead (Md.)* 27 L. R. A. 224, and note.

As to prior appropriation, see note to *Isaacs v. Barber (Wash.)* 30 L. R. A. 665.

40 L. R. A.

age water from lands irrigated by them through their drain ditches, though unfit for irrigation, as well as other drainage water, and introduced witnesses to state their understanding of its purpose. *Held*, that the purpose of the canal, and the powers the corporation was authorized to exercise, must be determined from its charter, not from the opinions of witnesses.

2. Articles of incorporation under the general law of the state, with the provisions defining their effect, constitute the charter of a corporation; and from them the purposes of the corporation, and the uses to which its property may be put, must be ascertained and limited.

3. Two purposes are enumerated in the charter of the Surplus Canal Company: (1) The diversion of a portion of the water of the Jordan river to prevent the overflow of adjacent lands; (2) irrigation and cultivation of lands. To these ends, the construction and maintenance of dams, head gates, flumes, and

maintain all necessary dams, head-gates, weirs, flumes, pipes, or other means that may hereafter be considered necessary to carry out the objects of this association." "Art. 5. The capital stock of this association shall consist of the several interests of the corporations hereof in the North Point Canal Company, together with the water rights thereto through the Surplus canal from the river Jordan as they now exist and appear of record in the office of the secretary of the North Point Irrigation district of Salt Lake county, Utah territory [names of incorporators omitted], and the same be, and is hereby, transferred and made to represent the capital stock of this association, and declared fully paid up, and subject to assessment by the association from time to time, as may be required." It also appears that the members of the North Point Canal Company and the stockholders of the North Point Irrigation Company, relying upon the agreement that the North Point Canal Company, and its successor, the North Point Irrigation Company, might take water, from and through the Surplus canal, from the Jordan river, for domestic and irrigation purposes, constructed a new canal a distance of 1 mile, connecting the two canals, at a large expenditure of time and money; that they also contributed a considerable sum to the building of the Surplus canal. It also appears: That the canal of the North Point Canal Company, and its property, and the interest of the members in the unincorporated association, were transferred and passed to the North Point Irrigation Company, and became a part of its capital stock. That on the 9th day of December, 1886, a written contract was entered into between the Jordan & Salt Lake Surplus-Water Canal Company and the North Point Irrigation Company, in the following language:

Agreement between Surplus Canal Company and North Point Canal Company, Salt Lake City, 1886. Know All Men by These Presents: That, whereas, at a meeting of the board of directors of the Jordan and Salt Lake Surplus-Water Canal Company, held in Salt Lake City on the 27th day of February, 1886, the privilege to take water from the said Jordan and Salt Lake Surplus-Water Canal Company by the North Point Canal Company was granted on condition that the said North Point Canal Company assist materially in the construction of the said Jordan and Salt Lake Surplus-Water canal; and whereas, the said North Point Canal Company, by its stockholders in and landowners under the said North Point canal, have contributed the sum of \$600 (six hundred dollars) to the construction of said Jordan and Salt Lake Surplus-Water canal, the receipt whereof is hereby acknowledged,—the North Point Canal Company is hereby granted the privilege to take water from said Surplus canal at a point a little north of the county bridge constructed across said Surplus canal at a point where Third South street, of Salt Lake City, produced westward, crosses said Surplus canal, subject only to the following conditions: (1) No obstruction injuriously affecting the flow of water shall be put in the Surplus canal during the time of high water. (2) During the times of low water the North

Point Canal Company may hold the water in the Surplus canal at a point two (2) feet above the present grade line of the Jordan and Salt Lake Surplus-Water canal. (3) The top of the overflow of the gate, dam, or flume placed in the Jordan and Salt Lake Surplus-Water canal by the North Point Canal Company shall be two (2) feet below the present grade line of the Jordan and Salt Lake Surplus-Water canal. In witness whereof, the said parties have hereunto caused their corporate seal to be affixed, and these presents to be subscribed by their vice-president, this 9th day of December, A. D. 1886.

T. E. Jerremy, Jr.,
Vice-President Jordan and Salt Lake Surplus
Canal Co.
Witness: N. W. Clayton.
Attest: George Q. Cannon,
Secretary.

In this agreement the name of the North Point Canal Company was, by mistake, used in the place of its successor, North Point Irrigation Company. That the intention of both parties was to make the grant to the last-named company, to whom the instrument was delivered, and who duly filed it for record on December 9, 1886.

It appears further that the Jordan & Salt Lake Surplus-Water Canal Company transferred, by deed bearing date December 12, 1886, its canal to Salt Lake City and Salt Lake county, in the following language: "And whereas, the said city and county have signified their willingness to take control and management of said canal, and to operate the same for the uses and purposes for which it was constructed, and thereby relieve this company from further expense or liability arising from the operation and management of the same: Now, therefore, in consideration of \$12,000 paid by said city and county of Salt Lake, and of the further consideration that said city and county will covenant to keep said canal open and free to accomplish the purposes for which it was constructed during the period of ten years from date hereof, we, the stockholders of said company, hereby signify our willingness to relinquish all our right, title, and interest in and to said canal to said city and county, to be by them held and operated for the uses and purposes aforesaid; and we authorize and direct the proper officers of this corporation to make, execute, and deliver to said county and city, jointly, a good and sufficient deed. [Then follow the conveyance and description.] Conditioned, however, that the parties of the second part, Salt Lake City and Salt Lake county, keep said canal open and free to accomplish the purposes for which it was constructed for the period of ten years from the date hereof." It also appears that the North Point Consolidated Irrigation Company, the plaintiff, was incorporated on August 15, 1889, and that the canal of the North Point Irrigation Company, and all its franchises, and interests in its property, were then transferred to the plaintiff. The seventh article of plaintiff's charter is as follows: "Art. 7. This corporation is organized for the purpose of owning and acquiring, making, building, and maintaining irrigation canals and ditches

in the county of Salt Lake, territory of Utah, to provide for irrigating agricultural land; to provide for irrigation, culinary, and other purposes through the canals and ditches now controlled by the North Point Irrigation Company and the West Point Canal Company, the so-called Surplus canal, and such other canals and ditches as may be hereafter constructed or acquired by this corporation; to manage and control its legitimate proportion of the waters of the river Jordan, and to construct, own, maintain, and control all necessary dams, head gates, weirs, flumes, pipes, or any other means necessary to carry out the purposes of this organization; to acquire all the cash on hand, rights, privileges, franchises, choses in action, accounts, deeds, liens, leases, goodwill, money due, books, and papers, and all property of every nature, now owned, enjoyed, controlled, or possessed by the North Point Irrigation Company and the West Point Canal Company. It being expressly intended hereby to consolidate said last-named companies, and to merge them into this corporation." It appears further that large tracts of land owned by the stockholders of the plaintiff and others depend for irrigation upon its canal; that after it was connected with the Surplus canal, up to 1892, its waters were used for irrigation and domestic purposes; that some of the land would be productive and valuable if irrigated with water suitable for irrigation, such as is taken from the Jordan river; that other portions contain alkali, that renders it unsuitable for growing crops, but that it would be improved through irrigation with pure water. It appears: That the plaintiff's canal connects with the Surplus canal about 4 miles below its mouth at the Jordan river. That above that portion of the Surplus canal, and, to the south and west, the canals of the defendants the Utah & Salt Lake Canal Company, the South Jordan Canal Company, and the North Jordan Irrigation Company are situated. That these canals take water from the Jordan river miles above the head or mouth of the Surplus canal—one as much as 17. That drain ditches were constructed and are used further up the river to carry the seepage from the lands irrigated back to the Jordan river, but the seepage from large tracts of land irrigated by water from these canals flows into Hunter's and Silver lakes. Much of it is conducted there by artificial ditches, and the seepage so collected is conducted into these small lakes or ponds, and into Decker's lake, and from the latter, a distance of about 2 miles, by means of a drain ditch, into White lake, which forms part of the Surplus canal. Much of this seepage is from alkali or mineralized lands. This seepage so conducted to and emptied into the Surplus canal is unfit for domestic or irrigation purposes. In fact, it kills vegetation, and renders the land irrigated by it unproductive.

Upon a final hearing of the case upon the pleadings, evidence, and arguments of counsel, the court rendered a decree denying the prayer for an injunction, dismissing plaintiff's action, and awarding costs against the plaintiff to the defendants. From this decree plaintiff has appealed, and assigns numerous errors, upon which a reversal is asked, and that the court below may be ordered to enter a decree per-

petually enjoining the defendants as prayed in plaintiff's complaint, and for costs.

Messrs. E. W. Taylor, C. F. Loofbourow and F. C. Loofbourow, and Moyle, Zane, & Costigan, for appellant:

The physical acts in the appropriation, together with the fact that the water is taken for a beneficial purpose and the actual use thereof (Black's Pomeroy, Water Rights, § 50), are sufficient to establish an appropriation.

Kimball v. Gearhart, 12 Cal. 28.

That grant related back to the date of the original agreement, February 27, 1886.

Jackson, Rensselaer County New Loan Officers, v. Bull, 1 Johns. Cas. 81; *Johnson v. Stagg*, 2 Johns. 510.

A conveyance to a copartnership or association, simply under the name of such copartnership or association and without specifying any or all of its members, is a valid grant, providing it can be shown who is the grantee.

New Vienna Bank v. Johnson, 47 Ohio St. 306, 8 L. R. A. 614; *Sherry v. Gilmore*, 58 Wis. 324.

A deed with a fictitious name, if actually delivered to the grantee intended, is a good conveyance.

David v. Williamsburgh City F. Ins. Co. 88 N. Y. 265, 38 Am. Rep. 418.

An appropriator's right begins at the head of the ditch where it connects with the natural source.

Black's Pomeroy, Water Rights, § 57.

The actual date of appropriation relates back to the primary acts of the appropriator.

Black's Pomeroy, Water Rights, § 55.

And the appropriation of water can be made through artificial ditches.

Black's Pomeroy, Water Rights, §§ 65, 66; *Barnes v. Sabron*, 10 Nev. 217.

The powers of a corporation are limited to such as are expressly defined in their articles, except such as are incidental.

4 Am. & Eng. Enc. Law, pp. 208-215; *Davis v. Flagstaff Silver Min. Co.* 2 Utah, 74; 4 Thomp. Corp. § 5638.

Compiled Laws of Utah 1888, § 2785, expressly provides that irrigating companies shall reconvey their surplus water into the natural source of supply.

Surface water cannot be collected in artificial channels, and discharged upon the property of an adjoining owner.

Gould, Waters, § 271; Wood, Nuisances, § 396; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Buller v. Peck*, 16 Ohio St. 834, 88 Am. Dec. 452; *White v. Chapin*, 12 Allen, 516; *Foot v. Bronson*, 4 Lans. 47; *Hicks v. Silliman*, 93 Ill. 255; *Kauffman v. Griessmer*, 26 Pa. 407, 67 Am. Dec. 437; *Martin v. Riddle*, 26 Pa. 415; *Miller v. Laubach*, 47 Pa. 154, 86 Am. Dec. 521; *Davis v. Londgreen*, 8 Neb. 43; *Porter v. Durham*, 74 N. C. 767; *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Goldsmith v. Elsas*, 58 Ga. 186; *Boynton v. Longley*, 19 Nev. 69; *Taylor v. Fickas*, 64 Ind. 167, 81 Am. Rep. 114; *Gillis v. Nelson*, 16 La. Ann. 275; *Sowers v. Shiff*, 15 La. Ann. 800; *Jutte v. Hughes*, 67 N. Y. 287; *Martin v. Jett*, 12 La. 501, 82 Am. Dec. 120; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep.

424; *Adams v. Walker*, 34 Conn. 466, 91 Am. Dec. 742; *Yerez v. Eineder*, 86 Mich. 24; *Patoka Twp. v. Hopkins*, 131 Ind. 142.

Surface water which the lower estate is bound to take is that which accumulates on the surface from natural causes, such as falling rain and melting snow, and not such as is created or brought upon the higher land by the hand of man.

Wood, Nuisances, §§ 385-387, 389, 397; Washb. Easem. p. 23.

Admitting, for argument, that the natural drainage, when Decker's lake overflows, is toward White lake, and that the natural drainage must be endured, such natural drainage cannot be added to by artificial means.

Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563; *Hooper v. Wilkinson*, 15 La. Ann. 497, 77 Am. Dec. 194; *Delahoussaye v. Judice*, 13 La. Ann. 587, 71 Am. Dec. 521; *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120.

Surface water must run naturally.

Washb. Easem. p. 450; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 426.

Irrigation water must not be deteriorated in quality to the damage of any other person.

Crane v. Winsor, 2 Utah, 248; *Black's Pomeroy, Water Rights*, §§ 76, 77; *Bear River & A. Water & Min. Co. v. New York Mining Co.* 8 Cal. 327, 68 Am. Dec. 325; *Hill v. Smith*, 27 Cal. 476, 32 Cal. 166.

The pollution of water of an artificial course to the use of which water in a pure state a right has been acquired, is a nuisance.

Wood, Nuisances, §§ 115, 116, 118, 446-448.

In order to establish an easement by adverse possession, the defense should have conclusively shown that plaintiff had express knowledge that its rights were being invaded. This the defendants have failed to do.

Washb. Easem. 4th ed. pp. 180, 181, ¶ 86; also p. 163, ¶ 43; *Zigefoose v. Zigefoose*, 69 Iowa, 391; *Carbrey v. Willis*, 7 Allen, 368, 83 Am. Dec. 688.

Adverse possession is not tenable unless exclusive.

Washb. Easem. p. 163, ¶ 43.

To establish a prescriptive right it must be shown that a nuisance was maintained for the full period with equally offensive results.

Boynton v. Longley, 19 Nev. 69; Wood, Nuisances, § 708; *Matthews v. Stillwater Gas & E. L. Co.* 63 Minn. 493.

The changing or enlarging a drain ditch avoids a prescriptive claim.

Totel v. Bonnefoy, 123 Ill. 653; *Boynton v. Longley*, 19 Nev. 69; 6 Am. & Eng. Enc. Law, pp. 16-19; *Cotton v. Pocasset Mfg. Co.* 13 Met. 429; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Matthews v. Stillwater Gas & E. L. Co.* 63 Minn. 493.

A prescriptive or adverse title for a nuisance cannot be acquired by a secret user only from the time the nuisance is known to the plaintiff and he was damaged thereby.

Wood, Nuisances, § 706; *Crosby v. Bessey*, 49 Me. 539, 77 Am. Dec. 271; *Grigsby v. Clear Lake Waterworks Co.* 40 Cal. 396; Washb. Easem. §§ 26, 26a, p. 150.

The rule is not changed even though the plaintiff came to the nuisance.

Boston Ferrule Co. v. Hills, 159 Mass. 147, 40 L. R. A.

20 L. R. A. 844; 16 Am. & Eng. Enc. Law, p. 394, note 1.

Nor is the rule changed by the fact that there is an absence of actual damages or even actual benefit from this drainage water.

Learned v. Castle, 78 Cal. 454; *Cooper v. Randall*, 53 Ill. 24; *Gleason v. Garg*, 4 Conn. 418; *Call v. Buttrick*, 4 Cush. 345.

No prescriptive or adverse right can ever be acquired by the defendants in this action to the Surplus canal, because the Surplus Company had no power to grant to the defendant canal companies the right to discharge their drainage water into the Surplus canal. The purpose of the Surplus canal was for irrigation and the taking of the Surplus water from the Jordan river and the Surplus Company never acquired any further or greater right, hence the defendants could take no greater right than the Surplus Company enjoyed; therefore, the invasion of the defendant canal companies was entirely illegal, and its adverse claim untenable.

6 Am. & Eng. Enc. Law, p. 146; *Burbank v. Fay*, 5 Lans. 397; 19 Am. & Eng. Enc. Law, p. 7; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Rep. 156.

A prescriptive right cannot be maintained against a prohibitory law.

See Green, *Ultra Vires*, p. 35; 4 Am. & Eng. Enc. Law, p. 212; 6 Am. & Eng. Enc. Law, p. 16; *State v. Krebs*, 64 N. C. 604.

Not only are the acts complained of against the defendant canal companies a private, but they are also a public, nuisance, and no person can gain a prescriptive right to maintain a public nuisance.

Ashbrook v. Com. 1 Bush, 139, 89 Am. Dec. 616; *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 781; *Jenkins v. Hooper Irrigation Co.* 13 Utah, 100.

Plaintiff gained its right through a written conveyance duly recorded, and its right is not lost, even though it was a nonuser for several years.

Dill v. Camden Bd. of Edu. 47 N. J. Eq. 421, 10 L. R. A. 276; *Arnold v. Sterens*, 24 Pick. 106, 35 Am. Dec. 305; *Bannon v. Angier*, 2 Allen, 128; *Owen v. Field*, 102 Mass. 90; *Barnes v. Lloyd*, 112 Mass. 224; *Smyle v. Hastings*, 22 N. Y. 217; *Wiggins v. McCleary*, 49 N. Y. 346; *Nitzell v. Paschall*, 3 Rawle, 76.

An injunction as prayed for is a proper remedy.

Wood, Nuisances, §§ 777, note 2, 779, 781-783, 789.

Messrs. Richards & Richards, for respondents, canal companies:

The plaintiff has no right or privilege in the Surplus canal or in the waters thereof, either by grant or appropriation. Its alleged grant is void for want of authority in the officers to execute the same. Under no circumstance could it take effect on the 27th day of February, 1886, for the reason that there was then no grantee to receive the grant, and it could not affect persons acquiring intervening rights who are not parties thereto.

In the absence of express authority conferred by the board of directors neither the president nor secretary, nor any other officer of the corporation, has the right to execute such a document for and on behalf of the corporation.

2 Cook, Stock & Stockholders, p. 716; *Mott v. Danville Seminary*, 129 Ill. 403; *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512; *Blenn v. Bear River & A. Water & Min. Co.* 20 Cal. 602, 81 Am. Dec. 132; *Corbett v. Woodward*, 5 Sawy. 403; *England v. Deerborn*, 141 Mass. 590; *Jesup v. City Bank*, 14 Wis. 332; *Titus v. Cairo & F. R. Co.* 37 N. J. L. 98; *Leggett v. New Jersey Mfg. & Bkg. Co.* 1 N. J. Eq. 541, 23 Am. Dec. 728; *Wait v. Nashua Armory Asso.* 66 N. H. 581, 14 L. R. A. 356; *Lyndon Mills Co. v. Lyndon Literary & Biblical Inst.* 63 Vt. 581; *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.* 7 Wend. 31.

An unincorporated association cannot take a grant in its association name or hold title to realty.

1 Devlin, Deeds, § 190; 1 Beach, Priv. Corp. § 379; *Jackson, Cooper, v. Cory*, 8 Johns. 886; *German Land Asso. v. Scholler*, 10 Minn. 338; *Hornbeck v. Westbrook*, 9 Johns. 75; *Jackson, Potter, v. Sisson*, 2 Johns. Cas. 321; *Sloane v. McConahy*, 4 Ohio, 157; *Thomas v. Marshfield*, 10 Pick. 368; *Barillet v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Hamblett v. Bennett*, 6 Allen, 140; *Tucker v. Seaman's Aid. Soc.* 7 Met. 188.

Rights in water for irrigation can only be acquired by the actual appropriation of the water to that beneficial use.

Munroe v. Irie, 2 Utah, 535; *Crane v. Winsor*, 2 Utah, 248; *Black's Pomeroy, Water Rights*, § 52; *Osgood v. El Dorado Water & D. G. Min. Co.* 56 Cal. 571; *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550.

Any right or privilege the plaintiff took was subject to the rights of the owners of the Surplus canal and of the defendant canal companies.

1 Beach, Priv. Corp. § 379, and cases cited. In the construction of the drain ditch, the defendant canal companies and the county of Salt Lake disposed of the drainage according to its natural disposition, and made that portion of the country which was naturally subservient bear its part of the drainage burden.

As a right incidental to their corporate power and to the business of irrigation, defendants could and did lawfully construct and maintain a drain ditch from the Decker lake into White lake, connecting this chain of lakes for the purpose of carrying away the seepage water and surface drainage necessarily incidental to the irrigation of the lands watered from their canals; said water being conveyed in the course in which the drainage would naturally flow.

Conrad v. Arrowhead Hot Springs Hotel, 103 Cal. 399; *Earl v. DeHart*, 12 N. J. Eq. 280, 72 Am. Dec. 395.

The drainage, in connection with the irrigation of land, is a reasonable use of the property of the canal companies, and one which they were entitled to enjoy.

Barnard v. Sherley, 185 Ind. 547, 24 L. R. A. 568; *Panton v. Holland*, 17 Johns. 99, 8 Am. Dec. 369; *Gibson v. Puchta*, 33 Cal. 310; *Townsend v. Bell*, 70 Hun, 537.

The prior right of the defendants to use the White lake and Surplus canal for the purpose of drainage commenced in June, 1886, and continued, to the same extent, from that time till the commencement of this suit; and the drain ditch was not enlarged, nor the flowage thereof increased.

40 L. R. A.

Jacob v. Lorenz, 98 Cal. 332; *Ramelli v. Irish*, 96 Cal. 214.

The defendant canal companies have obtained a prescriptive right in the Surplus canal and the waters thereof, by an open, notorious, peaceable, continuous, uninterrupted adverse use for a period of over seven years.

Such a right may be acquired.

Goddard, Easem. pp. 68, 69, 258, and note G; *Wood v. Sutcliffe*, 2 Sim. N. S. 163, 21 L. J. Ch. N. S. 253; *Black's Pomeroy, Water Rights*, § 152; *Wood, Lim. Act.* § 181; 1 *Wood, Nuisances*, p. 719; *McCallum v. Germantown Water Co.* 54 Pa. 40, 93 Am. Dec. 656; *Prentice v. Geiger*, 74 N. Y. 341.

The right is acquired in the period prescribed by the statute of limitation of actions, in this state seven years.

Black's Pomeroy, Water Rights, § 152; *Angell, Watercourses*, § 208; 19 *Am. & Eng. Enc. Law*, p. 11; *Washb. Easem.* p. 140; *Harkness v. Woodmansee*, 7 Utah, 227.

Such a right may be acquired for drainage.

Earl v. DeHart, 12 N. J. Eq. 280, 72 Am. Dec. 395.

The acts were of such a character as to give notice to all parties of the defendants' claim of right, and plaintiff, having had the means of knowledge, cannot say that it did not know.

Close v. Samm, 27 Iowa, 503; *School District No. 8 v. Lynch*, 83 Conn. 330; *Thompson v. Pioche*, 44 Cal. 517; *Poignard v. Smith*, 6 Pick. 172; *Scruggs v. Scruggs*, 43 Mo. 142; *Samuels v. Borrowdale*, 104 Mass. 210; *Wilson v. Williams*, 52 Miss. 488.

The adverse possession of the defendants was of such a character that the plaintiff will be presumed to have know of it, and hence no notice was necessary.

Key v. Jennings, 66 Mo. 367; *Bushey v. Santiff*, 86 Hun, 384.

A party must take notice of the existence of a ditch.

Cook v. Chicago, B. & Q. R. Co. 40 Iowa, 451; *Hodgson v. Jeffries*, 52 Ind. 334; *Baldock v. Atwood*, 21 Or. 73.

The law does not require the use to be in all respects identical and the same, both in manner and extent, in order to acquire an easement, and a change, if any, must be such as would cause some injury to others.

Washb. Easem. p. 171; *Jacob v. Lorenz*, 98 Cal. 332; *Ramelli v. Irish*, 96 Cal. 214.

The plaintiff is not entitled to an injunction.

1 *High, Inj.* § 7: 1 *Spelling, Extraordinary Relief*, § 26; *Atty. Gen. v. Manchester & L. R. Co.* 1 *Railway Cas.* 436; *Wicks v. Hunt*, Johns. V. C. (Eng.) 372; 1 *High, Inj.* § 2; *Drewry, Inj.* p. 265; *Kerr, Inj.* 230, 231; *Bispham, Eq.* § 400; *Ienberg v. East India House Estate Co.* 33 L. J. Ch. N. S. 392; *Ward v. Kelsey*, 14 Abb. Pr. 106; *Audrenied v. Philadelphia & R. R. Co.* 68 Pa. 370, 8 Am. Rep. 195; *Durell v. Pritchard*, L. R. 1 Ch. 244; *City of London Brewery Co. v. Tennant*, L. R. 9 Ch. 219; *Jacorub v. Knight*, 32 S. R. Ch. App. 601; *Rogers Locomotive & Mach. Works v. Erie R. Co.* 20 N. J. Eq. 379.

Messrs. **W. Van Cott, G. F. Putnam,** and **Ray Van Cott** for respondent Salt Lake County.

Messrs. **William McKay and D. B. Hempstead** for respondent Salt Lake City.

Zane, Ch. J., delivered the opinion of the court:

The plaintiff claims the legal right to take and use water from the Jordan & Salt Lake Surplus canal for irrigation and domestic purposes; that it has an interest in and right to the Surplus canal, and to its waters, to that extent; and that, in view of the pleadings and evidence, the court should protect that right by a writ of injunction; while the Utah & Salt Lake Canal Company, the South Jordan Canal Company, and the North Jordan Irrigation Company, three of the defendants, deny that plaintiff has any interest in the Surplus canal, or any right to take water therefrom for irrigation or other purposes, and they claim the right to use the same canal to carry the seepage and surplus waters from the lands irrigated by them, from their canals, though its waters may be thereby so polluted and befouled by alkali or other substances as to render it unfit for irrigation or domestic purposes. It is plain that the Surplus canal cannot be used for both purposes. It cannot be used to carry water fit for irrigation, and water unfit for irrigation, at the same time. The use of the Surplus canal to carry water unfit for irrigation or domestic purposes is, in effect, an exclusive right to the use of it, so far as the use of it to carry water for irrigation or domestic purposes goes; and the right to use it to carry water for irrigation or domestic purposes, in effect, excludes the use of it to carry water unfit for irrigation or domestic purposes. The two rights are perfectly inconsistent, and cannot be enjoyed together.

This brings us to the question, Has the plaintiff the right to take or use water from the Surplus canal for irrigation, culinary, or other domestic purposes? The plaintiff insists that the Surplus canal was constructed to relieve the Jordan river during freshets or high water; to carry a portion of its water and overflow water at such times, and as a drainage canal, to that extent; and also for the purposes of irrigation and domestic purposes; while the defendants claim it was constructed alone for the purpose of drainage to carry the seepage and surplus water from the lands irrigated by the defendant canal companies and others, as well as to relieve the Jordan river and adjacent lands submerged by it in times of freshets and high water. The understanding of various persons as to the object of the incorporation known as the Jordan & Salt Lake Surplus-Water Canal Company was received in evidence by the court below. While a special charter was not granted by the legislature of the late territory to the Jordan & Salt Lake Surplus-Water Canal Company, and it was incorporated under a general law, its articles of incorporation under that law were given the effect of a charter; and in them its purposes and powers must be found,—from them its franchise or franchises must be ascertained. Such a corporation can only use such powers as are expressly mentioned in its charter, and such as may be necessary to execute those expressed. In the case of *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950, the court said: "Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a cor-

poration is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." The object and business of the Jordan & Salt Lake Surplus-Water Canal Company, expressed in its charter, was "to construct [the canal described] for the purpose of diverting a portion of the said Jordan river from its present channel, and causing it to flow into" Salt Lake at a point named, "thereby preventing the western portion of Salt Lake City and the lands along the Jordan river from being submerged in times of high water, and making practicable the draining, irrigating, and cultivating of large tracts of land hitherto unavailable for agricultural purposes; and to this end the association may construct and maintain all necessary dams, head gates, flumes, and other means which may be necessary to control, regulate, and distribute said water for the purposes herein indicated." The objects were to divert a portion of the waters of the river in times of high water, to prevent the western portion of the city from being submerged, and to make practicable the drainage and irrigation and cultivation for agricultural purposes of large tracts of land; and to those ends the company was empowered to construct and maintain all necessary dams, head gates, flumes, and other means which might be necessary to control, regulate, and distribute the waters of the canal so diverted from the Jordan river. It is apparent that the diversion of water and its distribution for irrigation were intended, as well as the diversion of water from the Jordan river at times of high water. Having the power to construct and use its canal for the purpose of irrigation as well as drainage, the Surplus Canal Company was authorized to enter into the contract with the North Point Irrigation Company dated December 9, 1886, in which it granted to the company the right to take water from its canal for irrigation and domestic purposes, and to construct dams and gates to divert water into the canal of the North Point Irrigation Company to that end. This contract in writing of December 9, 1886, referred to, ratified the verbal contract of February 27 of the same year with the unincorporated company. While the name of the North Point Canal Company is used in the written contract, there is no doubt from the evidence that the North Point Irrigation Company, who had succeeded to the property and rights of the unincorporated company, was intended, and we must hold that the contract was made with the incorporated company.

Defendants also insist that the execution of the contract of December 9, 1886, by the Surplus Water Company, was not proved by a preponderance of the evidence. While the evidence was conflicting, we are disposed to find that it was proved by a clear preponderance, and that it was executed by authority of both parties to it. It purports to be so signed. Two witnesses so state. It was acknowledged and delivered by the proper officers of the Surplus Company, duly filed for record, and recorded.

The North Point Irrigation Company on the faith of it built a new canal the distance of a mile, at considerable cost, thereby connecting their canal with the Surplus canal, constructed a head gate according to the terms of the con-

tract, contributed to the building of the Surplus Canal, and took out water under the contract, whenever desired, until this suit was brought. After the contract was so signed, acknowledged, delivered, accepted, and acted upon by both parties, it would be a breach of faith for the defendants to avoid it now on the ground that it was not authorized and duly executed. After this contract or grant was so executed, acknowledged, delivered, and recorded, the Jordan & Salt Lake Surplus Water Canal Company transferred their canal to Salt Lake City and Salt Lake county, upon the condition that they would take the control and management of it for the uses and purposes for which it was constructed. It appears from the evidence in the record that the North Point Irrigation Company acquired its right to take water from the Surplus canal before its waters were rendered unfit for irrigation by the impure surplus and seepage water discharged through the drain ditch into it from Decker's lake. But the canal company defendants claim that the seepage and surplus water from the lands irrigated by them flows naturally into White lake, a part of the Surplus canal. Undoubtedly a proprietor of higher land is entitled to the benefit of the natural flow therefrom, onto the lands of another, of surface or other water not brought there by artificial means. But, when water is brought onto the higher land by artificial means, the proprietor is not entitled to such natural flow onto the land of another, to his injury. The proprietors of higher lands have not the right to the natural flow of water brought onto their lands by artificial means. If natural forces alone bring water onto a man's land, he may allow natural forces to take it off, though it may be deposited on the land of another, to his injury. Seepage from lands, caused by irrigation water brought in canals or other artificial ditches, cannot be regarded as natural seepage or drainage. It is not brought there alone by natural laws, as water from rain, snow, or springs is. Nor is the water in question conducted by gravitation, in drains or depressions made by natural forces, into the Surplus canal. It appears that the seepage and surplus water complained of is conducted, in small, artificially constructed drains, into the chain of lakes, and some of those are connected by such artificial ditches until it reaches Decker's lake, and from that a drain ditch nearly 2 miles long, of considerable width and several feet deep,—in one place as much as 6 feet,—was made and is maintained by the defendants, through which the waters so collected in Decker's lake flow into the Surplus canal. The defendants have no right to conduct water through their canals onto lands irrigated by them, and then, by means of drain ditches, conduct the seepage and surplus water therefrom, rendered unfit for irrigation or domestic uses, into the Surplus canal, out of which the plaintiff has the right to take water for useful purposes. *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452; Gould, *Waters*, § 271; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Adams v. Walker*, 34 Conn. 466, 91 Am. Dec. 742; 1 Wood, *Nuisances*, §§ 386, 387. There is evidence that the waters of Decker's lake, before the drain ditch complained of was

constructed, when the water was high, sometimes overflowed its rim, and found its way into the Surplus canal. This, however, did not authorize the defendants to cut a drain ditch through the rim or intervening higher ground, and conduct such water as would not overflow into the Surplus canal. In *Butler v. Peck*, 16 Ohio St. 343, 88 Am. Dec. 452, the court said: "And it makes no difference that . . . in times of high water a portion of the waters of the basin would overflow its rim, and find their way, along a natural swale, to and upon the lands of the plaintiff below; for, as to those waters which naturally could not surmount nor penetrate the rim of the basin, but were compelled to pass off by evaporation, or remain where they were, the case is the same as if the basin had no outlet whatever." Section 2785, Comp. Laws Utah 1888, declares: "It shall be the duty of all persons using water from any natural source of supply, to provide suitable ditches for conveying surplus water again into the natural channel, or other place of use, to the satisfaction or approval of the water commissioner." It appears that the defendant canal companies divert water from the Jordan river into their canals, several miles above the point where the Surplus Canal Company connects with the same river (one of them as much as 17 miles above), and that they have a number of drain ditches, at different points, carrying the surplus and seepage water back into the river, the natural source of supply; but, when they came down to the chain of ponds or lakes, they constructed their drain ditches into them, and from them into the Surplus canal, whose waters the plaintiff uses for irrigation. They should have carried the seepage and surplus water complained of back into the common source, the Jordan river, as they do further up the river, as the statute contemplates, or to Salt lake. Either way appears practicable, from the evidence.

The canal companies, defendants, also claim a prescriptive right to drain the water complained of into the Surplus canal. The evidence proves that the defendants, the canal companies, first constructed their drain ditch in the spring of 1886, but enlarged and extended it as late as 1892. And it appears that the plaintiff used water from the Surplus canal to the last-named year, when it was found to be unfit for irrigation, culinary, or other domestic use. At that time plaintiff's officers and agents found it was so impure as to be altogether unfit for use. The drainage of pure water, or water suitable for irrigation or other uses to which the plaintiff wished to put it, into the Surplus canal, was not inconsistent with plaintiff's use of it for the purpose of irrigation or other use. So long as the plaintiff obtained water from the Surplus canal suitable for its purposes, it could make no difference whether it all came from the Jordan river, or other source. But as soon as seepage or surplus water was emptied into the canal, that rendered it unfit for use, then such drainage became inconsistent with plaintiff's use of the same canal for irrigation purposes, and the canal companies' use of it became exclusive. It has been held that adverse use of an easement will give title by prescription, when substantially the same, as to length of time, ex-

clusiveness, acquiescence, and in other respects, as the adverse possession that will give title to real estate. If the adverse possession that will give title under the statute of limitations is required to be exclusive, continuous, and uninterrupted for seven, ten, or other number of years, under claim of right, with the knowledge and acquiescence of the owner, then the same facts must exist to give title in case of an easement. The statute of limitations as to real estate in force in the late territory and in this state at the time it is claimed that canal companies, defendants, gained the right by prescription to drain their seepage and surplus water into the Surplus canal, required the existence and concurrence of facts that do not exist with respect to the alleged easement relied upon in this case. This is apparent from an examination of §§ 3186, 3137, Comp. Laws Utah 1888. There is no analogy between the facts attending the alleged easement relied upon in this case, and the facts required to be shown in order to gain title under the statute of limitations.

The canal companies also rely upon § 2780 of the same compilation, which declares that "a right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, . . . is hereby recognized and acknowledged to have vested and accrued as a primary right to the extent of and reasonable necessity for such use thereof, under any of the following circumstances: . . . (2) Whenever any person or persons shall have had the open, peaceable, uninterrupted, and continuous use of water for a period of seven years." The facts upon which the easement claimed by defendants must stand are not analogous to those giving the right to the use of water under the statute. The statute relates to the use of water for a useful purpose. The defendants claim a right to drain impure and befouled water into a canal whose waters are used for the purpose of drainage, irrigation, and domestic purposes. The right described by the statute is to take water for useful purposes. The right as described in the pleadings and evidence is to discharge impure water, unfit for use, into a canal whose waters are used for irrigation, culinary, and other domestic purposes. The facts upon which the canal companies rely to establish a right by prescription are not analogous to those required by either of the statutes above referred to. And they can only be applied as to time when analogous in other respects. *Harkness v. Woodman*, 7 Utah, 227; 19 Am. & Eng. Enc. Law, 1st ed. p. 11.

The discharge of impure and foul water into a canal whose waters are used for irrigation or other useful purpose creates a nuisance. It appears from the evidence in this case that the waters of the Surplus canal were rendered totally unfit for irrigation or domestic purposes by the seepage and surplus water from the land irrigated by defendants' canals, discharged through their drain ditch from Decker's lake. Section 3463 of the statutes (Utah Comp. Laws 1888), declares that "anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property,

is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be abated or enjoined, as well as damages recovered." This section declares that anything which is injurious to health, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of property, is a nuisance. The mixing of alkali or mineral with water used for culinary or other domestic use, so that it cannot be used, is certainly offensive to the taste, injurious to health, and interferes with the enjoyment of life. And to befoul water used for irrigation, so that it kills vegetation, is an obstruction to the free use of property, and interferes with its enjoyment. A nuisance may be offensive to the sense of smell, sight, or hearing. In the prosecution of a business, offensive odors may be cast off, unusual and offensive noises may be given out, fluid substances may escape into a neighbor's well, or one may do or cause to be done that which is offensive to the eye. In either case it may become a nuisance. Or the thing done or maintained may be injurious to property, and affect the free use of it, and in that way be a nuisance. *Wood, Nuisances*, §§ 115, 116; *Crane v. Winsor*, 2 Utah, 248; *Black's Pomeroy, Water Rights*, § 76. The use that will give a prescriptive right to maintain a private nuisance must be adverse, under a claim of right, uninterrupted and continuous, for twenty years, with the knowledge and acquiescence of the party whose right is invaded. *Campbell v. Seaman*, 63 N. Y. 568, 30 Am. Rep. 567; 1 Wood, Lim. Act. 1st ed. § 132. *Totel v. Bonnefoy*, 123 Ill. 653. The general rule is that there can be no prescriptive right to maintain a public nuisance. Time will not sanctify it. *Ashbrook v. Com.* 1 Bush, 139, 89 Am. Dec. 616; *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

It appears from the evidence in the record that plaintiff's canal was designed to irrigate various tracts of land owned by different persons, and that a number of them irrigated their lands from the canal for a time, and that stock drank of its waters. The further question is, Did the canal companies create a public nuisance by draining the seepage and surplus water from the lands irrigated by them into the Surplus canal, in that way contaminating its waters with salt and other substances thus rendering it unfit for use? The statute (Utah Comp. Laws 1888, § 4566) declares that "a public nuisance . . . consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: (1) Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons. . . . (4) In any way renders three or more persons insecure in life, or the use of property." It appears that various persons were prevented from cultivating or using their property, and the water upon which they relied to some extent for watering stock and for domestic purposes was made unfit for these purposes. It is true that considerable evidence was introduced on the trial tending to show that much of the land situated so that it could be irrigated from plaintiff's canal

is impregnated with alkali and salt, and unfit for agricultural purposes. But the evidence establishes the fact that crops grew on some of it prior to 1892, when irrigated with water from the plaintiff's canal, received through the Surplus canal, from the Jordan river, before the drain ditch from Decker's lake was enlarged; and we think the evidence authorizes the inference that a great portion of the land that could be leached and irrigated from plaintiff's canal would eventually become fit for cultivation if irrigated alone with water from the Jordan river, or with water through the Surplus canal, without being mixed with the water from the drain ditch from Decker's lake. There was also evidence tending to prove that the waters of White lake, through which the Surplus canal runs, contain a large per cent of salt; that its waters are unfit for irrigation. That lake is not large, and from the evidence we are of the opinion that a portion of the waters of the Jordan river, running through it, would purify and render it fit for irrigation, when not contaminated with the seepage and surplus water from the lands irrigated by the canals of the defendants, and by waters of the chain of lakes discharged through the drain ditch from Decker's lake.

The defendants finally urge that the findings of the court below should not be disregarded or set aside, and the decree based thereon reversed, unless it appears that they, or some one or more of them, are so essentially and palpably erroneous as to induce a belief that such findings were induced by a mistake, or that the court was misled in some essential respect with respect to them. This appeal was taken on questions of fact as well as of law, and this court has recently held that in equity cases we may go behind the findings, and weigh all the evidence, and decide according to its preponderance. But when the evidence as to a fact found to exist or not to exist is so evenly balanced, or the proof of it is so unsatisfactory, as to cause the mind to hesitate and pause as to the side on which it preponderates, or as to its existence or nonexistence, and to leave it in

grave doubt, we are of the opinion the finding of the court below should remain. In the case of *Whittaker v. Ferguson* (decided at the present term, but not yet officially reported) 51 Pac. 981, this court said: "An appeal may be taken in equity cases on questions of fact as well as of law. The appellate court, therefore, by necessary intendment and implication, has the same jurisdiction and power in equity cases to determine questions of fact as of law, and may go behind the findings and decree of the trial court, consider all the evidence, decide on which side the preponderance thereof is, ascertain whether or not the proof justifies the findings and decree, and modify or set aside the findings and decree, and enter or direct such findings and decree to be entered as the evidence, in the judgment of the appellate tribunal, may justify." We hold that the court below erred in its findings, so far as they conflict with this opinion, and in granting the decree entered upon them. *The decree appealed from is reversed*, and the cause is remanded, with directions to the court below to set aside its findings so far as they conflict with this opinion, and to make additional findings in conformity with it, and to enter a decree perpetually enjoining the three canal companies named as defendants from draining the seepage or surplus water from the lands irrigated from their canals, or any or either of them, or the waters of the chain of lakes mentioned in the pleadings, through the drain ditch from Decker's lake, also mentioned in the pleadings, or otherwise, into the Salt Lake Surplus Water canal, or into White lake, a part of it, and ordering them to fill up said drain ditch, and ordering a writ of injunction to the same effect, against each of the defendants, to be served upon them. Costs are awarded to the plaintiff against the defendants.

Miner, J., and Johnson, District Judge, concur.

Rehearing denied March 30, 1898.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

John H. KNAPP *et al.*, *Appts.*,

v.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(56 U. S. App. 452, 85 Fed. Rep. 329, 29 C. C. A. 171.)

1. A mortgagee who sues a purchaser from the mortgagor for a portion of the mortgage debt, which such purchaser has assumed to pay, does not thereby adopt the covenants of warranty in the mortgagor's deed, except as against the part of the indebtedness assumed and sued for, so as to prevent foreclo-

sure of the mortgage against such purchaser for the balance of the debt.

2. The right of a mortgagee to enforce the payment of a mortgage debt as against the grantee of the mortgagor, who has assumed its payment, does not rest upon any contract between the mortgagee and grantee which is enforceable by the mortgagee by a suit at law, but is founded upon the fact that the grantee has become primarily liable to pay the debt, while the mortgagor is surety for its payment, so that the mortgagee may be subrogated to the rights of the mortgagor, and may, by a suit in equity, compel the grantee to keep his engagement.

NOTE.—As to liability of a purchaser subject to mortgage, see *note to Jefferson v. Asch* (Minn.) 25 L. R. A. on p. 275; also *Robinson Bank v. Miller* (Ill.) 27 L. R. A. 449; and *Hare v. Murphy* (Neb.) 29 L. R. A. 861.

40 L. R. A.

February 14, 1898.)

A PPEAL by defendants from a decree of the Circuit Court of the United States for the

District of Minnesota in favor of complainant in an action brought to foreclose a mortgage. *Affirmed.*

Before *Sanborn* and *Thayer*, Circuit Judges, and *Philips*, District Judge.

Statement by *Thayer*, Circuit Judge:

This suit was brought by the Connecticut Mutual Life Insurance Company, the appellee, against John H. Knapp, Helen W. Knapp, Edgar J. Knapp, and Herbert V. R. Knapp, the appellants, and against certain other persons who have not appealed, to foreclose a mortgage executed by William R. Marshall on October 1, 1889, in favor of the Connecticut Mutual Life Insurance Company, which mortgage covered a tract of land situated at the corner of Jackson and Tenth streets, in the city of St. Paul, state of Minnesota. The mortgage, as originally drawn, covered a tract of land fronting 100 feet on Jackson street, and 150 feet on Tenth street, and was given to secure a note executed by said Marshall for the sum of \$20,000, payable on October 1, 1894. On June 2, 1890, Marshall paid \$5,000 on said note, and obtained a release of a part of the mortgaged premises, the same being a lot of land fronting 48 feet on Tenth street, leaving the mortgage to stand as an encumbrance on the residue of the tract situated at the corner of said streets, which fronted 100 feet on Jackson street, and 102 feet on Tenth street. The appellants above named filed an answer to the bill of complaint, which, by its admissions and averments, discloses in substance the following facts: On November 12, 1891, William R. Marshall and wife sold and conveyed to the appellants, John H. Knapp, Edgar J. Knapp, and Herbert V. R. Knapp, for the sum of \$32,000, a part of the mortgaged premises to which the lien of the mortgage then attached, to wit, all thereof except a strip of land 15 feet wide fronting on Jackson street, and extending back of that width a distance of 102 feet, the same being that part of the mortgaged premises which was most distant from Tenth street. The deed last mentioned contained the following clause by virtue of which the grantees above named assumed to pay a part of the mortgage indebtedness then existing on the property: "Subject to a mortgage encumbrance on said property of ten thousand dollars (\$10,000), being two thirds of fifteen thousand dollars (\$15,000) balance owed to the Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, under a mortgage made by said William R. Marshall, dated October 1, 1889, recorded in the office of register of deeds of said Ramsey county, October 31, in book 228 of Mortgages, page 106, which sum of \$10,000 with 6 per cent per annum interest from the date hereof said parties of the second part assume and agree to pay as part of the consideration hereinbefore stated." The deed in question also contained the following covenant made by the grantor: "And the said William R. Marshall, one of the parties of the first part, for himself, his heirs, executors, and administrators, does covenant with the said parties of the second part, their heirs and assigns, that he is well seised in fee of the land and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid;

that the same are free from all encumbrances except as hereinbefore stated, and the above bargained and granted lands and premises, is the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will warrant and defend." At a later date, to wit, May 25, 1893, William R. Marshall and wife conveyed to the same grantees above named, by a conveyance which was absolute in its terms, the aforesaid strip of land 15 feet in width, which was not covered by the deed of November 12, 1891; but it seems that this latter conveyance was made by Marshall and wife merely to secure the grantees therein named against their liability to pay that part of the mortgage indebtedness, to wit, \$5,000, which Marshall had agreed to pay by the deed of November 12, 1891, and was a lien on the property which the appellants had purchased. The mortgage debt having matured on October 1, 1894, and being unpaid, the Connecticut Mutual Life Insurance Company, on or about April 1, 1895, demanded payment from the appellants of the sum of \$10,000, being the part of the mortgage debt which they had assumed and agreed to pay. Payment was refused, whereupon a suit was brought by the aforesaid insurance company against the appellants in the district court of Ramsey county, state of Minnesota, to recover the sum of money so demanded. In the trial court, and in the supreme court of the state of Minnesota as well (62 Minn. 407) this suit resulted in a judgment against the appellants for the sum claimed. That judgment, it seems, was paid prior to the institution of the suit at bar. In their answer to the bill of complaint, the appellants further charged, in substance, that William R. Marshall was insolvent when the principal of the mortgage indebtedness became due, to wit, on October 1, 1894; that he subsequently died insolvent; that the plaintiff company assented or agreed to the arrangement for the division of the mortgage indebtedness as between said Marshall and the appellants John H. Knapp, Edgar J. Knapp, and Herbert V. R. Knapp, which is disclosed by the deed of November 12, 1891, heretofore mentioned; and that the mortgage sought to be foreclosed had therefore ceased to be a lien on the property, fronting 85 feet on Jackson street, and 102 feet on Tenth street, which they acquired from said Marshall by the aforesaid deed. The answer of the appellants contained no averment, however, touching the value of that part of the mortgaged property, to wit, the strip of land 15 feet in width fronting on Jackson street, which was retained by Marshall when the conveyance of November 12, 1891, was executed. The circuit court overruled the defenses which are disclosed by the appellant's answer, and entered a decree of foreclosure against all of the property covered by the mortgage lien, but it directed that the strip of land fronting 15 feet on Jackson street, and extending back of that width 102 feet from said street, being the property last conveyed by William R. Marshall to the appellants, should be first sold for the satisfaction of the mortgage debt. To reverse such decree, the defendants below have prosecuted an appeal.

Messrs. Frank B. Kellogg, Cushman K. Davis, and C. A. Severance for appellants.

Messrs. Markham, Moore, & Markham, for appellee:

Upon the execution of the deed from Marshall to the Knapps containing the covenant on the part of the grantees to assume and pay two thirds of the mortgage indebtedness owing by Marshall to the appellee, the Knapps, as to that part of the mortgage indebtedness, became the principal debtors, and Marshall a surety, the covenant or promise of the Knapps to pay \$10,000 became an additional security in the hands of Marshall, the surety, of which the appellee had the right, by virtue of the equitable doctrine of subrogation, to avail itself.

Travers v. Dorr, 60 Minn. 173; *Alt v. Banholzer*, 86 Minn. 57; *Keller v. Ashford*, 133 U. S. 625, 33 L. ed. 678; *Second Nat. Bank v. Grand Lodge, F. & A. Masons*, 98 U. S. 123, 25 L. ed. 75; 1 Jones, *Mortg.* § 755; 1 Beach, *Mod. Eq. Jur.* § 455; 3 Pom. *Eq. Jur.* § 1206; *Rice v. Sanders*, 152 Mass. 108, 8 L. R. A. 315; *Willson v. Burton*, 52 Vt. 394; *Flagg v. Gelmacher*, 98 Ill. 293; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Palmeter v. Carey*, 63 Wis. 426; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Boardman v. Larrabee*, 51 Conn. 39; *Figart v. Halderman*, 75 Ind. 564; *Ellis v. Johnson*, 96 Ind. 377; *Willard v. Worsham*, 76 Va. 392; *Marshall v. Davies*, 78 N. Y. 414; *Ayers v. Dixon*, 78 N. Y. 318; *Wales v. Sherwood*, 62 How. Pr. 413; *Thompson v. Bertram*, 14 Iowa, 476; *Halsey v. Reed*, 9 Paige, 446; *King v. Whitely*, 10 Paige, 465; *Hoy v. Bramhall*, 19 N. J. Eq. 74; *Crowell v. Currier*, 27 N. J. Eq. 152; *Youngs v. Trustees for Support of Public Schools*, 31 N. J. Eq. 290; *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Booth v. Connecticut Mut. L. Ins. Co.* 48 Mich. 299; *Pardee v. Treat*, 82 N. Y. 385; *Coffin v. Adams*, 131 Mass. 188; *Biddel v. Brizzolara*, 64 Cal. 354; *Crowell v. Hospital of Saint Barnabas*, 27 N. J. Eq. 650; *Connecticut Mut. L. Ins. Co. v. Mayer*, 8 Mo. App. 18; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Corbett v. Waterman*, 11 Iowa, 86.

A provision whereby a grantee "assumes and agrees to pay" a mortgage is a contract, not merely to indemnify the grantor, but to pay the debt, provided it be the debt, of the grantor.

1 Jones, *Mortg.* 5th ed. § 769; *Furnas v. Durgin*, 119 Mass. 501, 20 Am. Rep. 341; *Locke v. Homer*, 181 Mass. 93, 41 Am. Rep. 199; *Stout v. Folger*, 34 Iowa, 71, 11 Am. Rep. 138; *Wilson v. Stihcell*, 9 Ohio St. 468, 75 Am. Dec. 477; *Lathrop v. Atwood*, 21 Conn. 117; *Poster v. Atwater*, 42 Conn. 244; *Belloni v. Freeborn*, 63 N. Y. 388; *Merriam v. Pine City Lumber Co.* 23 Minn. 814; *Wicker v. Hoppock*, 6 Wall. 94, 18 L. ed. 752; *Gregory v. Hartley*, 6 Neb. 356; *Gage v. Lewis*, 68 Ill. 604.

Thayer, Circuit Judge, delivered the opinion of the court:

No exception is taken by the appellants to the decree of the circuit court, in so far as it directs a sale of the strip of land 15 feet in width fronting on Jackson street; but it is strenuously insisted by them that the decree 40 L. R. A.

was and is erroneous, in so far as it permits a sale of the remaining 85 feet of the mortgaged property which was purchased by the appellants from William R. Marshall, the mortgagor, on November 12, 1891. A critical examination of the answer to the bill of complaint has satisfied us that this contention is based solely on the theory that by suing the appellants in the first instance to compel them to pay the sum of \$10,000, being the two thirds of the mortgage debt which they had assumed to pay, the plaintiff company thereby adopted all the covenants contained in the deed of November 12, 1891, and became bound thereby to the same extent as Marshall, the grantor in such deed. The argument is, in effect, that the plaintiff in this manner made itself a party to Marshall's covenant to warrant and defend the title to that part of the mortgaged property which was conveyed to the appellants, except as against that part of the mortgage indebtedness, to wit, \$10,000, which the appellants had assumed, and that it cannot be heard to assert a lien against the property which the appellants purchased, for that part of the mortgage debt, to wit, the sum of \$5,000, which Marshall undertook to pay. Whether this theory is tenable depends very largely, we think, on the nature of the right which the complainant company acquired, and afterwards enforced by a suit against the appellants, by virtue of their agreement with Marshall to pay a portion of the mortgage debt. In some cases it has been held, in substance, that where the purchaser of an equity of redemption agrees with the mortgagor to pay the whole or a part of the mortgage debt, such a promise may be treated as a contract made by the mortgagor for the mortgagee's benefit, which the latter may adopt as his own, and enforce by a suit of law. See *Fitzgerald v. Barker*, 4 Mo. App. 103; *Beardslee v. Morgner*, 4 Mo. App. 139; *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Rogers v. Gosnell*, 51 Mo. 466, and cases there cited. In the opinion of the learned judge of the trial court, which is found in the record, it is stated that this is the rule in the state of Minnesota. The prevailing doctrine, however, is that which is stated and approved in *Keller v. Ashford*, 133 U. S. 610, 623, 624, 33 L. ed. 667, 673, namely, that the right of a mortgagee to enforce the payment of a mortgage debt as against a grantee of the mortgagor who has assumed its payment does not rest upon any contract existing between the mortgagee and grantee which is enforceable by the mortgagee by a suit at law, but is founded altogether upon the fact that by virtue of the agreement to assume the mortgage debt, the grantee becomes primarily liable to pay the same, while the mortgagor, with respect to his grantee, is merely a surety for its payment. Such being the relation existing between the mortgagor and his grantee, it is held that the mortgagee may be subrogated to the rights of the mortgagor, and, by a suit in equity for that purpose, may compel the grantee to keep his engagement with the mortgagor by paying the mortgage debt. But as the right which the mortgagee thus acquires by virtue of the agreement of a third party with the mortgagor to pay the mortgage debt is purely equitable, and does

not rest on privity of contract, it will not be enforced if, for any reason, the contract between the mortgagor and his grantee could not be enforced by the former in a suit at law. If reasons exist which would enable the grantee to defend successfully an action brought by the mortgagor for nonpayment of the mortgage debt, the same reasons will preclude the mortgagee from enforcing his equitable right. *Crowell v. Hospital of Saint Barnabas*, 27 N. J. Eq. 650; *Palmeter v. Carey*, 63 Wis. 426; *Boardman v. Larrabee*, 51 Conn. 39; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Biddel v. Brizzolara*, 64 Cal. 854; *Flagg v. Geltmacher*, 98 Ill. 298; *Pigart v. Halderman*, 75 Ind. 564; *Second Nat. Bank v. Grand Lodge, F. & A. A. Masons*, 98 U. S. 123, 25 L. ed. 75; *Halsey v. Reed*, 9 Paige, 446; *Pardee v. Treat*, 82 N. Y. 385, 389; *Coffin v. Adams*, 181 Mass. 138, 137; *Jones*, *Mortg.* 5th ed. §§ 740, 770.

In view of the doctrine last stated, which is sustained by the great weight of authority, and is approved by the Federal Supreme Court, we are unable to concede that the complainant company adopted and became bound by the mortgagor's agreement with the purchaser of the equity of redemption to discharge a part of the mortgage debt merely because it sued the appellants to compel them to pay such portion of the mortgage debt as they had themselves assumed. It is obvious that, in bringing such suit, the mortgagee did not intend to release its lien upon any part of the mortgaged property. That proceeding cannot be regarded as an action at law, since the assumption agreement did not create any privity of contract between the complainant company and the appellants which would sustain such an action. *Keller v. Ashford*, 133 U. S. 610, 621, 622, 33 L. ed. 667, 672, 673. In the state of Minnesota where the suit was brought, there is but one form of action for the enforcement of private rights (*Minn. Gen. Stat.* 1894, § 5131, chap. 66); and, whatever may have been the form of the suit in question, it was essentially an equitable proceeding to reach an additional obligation or security that had been given for the satisfaction of a part of the mortgage debt. The mortgagee was entitled to avail itself of that security by virtue of a well-established

equitable doctrine, because the security or obligation was held by the mortgagor, who, with respect to the appellants, had become their surety for the payment of that part of the mortgage indebtedness which the appellants had assumed. This being an equitable proceeding to reach and appropriate the additional security that had been created by the assumption agreement it is undoubtedly true that the appellants were entitled, by way of defense to the claim, to plead any facts or circumstances which rendered the enforcement of the additional obligation either unjust or inequitable. Such a defense was in fact attempted by the appellants but the facts which they alleged and relied upon to defeat the suit were adjudged insufficient for that purpose by the supreme court of Minnesota (62 Minn. 407); and in this proceeding that adjudication must be regarded as conclusive.

The suit at bar proceeds upon the theory that the lien of the mortgage has never been released as respects any part of the mortgaged property, except the 48 feet fronting on Tenth street, which was released by the complainant company on June 2, 1890. The mortgagee seeks to have the lien of its mortgage enforced simply as against the mortgaged property. It did not demand a judgment over against the appellants in case there should be a deficiency in the proceeds of the foreclosure sale; nor was provision made for the entry of such a judgment by the decree of the circuit court. In other words, the complainant company in this proceeding does not ask for any relief under or by virtue of the assumption agreement, because the rights created by that agreement were adjudicated in the suit which was brought in the state court. The relief prayed for in this action cannot be denied, unless it is held that the mortgagor has released its lien upon the 35 feet fronting on Jackson street, which the appellants purchased, or has heretofore entered into an agreement with the appellants not to enforce the lien of the mortgage, as against said property; and for the reasons heretofore indicated, we are unable to so hold.

The result is that *the decree of the Circuit Court will be affirmed.*

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Fourth Quarter of the Judicial Year Beginning with October 1, 1897, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.
- V. FIDUCIARY RELATIONS.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

The right of a court to examine legislative journals to determine whether an alleged statute was passed, is sustained in Wyoming under constitutional provisions requiring each house to keep a journal in which shall be entered the ayes and noes on the final passage of every bill. (Wyo.) 195.

Legislative apportionment.

A legislative apportionment changing one made since the last Federal census is held invalid under a constitutional provision for apportionment every ten years, based on the Federal census. (Ill.) 770.

Money.

A dollar bill, from the upper left-hand corner of which a piece $1\frac{1}{4}$ inches by $1\frac{1}{4}$ inches has been torn, is held not to be a legal tender for car fare. (N. J.) 410.

Use of public money.

A statute for raising a free-scholarship fund to support students who are unable to obtain an education otherwise, while attending the state university, is held unconstitutional as an attempt to raise public money by taxation for a private purpose. (Mo.) 280.

Language of public notice.

The rule that publication of an official notice must be made in the English language is applied to a case where it is held insufficient to publish a delinquent tax list in the English language in a German newspaper. (Wis.) 848

Health.

A contract by a city for the care of a person having leprosy, by laborers who have a family of children and have no experience in such matters, is held unreasonable as tending to spread the disease, and therefore an injunction is granted. (Md.) 494.

Game laws.

Game killed by Indians on a reservation and sold to another Indian is held subject to the game laws of the state after it is taken off the reservation to ship out of the state. (Minn.) 759.

Coroners' verdict.

The verdict of a coroner's jury is held merely advisory and without effect as a judgment or as evidence, so that it cannot be reviewed, set

aside, or quashed in a judicial proceeding. (Ga.) 869.

Officers.

The negligence of a sheriff in failing to protect a prisoner from a mob is held to create no right of action against him. (Md.) 628.

On the theory that a reward to a public officer for doing his duty is against public policy, it is held that a statute offering a reward for the arrest of a criminal is not intended to apply to arrests by officers in the course of their duty. (Cal.) 855.

Railroad commission.

An order of a state railroad commission for the abolition of a grade crossing, according to a plan which includes abutments in the highway, is held a defense to a suit by the city for an injunction against such abutments in the street. (Conn.) 479.

School director.

The personal enmity of a school director toward a superintendent who is charged with misconduct, and the fact that he has declared that he will vote for his condemnation and has been a prime mover in the prosecution, are held to disqualify him, and justify a writ of prohibition against his sitting, where there is no appeal from the decision. (Wash.) 817.

Attorneys.

The attempt of an attorney pending proceedings for disbarment, to resign his office without consent of court, is held ineffectual to defeat his disbarment. (Or.) 194.

Posse comitatus.

Members of a posse comitatus are held to have no right to compensation from the county, in the absence of statutory provision therefor. (Mont.) 405.

Municipalities.

The right of a municipality to purchase an electric-light plant, and create a debt therefor, is denied, where the Constitution of the state prohibits the creation of debts except for the necessary expenses of the town. (N. C.) 163.

The right of a municipal corporation to recover indemnity from an abutting owner on account of a judgment against it for injuries due to a defective sidewalk is denied, where

the city could itself, if he failed to repair the walk, do so at his expense. (Ohio) 294.

The liability of a city for defects in a toll road which it has built in another state under grant from that state, without authority from its own state, is denied. (Wis.) 829.

A city is held not liable, unless made so by statute, for damages caused by the failure of a bridge tender to open a draw in the bridge because the bridge became caught. (Mich.) 526.

A city is held not to be liable for injury from the explosion of a cannon cracker on the Fourth of July in violation of an ordinance, while persons were assembled on the streets shooting firecrackers, although the statute creates a liability for injury done by a mob or riot. (Wis.) 788.

Discretion as to license.

An ordinance giving a city council discretion as to the issuing of licenses in a certain part of the city is held valid. (Wyo.) 710.

Highways.

The use of a street to a reasonable extent for poles and wires of a telephone company is upheld as proper street use for which compensation is not required to abutting owners. (Ind.) 370.

Awning permit.

An order permitting an awning in violation of a general ordinance is held to be only a license subject to revocation at any time. (Ill.) 621.

Harbors.

The lease of harbor areas for storing and marketing fish is held unauthorized by the Washington Constitution, reserving such areas for conveniences of "navigation and commerce." (Wash.) 698.

Parks.

The erection of a schoolhouse on land dedicated for an ornamental public park is held to be a wrongful use subject to injunction. (Miss.) 402.

License tax.

A license tax on brokers is held to extend to brokers who buy and sell stocks and other securities on the floor of a stock exchange, making actual transfers of possession of the securities or of the payment therefor. (Ill.) 611.

Elections.

Residence on a steamboat while living upon it as a clerk, although he has no other home, is held insufficient to give a person a voting residence. (Md.) 753.

To similar effect, it is held that a purser cannot, by living on the boat, change his voting residence to another district of the same city. (Md.) 752.

The use of paper ballots is held unlawful under the Illinois statute requiring official ballots to be used, on which names of all candidates are printed, except those written by the voter. (Ill.) 617.

Water supply.

The right of a water company to refuse to turn on water for a building until unpaid charges against previous owners or tenants are paid, is held invalid, unless authorized by statute. (Mass.) 657.

The removal of a water meter is held lawful, although the consumer has so arranged his fixtures that on paying for the water without a meter it will cost him twenty times as much as others pay for the same quantity. (Mass.) 172.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Custom.

A custom of the carpet-making business which would give a color mixer exclusive title as against his employer to the shades and combinations of color devised by him is held void for unreasonableness. (Pa.) 550.

Bills and notes.

A written assignment of a negotiable note made on a separate and detached piece of paper is held insufficient to give the transferee the legal title. (Ga.) 244.

The mere nonpayment of the first of two notes secured by a deed of trust without any action on the part of the holders is held not to make the other note due, although the deed of trust provided that both should be due and payable on such default. (Mo.) 154.

Forged note.

Promises to pay a forged note, in the absence of circumstances to create an estoppel, are held not to be binding, when they were made without full knowledge of the facts. (Ariz.) 471.

Bonds.

The loss of public money by bank failure is held not to create a liability on the bond of a state treasurer conditioned to account for the money, and to perform the duties of his office. (Wyo.) 690.

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As to medium of payment.

A note "payable" in specified bonds at par is held absolutely payable in such funds, and not to become payable in money on failure to pay or tender the bonds when due. (Ark.) 74.

Gold clause.

An undisclosed gold clause in a mortgage on land bought at auction subject to the mortgage is held not to be a defect in the title for which the purchase can be canceled, where there is no probability that the existing policy of the government to keep all its funds at par will be changed before the mortgage comes due. (N. Y.) 666.

Assumption of risks.

The assumption of risks by express contract of an employee, including all risk of the employer's negligence, is held not contrary to public policy. (Ind.) 101.

Assignment of wages.

An assignment of wages for the period of one year is sustained, where the person was working under a contract, whether it was by the day, the week, or otherwise, if made and recorded as the statute required. (R. I.) 735.

Carriers.

A person having a mileage ticket, who tries to cross the main track to board a train on a

siding, without going to the station, is held not to be a passenger. (C. C. App. 5th C.) 746.

The duty of an initial carrier stipulating to forward the property to destination but not to be liable beyond its own line as a common carrier, where there is an agreement for through passenger-train service for a carload of fruit, is held to require the initial carrier to see that proper instructions for such service are given to every carrier on the line, and not merely to the first of them, and for any delay it has the burden of showing that it was not itself in default. (Cal.) 78.

A carrier shipping a carload of orange trees from New Orleans to California by way of Denver, Colorado, and Ogden, Utah, without taking advice from the consignor or consignee, merely because its own more southern route was temporarily broken by storms and wash-outs, is held liable for the destruction of the trees by freezing. (Cal.) 850.

The delivery of goods without surrender of the bill of lading, which stipulates for its surrender, is held proper, if it is made to the consignee, or on his order, or by his direction. (Ga.) 367.

Sale; delivery to carrier.

One who delivers goods to a carrier consigned to himself, to his agent, or his own order, presumptively intends to retain title to the goods, but when he consigns them to a vendee named in the bill of lading, it is presumed that he intends the title to vest then in the vendee, except that, if he prepays the freight, he is presumed to retain title during transit. (Neb.) 584.

Delivery of telegrams.

The delivery of a telegram to the wife of the addressee in his absence is held not to be, as matter of law, either necessary or sufficient to discharge the duty of the telegraph company, but its duty in this respect is a question of fact for the jury. (Tex.) 209.

Storage of game.

A contract for the cold storage of game during the closed season is held void, where the statute makes its possession during such period unlawful. (Mo.) 151.

Innkeepers.

An innkeeper is held liable for goods stolen from a peddler's cart in his stable, although the peddler had no license for his business, as he was lodging at the inn as an individual and not as a peddler. (Me.) 491.

As to care for patient in hospital.

An employer who takes an injured employee to a hospital and promises to pay for his care is denied the right to cancel his arrangement at a time when the employee cannot be safely removed, unless the patient is able to pay his own expenses. (Minn.) 888.

Contracts for racing.

An agreement by the owners of race horses to divide premiums and stake moneys offered by racing associations if awarded to any of their horses is upheld against the claim that it was a wagering contract. (Cal.) 76.

A partnership for the purpose of horse racing on a bet with one who was regarded as a "sucker," and whom the partners deceived by

making him think their horse was untrained, is held to be such a conspiracy to defraud that neither partner can compel the other to account for its share of profits. (Mont.) 158.

Insurance.

Keeping a stock of drugs and intoxicating liquors for sale without the permit required by law is held not to make insurance thereon void as against public policy. (Iowa) 845.

The indivisibility of a policy of insurance upon a quantity of furniture as a whole is held to render it entirely void where it is void as to part because of lack of sole ownership and the existence of encumbrances, and of false swearing by the insured. (D. C.) 358.

The express terms of an insurance policy to the effect that it shall be void if there be any encumbrance on the property, "whether inquired about or not," are held insufficient to make the policy invalid because of an encumbrance, if no inquiries were made of the insured, and he made no false representation on the subject. (Neb.) 408.

Return of unearned premiums is held necessary to the cancellation of a standard policy providing, not only for five days' notice of cancellation, but also that the unearned premiums shall be returned on surrendering the policy. (N. Y.) 765.

An abrasion of the skin of a toe, caused by wearing a new shoe, is held to be an accident, within the meaning of an insurance policy. (C. C. App. 8th C.) 658.

Death caused by blood poisoning due to germs in cotton inserted by a dentist in the wound made by removal of teeth, to stop hemorrhage, is held to be within a provision against liability for poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled. (Wis.) 651.

An attempt of a traveling salesman to cross a slough in a public road, which he had often crossed when he thought there was no danger to his life in so doing, is held not to be a voluntary exposure to unnecessary danger. (Ohio) 453.

Sitting on a bag on a railroad track at a highway crossing, and when warned of the approach of a train, starting away but turning back for the bag, are held not to be a voluntary exposure to unnecessary danger within the meaning of an insurance policy. (Va.) 482.

A farmer attempting to drive a bull from a calf pasture is held not to expose himself voluntarily to unnecessary danger, if he had no reason to believe that there was danger in so doing. (Mich.) 440.

A bank cashier using a buzz saw to cut boards for his own use is held not to engage in any professional employment or exposure not rated as preferred. (Mich.) 444.

A person hunting prairie chickens with a loaded gun when it is unlawful to kill them, who is injured by an accidental discharge of his gun as he is attempting to climb a bank, is held not to be injured as a result of violating the law, within the meaning of an insurance policy. (N. D.) 487.

Twenty-nine days' delay in giving notice of an accident after knowledge of the facts is held fatal, where the policy required immediate notice. (Wis.) 883.

III. CORPORATIONS AND ASSOCIATIONS.

The power of the state railroad commission to compel intersecting railroads to make a connecting switch and interchange loaded cars and fix joint rates for shipments partly over each is held constitutional. (Minn.) 389.

The invalidity of the scheme of a corporation is held to be no defense to a subscriber against creditors of the company who relied on the subscriptions, when it did not appear in the contract of subscription or the prospectus. (Va.) 240.

A contract between two persons who are equal owners of substantially all the stock of a corporation, attempting to dispose of its property, is held not binding on the corporation. (Ill.) 589.

The pledge for his own debt by a cashier of a bank, of shares of corporate stock intrusted to the bank for safe keeping by a guardian of infant owners who had signed a blank transfer as guardian, is held to give the pledgee no rights as against the infants, even when new certificates had been issued by the corporation. (Mass.) 498.

Forfeiture of franchise.

The forfeiture of the franchise of a water company for flagrant disregard of its duty to furnish wholesome water is enforced notwithstanding an offer after suit is brought to perform the contract. (Tex.) 203.

An insurance organization is held to have forfeited its charter by attempting to issue policies in excess of the amount allowed to be issued on any single life. (Md.) 187.

Alien ownership.

Conveyances to a corporation a majority of the stock of which was owned by citizens are held void when aliens acquire a majority of the stock afterwards, under a constitutional prohibition of alien ownership. (Wash.) 430.

Foreign.

Insurance on the assessment plan, though not authorized to be transacted by stock companies in Ohio, is held a business for which corporations of other states may be licensed if they are authorized to carry on such insurance business by the laws of the state in which they are created; but it is held that such business under the Ohio laws must be for the sole benefit of the policyholders, and its rev-

enue principally derived from post mortem assessments for specific losses. (Ohio) 418.

The right of a foreign corporation to plead the statute of limitations when it has agents and officers on whom service of process can be made in the state is sustained, notwithstanding its failure to comply with the statute by filing its charter in the state. (Tenn.) 768.

State institution.

An agricultural and mechanical college, being a public or quasi corporation is held exempt from being sued, in the absence of statutory authority therefor. (Okla.) 677.

Promoters.

A promoter who transfers land which he had purchased before anything was done toward forming a corporation, to the corporation when formed, is held not to be liable for the profit made by him, in the absence of any misrepresentation or false statement, although he did not disclose the amount paid by him to the subscribers to the corporation. (Wis.) 837.

Syndicate.

A syndicate is defined, and the duties of its members to each other are discussed at length, in a Maryland case which holds that the utmost good faith toward each other is necessary, and that one member cannot be allowed to obtain any secret advantage over the others. (Md.) 216.

A secret agency of members of a syndicate who act as agents for it in purchasing property, whereby they get a commission from the vendor, is held fraudulent on the other members. (Va.) 234.

Lodge.

A mandatory injunction to compel a secret password of a grand lodge to be given to a delegate of a subordinate lodge is held to be beyond the province of equity. (Ky.) 488.

Church.

A bishop of the Roman Catholic Church is held to be under no implied obligation to pay the salary of a priest assigned to duty by his predecessor or by himself, and a decision against the priest by a church tribunal to which he had submitted the controversy is held binding upon him. (N. Y.) 670.

IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.

A right of action to the "heirs or personal representatives" of a person killed by wrongful act or neglect is held not to extend to parents. (Wash.) 822.

A tort committed by a husband upon his wife while they are living together as husband and wife is held not actionable by her, in the absence of statute. (Mich.) 757.

The marriage in a state where it is valid, of a divorced person, who by the law of his domicile was incapable of remarrying, is held not to be void at his domicile unless the statute expressly so provides, although he went out of the state for the express purpose of evading the law, and immediately returned. (Vt.) 428.

A wife's right of action against one who in-

duces her husband to abandon her is upheld, but the husband's parent is held entitled to give him advice in good faith. (Pa.) 549.

Custody of child.

The right of a father to the custody of a child is held subject to the consideration of the child's welfare, where he has for five or six years allowed sisters of the mother, in accordance with her will, to keep and rear the child. (Va.) 623.

Support of child.

The right of the mother of a child, who has been divorced from her husband, to recover from him for the maintenance of the child which has been awarded to her, is sustained. (Wash.) 587.

(FIDUCIARY RELATIONS. TORTS; NEGLIGENCE; INJURIES.)

An order for the support of minor children by the father, made in a divorce suit long after the decree had become final and the mother had remarried, was held to be within the jurisdiction of the court, where the decree awarded her the custody of the children without any provision for their maintenance. (Cal.) 585.

Another somewhat striking decision as to an implied promise holds that the father is liable to pay the mother, after their divorce, for keeping a child which the father, by the decree, had a right to, if he was left with the mother, although she refused to surrender him and the father told her he would not pay for the child if she did not. (Wis.) 579.

Insanity.

The payment of the check of an insane per-

son adjudged such in another state, although his insanity was not known to the bank, is held to make the bank liable. (Ga.) 250.

Marriage of a person adjudged mentally imbecile is held absolutely void *ab initio*. (N. C.) 737.

Mere belief in spiritualism is held insufficient proof of insanity, but where such a belief was made the means of inducing an aged woman to marry a man much younger than herself and notoriously unfit morally to be her husband, when her chief object was to give him the right to her money for philanthropic schemes that he had fraudulently induced her to believe in, the marriage and a will in his favor were held void. (Ill.) 258.

V. FIDUCIARY RELATIONS.

Money due to an estate, collected by one who is afterwards appointed administrator, is held to become a part of the cash assets of the estate for which his bond is liable, but for which the administrator *de bonis non* cannot bring an action against him or his estate. (Me.) 83.

Negligent injuries.

The negligence of a shipper in piling lumber on a car is held not to make him liable for injury to a brakeman by the shunting of the lumber while coupling cars, where the duty of the railroad company to inspect the car has intervened before the injury. (Mich.) 528.

Injury to passenger.

The intoxication of a passenger standing on the running board of a street car is held not to absolve the carrier from the duty to exercise care toward him, nor prevent his recovering damages if injured by the carrier's negligence. (Mich.) 181.

Injury by train.

A person sitting or lying on a railroad track when struck by a train, between midnight and daylight, is held to be guilty of contributory negligence as matter of law, and the presumption of the negligence of the railroad company when a person is struck by a train is overcome. (Ga.) 364.

Defective street car.

The use of a defective electric car which prevented stopping it with reasonable promptness on discovering the danger of a boy on the track is held to render the company liable for the injury, although the boy was guilty of contributory negligence. (Utah) 172.

Employer's negligence.

A servant is held entitled to rely on the promise of his master to repair defects in the place where he works only for a reasonable time to make the repairs. (Ill.) 781.

VI. TORTS; NEGLIGENCE; INJURIES.

Arrest.

An arrest of a street car passenger by a policeman called by the conductor for that purpose, on the charge of riding without payment of fare, is held not to make the carrier liable, if the conductor was authorized only to put delinquent passengers off the car. (Ark.) 478.

Assault.

An assault with intent to rape upon a passenger, by a baggage master on the train, is held to make the carrier liable in an action for damages. (Ga.) 483.

Libel.

The transmission of a libelous telegram is held to be a publication by the telegraph company. (Minn.) 661.

Malicious fence.

Building a high fence solely for the purpose of annoying and injuring a neighbor is held to be lawful when it is erected on one's own land. (Ohio) 177.

Fraudulent mortgage sale.

Interference with ownership of real property by selling it under a fraudulent mortgage and preventing payment of rents to the real owner is held to constitute an actionable wrong, 40 L. R. A.

but no action is allowed for the resulting damage to the owner's reputation. (Md.) 882.

Screwing down windows which lead to fire escapes is held not to violate the statute, and not to constitute negligence, where the frames are so light that they can be easily broken if necessary, when there is not time to unfasten them. (N. Y.) 411.

Of mine boss.

The negligence of a mine boss, the employment of whom is required by statute, is held to be that of a fellow servant for which the employer is not liable. (W. Va.) 812.

Contractor's negligence.

For injury to a spectator at a free exhibition of marksmanship given by an independent contractor employed by a street-railway company, upon the latter's grounds, the company is held liable. (Mass.) 345.

Injury by dog.

A traveler leaving his team at a livery and feed barn for the night, who went, between 8 and 8½ o'clock in the evening, to the yard to see that his buggy had been put in the barn and to get some articles out of the buggy, when he was attacked and bitten by a dog, is

held not to have been a trespasser or to be doing an unlawful act, within the meaning of the Iowa statute which makes the owner of a dog liable for injuries done by it to any person who is not engaged in an unlawful act. (Iowa) 117.

Fright.

Liability for personal injuries resulting from fright without other physical injuries is sustained in an action for negligence. (S. C.) 679.

Frightening team.

The loud blowing of a locomotive whistle several times under a bridge over which vehicles of all kinds are constantly passing is held negligence, unless there is a necessity therefor, and the burden of proof of that is on the railroad company. (Tenn.) 436.

Fire.

One whose negligence caused a fire is held not to be liable for property burned after the fire had united with another for which no known responsible agency could be fixed, and either fire would have been alone sufficient to do the damage. (Wis.) 457.

Dangerous person at large.

Persons having custody of a convict are held not to be liable for damages resulting from a crime committed by him as a result of their failure to keep him safely confined where they did not participate in the crime or have reason to apprehend it. (Ga.) 95.

Dangerous wires.

The liability of a city for negligence in respect to an abandoned telephone wire crossing another dangerous electric wire is held to ex-

ist, notwithstanding the liability of other persons or corporations therefor. (Pa.) 811.

The stringing of dangerous electric wires over a bridge where employees must come in contact with them when making repairs, if the insulation is not sufficient to make contact with them safe, is held such negligence as will make the electric company liable for the death of an employee of the owner of the bridge when repairing it. (Or.) 799.

Dangerous premises.

The liability of a city for the drowning of a child in a pond on private premises is denied although the city caused the formation of the pond by obstructing water, and may be liable for the injury to the property. (Neb.) 531.

The explosion of a digester in a pulp mill operated by a lessee is held to create no liability on the part of the lessor for injury to an employee of the lessee. (Me.) 377.

The occupant of a house is held not to be liable for injury received by stepping, when it was dark, into a coal hole about 2 feet back from the street line, in a space paved like the sidewalk and covered with coal, while a coal wagon stood at the curb, and employees of a coal dealer were preparing to put in the coal, although the injured person was a foreign woman who did not know the custom of putting in coal through coal holes. (Mass.) 347.

Dangerous attraction for child.

Leaving a platform car without any brake on a street-railway side track is held not to constitute negligence which will render the company liable for a resulting injury to a child playing with it. (Mich.) 385.

VII. PROPERTY RIGHTS; WILLS; LIENS.

A decision on a question of great importance discussed elaborately by the court denies the validity of a statute limiting recovery on a debt secured by mortgage to the property mortgaged. (Wash.) 802.

Dogs.

Dogs are held to be such property that an action of trover may be maintained for a dog that is converted. (Ga.) 503.

The right of property in dogs is upheld as the basis of an action for negligence of a street-railway company in running over a dog. (Tenn.) 518.

Easements.

An easement for a railroad right of way is held not to arise by occupation under color of title, where the occupation was lawful under the right of eminent domain. (N. C.) 415.

An easement of light and air is held not to pass by implication on a conveyance of a building with windows looking over vacant lots. (Cal.) 476.

The doctrine that an easement appurtenant to a close is appurtenant to every portion of it is denied application to an easement of light and air. (Mass.) 754.

Use of another bar-way for eleven years after one which connected a right of way by prescription with a highway had been shut up because it was impassable on account of the lowering of the road by the public authorities is held not to constitute an abandonment of the
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original bar-way, so as to preclude the owner of the easement from cutting it down to the grade of the highway and using it when the new bar-way is shut up against him. (Conn.) 81.

A right of way by necessity is held to arise on a partition of lands if it would have been created in favor of the dominant estate on its conveyance or devise by the common ancestor, and an offered substitute consisting of a private way across other lands not belonging to the common estate is insufficient to defeat the way of necessity. (Ind.) 105.

Rents.

The right of action on a covenant to pay rent passes on the death of the lessor to his administrators, although his heirs are the only persons beneficially interested. (Mass.) 321.

Bee tree.

One who finds a bee tree on the land of another is held to have no interest in them or in the tree in which they are, and where he leaves them in a hive which he does not own, on such land, he is held to have no interest in them which can be the subject of larceny. (Iowa) 687.

Buildings.

An apartment house intended only for residence purposes is held to be allowable on premises restricted by deed to residence purposes. (Ky.) 489.

Trusts.

A man entitled to half the income of a joint trust, who obtained from the trustee, who was financially embarrassed, a mortgage for one half the trust, concealing the facts from the other *cestui que trust*, is held to be a trustee in one half of such mortgage for the other *cestui que trust*. (Pa.) 552.

Exemptions.

The selection of cows which can be claimed as exempt from a chattel mortgage under a statute is held to be the right of the householder and not of his wife, and her consent to the selection is unnecessary. (Mich.) 150.

Stock.

Shares of stock in a corporation are held to be personal property only, and governed by the law of the owner's domicile, and therefore a legacy of such shares is held to lapse under the law of the legatee's domicile, irrespective of the law of the state where the will was made and the corporation was located. (Md.) 380.

Minerals.

Mineral oil and gas are held not to be included in a deed of iron ore, fire clay, and other valuable minerals, with the right to use pits, shafts, railroads, etc., to remove such minerals. (Ohio) 266.

Name.

The use of the name of a retiring partner which the continuing partner is entitled to, under the contract of dissolution, is held to be a personal right which cannot be transferred to a corporation organized to continue the business. (Md.) 632.

Fence.

Failure to trim a hedge fence on a division line is not within a statute providing for an appeal to the fence viewers in case of an insufficient fence. (Iowa) 626.

Homestead.

A woman who abandons her husband and lives apart from him in another state with another man does not thereby forfeit her right to his homestead as a widow when he dies. (Ark.) 750.

Partnership property.

Partnership property is held properly conveyed to pay notes signed by individual partners. (Wash.) 297.

Land sold by court.

The sale of lands by a court of equity to prevent their loss through inability of a life tenant to pay the taxes is sustained, and possible after-born children are held to be bound by it. (Ill.) 776.

Wharves.

Owners of land abutting on a lake owned by the state are held to have the right to make wharves and piers in aid of, but not obstructing, navigation in the shoal water far enough to reach water navigable for such boats as are in use on the lake. (Wis.) 635.

Shore.

Title to a proportionate share of land under water depending on title to the upland is held to be conveyed by a deed of a certain number of undivided acres out of the tract of upland bordering on the water. (C. C. App. 7th C.) 398.

Ditches.

The independent existence of possessory rights to ditches and the use of water is declared in an Idaho case holding that a ditch may be conveyed, reserving the water right, or the water right be conveyed, reserving the ditch. (Idaho) 485.

Irrigation.

The right to irrigate land is held subject to the duty of the party irrigating it to take care of the seepage or waste water so as not to damage others, and in this case the seepage water was unfit for irrigation because it had become mineralized by the land which it irrigated. (Utah) 851.

Surface water.

The owner of a city lot is denied the right to fill up a natural depression which has carried off surface water from a large section of the city, although it is not technically a water-course, if the city has undertaken to keep the outlet open, and its obstruction would be followed by serious injury to the city and the people in the territory drained. (Iowa) 465.

Wills.

A will giving all testator's property to an unmarried woman who is appointed one of his executors and whom he afterwards marries, is held not to show on its face that it was made in contemplation of marriage, so as to be preserved from revocation by the marriage. (Mass.) 191.

A gift by will of a certain sum to a priest to say masses for the testator is held valid as a direct gift to take effect at once, and therefore not void as a private trust in perpetuity. (R. I.) 717.

A bequest to a priest for the celebration of masses for the souls of the testator and another person is sustained as a direct gift to the donee with an injunction to the performance of the mass, and not as a trust. (Kan.) 721.

Another case sustaining the validity of bequests or devises for masses is one in which the gift was to a church for that purpose. The court holds that the trust is not private, but public and charitable, as it aids to support the clergy and public worship. (Ill.) 780.

But in another case a bequest to a bishop to procure masses for the repose of the souls of certain persons is held void for want of any beneficiary who can enforce performance of the trust. (Wis.) 725.

Lien.

A lien for repairs on a buggy is held superior to a pre-existing chattel mortgage upon it, when this provided that the property should not be improperly used or cared for. (Neb.) 761.

VIII. CIVIL REMEDIES.

Constructive service.

The matrimonial domicile of a wife who has been justified by cruelty in leaving her husband is held changed by her removal to another state, so as to prevent jurisdiction by constructive service of process in a divorce suit in the state from which she removed. (N. Y.) 291.

Judgment lien.

A record of the judgment is held necessary to complete its "rendition" for the purpose of a lien, where the statute requires the recording in order to make the judgment valid. (Iowa) 375.

A statute limiting the lien or charge of a judgment to six years, and prohibiting its renewal except for one year after the act takes effect, is held an unconstitutional impairment of contracts previously existing. (Wash.) 815.

Enforcing assumed mortgage.

The right of a mortgagee to enforce the debt as against a grantee of the mortgagor who has assumed its payment is held to rest on the principle of subrogation, and not upon any contract which he can enforce. (C. C. App. 8th C.) 861.

Money had and received.

An officer who receives fees to which he is not entitled, from a person whom he knows to be ignorant of the law, and does not inform him that it is not necessary to pay them, is held liable, on the ground of fraud, to an action for money had and received. (Me.) 185.

Guardian ad litem.

The representation of persons unborn by a guardian *ad litem* as provided by statute is held sufficient to constitute due process of law in a suit to remove a cloud. (Mass.) 127.

Garnishment.

One garnished for a debt due a nonresident creditor is allowed to prevent judgment by showing that without his collusion, and notwithstanding his plea of the pendency of such proceeding, a court at the creditor's domicile has rendered judgment against him on the debt in favor of the creditor, which he has been obliged to pay. (Va.) 287.

Ejectment.

Ejectment is denied on account of the projection of the eaves of a barn over a boundary line, where the eaves of the plaintiff's barn are lower, and are so close to the line that the water therefrom falls on defendant's land. (Wis.) 577.

Set-off.

A claim accruing in favor of an assignee for creditors for a share of the proceeds of money collected after the assignment by a person to whom judgments had been previously transferred by the assignor under a contract for a division of the proceeds is held subject to set-off against a claim of the other party which 40 L. R. A.

was due at the time of the assignment. The rule is laid down that the maturity of either claim at the time of the assignment is sufficient to give the right of set-off. (N. Y.) 664.

Injunction.

An injunction to prevent the proprietor of a theater from breaking his contract with a manager, for the use of the theater and its equipment, with lights, heat, ushers, etc., and from letting a rival company have the theater for the time in question, is denied on the ground that a court of equity cannot compel the full performance of the contract, and that a part of it cannot be enforced. (Ill.) 93.

An injunction to prevent the approval of a uniform policy of insurance by the superintendent of insurance under an unconstitutional statute is denied, as the statute, if unconstitutional, cannot stand in the way of other contracts. (Mo.) 501.

Evidence.

A statute making books of science and art presumptive evidence of facts of general notoriety or interest is held not to include medical works, such as a treatise on concussion of the spine, about the extent and character of which there is some difference of opinion among medical men. (C. C. App. 5th C.) 558.

But statistics of mechanical experiments and tabulations of their results, where the scientific work containing them is concededly recognized as a standard authority by the profession, and when they are generally relied upon by experts in that field, are held admissible in evidence to support the opinions of experts. (C. C. App. 2d C.) 561.

Physical examination.

An examination with instruments in case of injury to plaintiff's bladder is held to be beyond the discretion of the court, under evidence showing that it might be dangerous. (Wis.) 381.

Comment to jury.

Against an elaborate dissenting opinion, it is held that the failure of a defendant to examine an employee present in court as a witness on a matter within his knowledge and as to which the evidence was conflicting is a matter which the plaintiff's counsel may urge in argument to the jury, as a circumstance from which it may be inferred that, if examined, the employee would have testified against the defendant. (Ga.) 84.

Demurrer.

The rule that allegations of fact are admitted by demurrer is held subject to an exception of such improbable allegations as that a child less than two years of age performed certain specified services of the value of \$3 per month. (Ga.) 258.

IX. CRIMINAL LAW AND PRACTICE.

That which constitutes an offense against a state statute, triable only in a court of record, is held to be beyond the power of a municipality to make by ordinance an offense against the city. (Tex.) 212.

Mixing food.

A statute making the mixture of any article of food an offense is held to be too general to be enforced. (Tex.) 201.

Telegraphing bet.

A statute prohibiting a person to keep a place for transmitting money to be bet on horse-races, etc., or to be concerned in such business, is held valid as applied to a person who sends the money to another state by telegraph. (Conn.) 607.

Larceny.

A dog is the subject of larceny under a statute making it a crime to steal "chattels." (Iowa) 508.

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Sentence.

A statute providing for indeterminate sentence of criminals, not more than the maximum nor less than the minimum prescribed for a specified crime by statute, is held constitutional. (Ind.) 109.

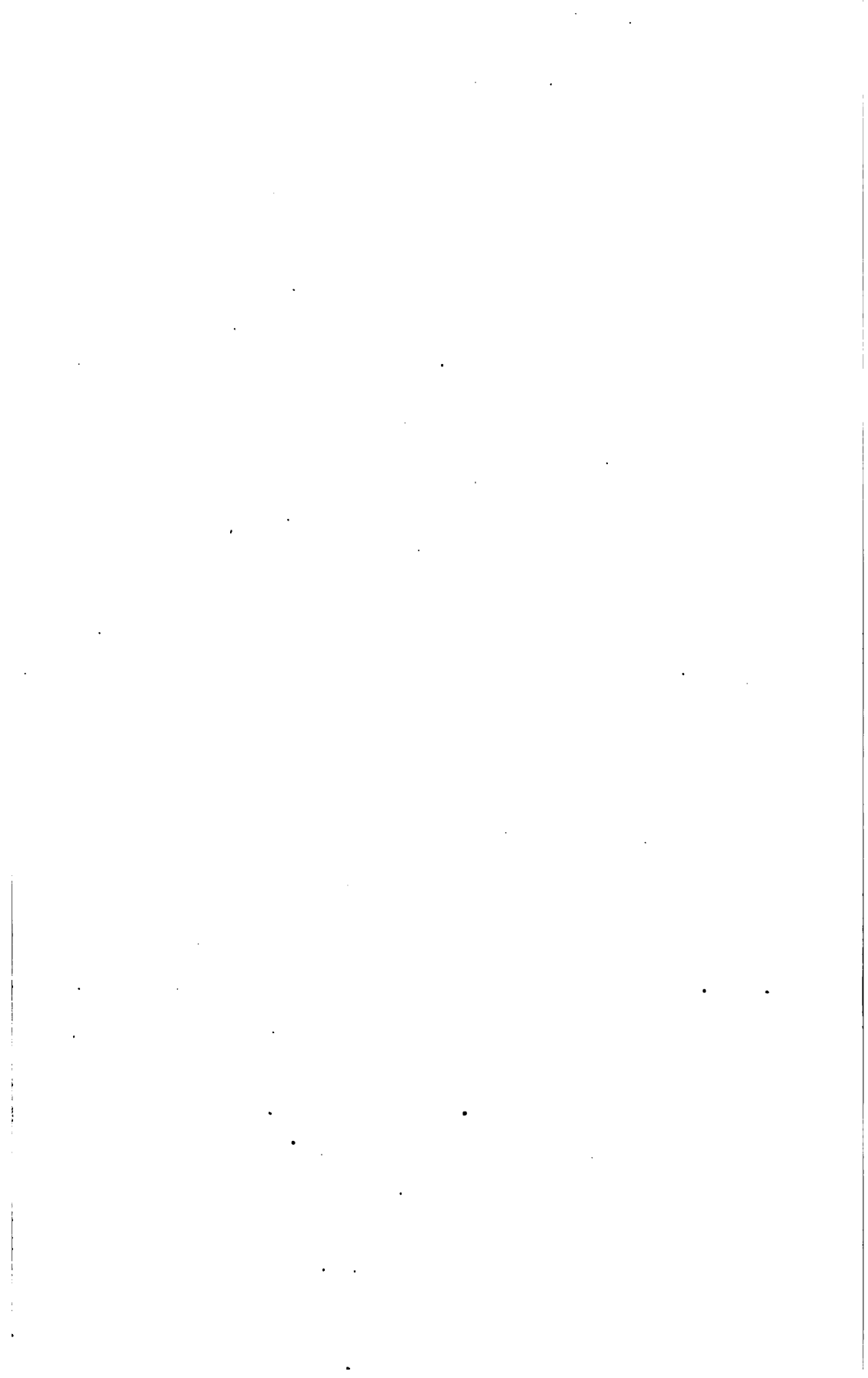
Evidence.

The hypnotism of a person accused of crime is held insufficient to render evidence made by him while under the influence admissible in his favor. (Cal.) 269.

See also *supra*, VIII.

Witness fees.

The constitutional right of an accused person to compulsory process for his witnesses is held insufficient to give his witnesses a right to claim fees from the county. (S. C.) 426.



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5. The state is not a necessary party to a suit by a city which has the exclusive control of streets, to revoke the right of a water company to use them. *Id.*

6. An amendment to a bill for an injunction against the improper use of land dedicated to the public should be allowed to join some of the original donors as plaintiffs, when the bill is filed by other resident citizens. *Rouzee v. Pierce* (Miss.) 402

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ALIENS.

1. A lease of land for forty-nine years to an alien is void under Wash. Const. art. 2, § 83, prohibiting the ownership of lands by aliens and providing that all conveyances of land to any alien shall be void. *State, Winston, v. Hudson Land Co.* (Wash.) 430

2. Conveyances made to a corporation when a majority of the stock was owned by citizens will be declared void where a majority of the stock is transported to and held by aliens, under Wash. Const. art. 2, § 83, prohibiting the ownership of land by aliens and providing that all conveyances of lands to any alien directly or in trust shall be void, and that every corporation the majority of the capital stock of which is owned by aliens shall be considered an alien for the purpose of such prohibition. *Id.*

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1. The owner of a dog has such a property in it as will entitle him to maintain trover for its recovery in case of its wrongful conversion. *Graham v. Smith* (Ga.) 508

2. A street-railway company is liable for the killing of a dog by an electric car, caused by the negligence of the motorman. *Citizens' Rapid Transit Co. v. Dew* (Tenn.) 519

3. A dog is the subject of larceny under Iowa Code 1878, § 8902, making it a crime for anyone to steal any "chattels" of another. *Hamby v. Samson* (Iowa) 508

Injury by dogs.

4. One who harbors a dog on his premises as owners usually do with their dogs is to be deemed the owner under a statute respecting the liability of owners for injuries done by dogs. *Shultz v. Griffith* (Iowa) 117

5. Negligence of a party bitten by a dog is

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immaterial under Iowa Code, § 1485, on the question of the liability of the owner of the dog, unless that negligence amounts to an unlawful act. *Id.*

6. A traveler going into a yard of a feed and livery barn which is open to patronage by the public and at which his team is being kept for the night, in order to see that his buggy, which was left in the yard, has been put in the barn and to get some articles from it, when this is done between 8 and half past 8 o'clock in the evening, while employees are working at the barn, is not a trespasser or doing an unlawful act within the meaning of Iowa Code, § 1485, so as to preclude his recovering from the proprietor for injuries received from a dog which attacks and bites him. *Id.*

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APPEAL AND ERROR. See also CASES CERTIFIED.

1. A separate appeal must be taken from a death warrant signed after judgment, to bring the question of its regularity before the appellate court. *People v. Ebanks* (Cal.) 269

2. Trustees representing a religious society to which a devise was made in trust to expend the proceeds in saying masses are proper parties to appeal from a decision against the devise. *Hoeffer v. Clogan* (Ill.) 730

Bond.

3. Defendant in error in the Virginia supreme court of appeals waives the omission from the appeal bond, given before the clerk as prescribed by Va. Code, § 8471, of the condition for the payment of all actual damages incurred in consequence of the proceedings, by failing to raise the objection until it is too late for plaintiff to give a new bond or to have another appeal allowed. *Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co.* (Va.) 287

Supersedeas.

4. An order of supersedeas to preserve the status quo of the parties pending the determination of an appeal upon its merits is within the inherent powers of an appellate tribunal which is authorized to issue all writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. *State, Barnard, v. Seattle Bd. of Edu.* (Wash.) 317

Record; evidence.

5. A written opinion filed by the trial court 40 L. R. A.

on a trial without a jury is not an essential part of the record on appeal, and where general findings are made by the court and a judgment pronounced thereon, the appellate court will conclusively presume that the trial court considered all the competent evidence before it and decided all the material and necessary issues presented by the pleading, although the opinion shows the contrary. *Phenix Ins. Co. v. Fuller* (Neb.) 408

6. When any document is offered in evidence and excluded, it must be brought into the record to have its competency determined on appeal. *Slauson v. Goodrich Transp. Co.* (Wis.) 825

7. An appellate court can take notice of papers which are not part of the judgment roll only when they have been preserved and properly identified in the bill of exceptions. 11

8. A bill of exceptions is not necessary for the review of a demurrer to evidence which incorporates the evidence. *Mitchell v. Nashville, C. & St. L. R. Co.* (Tenn.) 426

9. The remedy for refusal by the trial court to furnish a transcript of the stenographer's notes to a person convicted of crime is an application to the supreme court for an order requiring it to do so. *Miller v. State* (Ind.) 119

10. Failure to show that a designated person was regularly appointed shorthand reporter to take the testimony of an accused before a committing magistrate will not support an assignment of error, if it does not appear that he acted or reported the testimony or certified to it. *People v. Ebanks* (Cal.) 269

Briefs.

11. Under rules requiring but one brief on each side, and permitting a reply in addition, although separate briefs may be permissible where there are several counsel on the same side, the allowance for printing will extend only to what is reasonably necessary. *Clark v. Minneapolis, St. P. & S. M. R. Co.* (Wis.) 457

12. The provision of the Wisconsin supreme court rule 9, that in cases depending on the evidence the brief of appellant must contain a concise statement of the leading facts or conclusions which the evidence establishes or tends to prove, does not mean a recital or restatement of the evidence, but merely that such facts or conclusions should be stated with a reference to the names of the witnesses and the places in the printed cases where the evidence which establishes or tends to prove such facts or conclusions may be found. *Milwaukee Cold Storage Co. v. Dexter* (Wis.) 837

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13. Alleged error in failing to direct a verdict for defendant accident insurance company on the ground that plaintiff had voluntarily exposed himself to unnecessary danger, is not available on appeal where no request therefor was made in the trial court. *Johnson v. London Guarantee & A. Co.* (Mich.) 440

13a. Variance between pleading and proof is not ground for reversal when no objection was made in the trial court. *Cofax Mountain Fruit Co. v. Southern Pac. Co.* 73

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14. An appellant cannot complain of error in an instruction which was in his own interest. *Erb v. German-American Ins. Co. (Iowa)* 845

15. An inconsistency in the instructions due to the fact that some instructions are more favorable to one of the parties than he is entitled to is not available to such party. *Hess v. Preferred Masonic Mut. Acct. Asso. (Mich.)* 444

16. The failure of the court to assess disfranchisement as part of the punishment of a convict is not an error of which he can complain. *Miller v. State (Ind.)* 109

17. One who relied upon a former adjudication of a matter cannot complain of a decision which is to the same effect. *Gibson v. Gibson (Wash.)* 587

Review of facts.

18. A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject of review on proceedings in error. *Nichols v. Peck (Conn.)* 81

19. Findings of fact are not conclusive on the appellate court in equity cases, unless the evidence is so evenly balanced or so unsatisfactory as to leave the court in serious doubt. *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co. (Utah)* 851

Errors requiring reversal.

20. Filing the sheriff's affidavit that he was biased, taken upon a challenge to a special venire summoned by him, embodying facts brought out while the jury were excluded from the room, is not reversible error. *People v. Ebanks (Cal.)* 269

21. Irrelevant testimony will not require a reversal, if it was harmless. *Mack v. South Bound R. Co. (S. C.)* 679

22. There will be no reversal for cross-examination as to matters not testified to in chief if the examination in chief is not in the record, so that it does not appear whether the cross-examination was improper or not. *People v. Ebanks (Cal.)* 269

23. A judgment will not be reversed for failure to sustain a demurrer for reasons not specified therein. *Bristol v. New England R. Co. (Conn.)* 479

24. An improper statement by counsel in opening a case, which is immediately withdrawn after an exception, with an acknowledgment that it was not justified under the existing state of the record, will not be regarded on appeal as prejudicial error, if it was not so considered by the trial judge. *Erb v. German-American Ins. Co. (Iowa)* 845

25. Refusal of instructions the meaning of which is involved in doubt, or which are uncalled for in the case, is not reversible error if the instructions given upon that branch of the case are as favorable to the complaining party as the facts and the law will warrant. *People v. Ebanks (Cal.)* 269

26. Refusal to charge the jury that the burden of showing that the loss was caused by fire was upon the one seeking to recover under 40 L. R. A.

a fire insurance policy is not error, where that fact was fully proved, with no question as to the accuracy of the proof. *Western Assur. Co. v. J. H. Mohlman Co. (C. C. App. 2d C.)* 581

27. Verbal inaccuracy of a charge to the jury will not require a reversal, if the charge as a whole fairly and accurately presents the law applicable to the facts. *Perham v. Portland General Elec. Co. (Or.)* 799

NOTES AND BRIEFS.

Appeal; conclusiveness of findings of jury as to law. 653

APPORTIONMENT. See ELECTION DISTRICTS.

APPRAISAL. See MORTGAGE, 5, 6.

APPURTENANCES. See DEEDS, 2; EASEMENTS, 9.

ARCHITECT. See ACTION OR SUIT, 8.

ARREST. See also REWARD, 2.

The arrest by a police officer of San Francisco, without a warrant, of a murderer, for a crime committed in another county of the state, is made in the exercise of his duty, so as to preclude his recovery of a reward for making it. *Lees v. Colgan (Cal.)* 855

ASSAULT AND BATTERY. See CARRIERS, 4.

ASSIGNMENT. See also BILLS AND NOTES, 2; FRAUD, 2.

1. The right of one person to use the name of another, given him by contract, cannot be assigned or transferred to a third party, in the absence of an express stipulation to that effect. *Bagby & R. Co. v. Rivers (Md.)* 682

2. An assignment of wages for the period of one year, made by a person then working under a contract, whether it was for work by the day, by the week, or otherwise, is valid, under R. I. Gen. Laws, chap. 254, § 28, when made and recorded as the statute provides. *Dolan v. Hughes (R. I.)* 738

NOTES AND BRIEFS.

Assignment; of wages to be earned. 785

ASSIGNMENT FOR CREDITORS. See INSOLVENCY; PARTNERSHIP, 8; SET-OFF.

ASSOCIATIONS. See also RELIGIOUS SOCIETIES, 1.

NOTES AND BRIEFS.

See also SYNDICATES.

Associations; power to hold property; trust for. 726

ASSUMPSIT.

A public officer receiving fees to which he is not entitled, from a party whom he knows to be ignorant of the law, without informing him that he is not bound to pay, receives money fraudulently, and is liable to an action for money had and received. *Marcotte v. Allen (Me.)* 185

NOTES AND BRIEFS.

Assumpsit; for money paid by mistake. 185

ATTORNEYS.

The resignation of an attorney without consent or privilege of the court is ineffectual to preclude his disbarment, when proceedings therefor were pending at the time of his resignation. *Ex parte Thompson* (Or.) 194

ATTORNEYS' FEES.

The regulation of attorneys' fees by Wash. Laws 1895, p. 81, limiting stipulations of the parties in that respect, is a valid measure of public policy. *Dennis v. Moses* (Wash.) 302

AWNINGS. See also MUNICIPAL CORPORATIONS, 3.

1. An awning which makes a permanent encroachment on a street is a purpresture. *Hibbard v. Chicago* (Ill.) 621

2. A mere order of the city council, authorizing the erection of an awning, which is prohibited by a general ordinance, is no more than a license, which is subject to revocation by the council at any time. *Id.*

NOTES AND BRIEFS.

Awnings; in street, license for 621

BALLOTS. See VOTERS AND ELECTIONS, 4.**BANKS.** See also BONDS, 81; INTEREST; TRUSTS, 72.

1. Payment of a check of an insane person who had been lawfully adjudged insane by a court in another state will render a bank liable for the money, although it did not know of his insanity. *American Trust & B. Co. v. Boone* (Ga.) 250

2. A bank receiving a check deposited and indorsed by a person to whom it was payable as administrator, but who claims to be the sole heir of the estate and deposits it to his individual credit, cannot appropriate a part of the fund to pay his individual debts to the bank. *Id.*

NOTES AND BRIEFS.

Banks; right to cash checks on trust funds 250

BAR-WAY. See EASEMENTS, 12-14.**BEES.**

1. A trespasser who finds bees on the land of another and hives them, but is not the owner of the hive in which he puts them or the land on which he leaves them, has no interest in them which is the subject of larceny. *State v. Repp* (Iowa) 687

2. The mere finding of bees in a tree on the land of another person gives the finder no right to the bees or to the tree. *Id.*

NOTES AND BRIEFS.

Bees; property rights in:—(I.) Generally; (II.) trespass and trover; (III.) larceny; (IV.) tithes. 687

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BENEFIT SOCIETIES. See INJUNCTION, 2; PLEADING, 2.**BET.** See also CONTRACTS, 4.

A partnership for horse racing on a bet with a person whom the partners regard as a "sucker" and a "big snap," into which they induce him to enter by making him think he has a sure thing and by deceiving him into the supposition that their horse is untrained and undeveloped, while they deemed that they had a "dead mortal clinch," is a conspiracy to defraud such that a court will not aid either of the partners by compelling one who has pocketed all the profits to make an accounting. *Morrison v. Bennett* (Mont.) 156

BID. See MORTGAGE, 7.**BILLS AND NOTES.** See also EVIDENCE, 21, 22; MORTGAGE, 1, 2, 10; PRINCIPAL AND SURETY.

1. Mere promises to pay a forged note do not lay a foundation for liability, in the absence of circumstances to create an estoppel, and when the promises are made after maturity, without consideration and without full knowledge of the material facts in relation to the note. *Barry v. Kirkland* (Ariz.) 471

2. A written assignment of a negotiable note on a separate and unattached piece of paper does not pass the legal title, or—at least when it was made as collateral security and has been surrendered to the payee merely for the purpose of collection—preclude him from bringing action on the note. *Haug v. Birk*, (Ga.) 244

3. The possession of a negotiable note by a firm to which one of the makers belongs will not charge a purchaser of the note on the second day of grace with notice that the note has been paid. *Id.*

4. The transfer of a negotiable note on the second day of grace is before maturity for the purpose of conferring rights on a bona fide purchaser. *Id.*

5. Payment of a negotiable note by one of the joint makers, for whose accommodation it was signed by the other, will not discharge the latter as against a bona fide holder to whom the note is indorsed before maturity after such payment. *Id.*

6. A note "payable" in specified bonds at par does not become payable in money on the failure of the maker to pay or tender the bonds on the day the note is due, since it does not give him the mere privilege or option to pay in bonds, but makes a positive and absolute promise to pay in the specific funds named. *Johnson v. Dooley* (Ark.) 74

7. A payee who knows of the facts involved has no better right to enforce drafts drawn by his secret agent than the latter had to claim the fund drawn upon. *Baltimore Trust & G. Co. v. Hamblen* (Md.) 217

NOTES AND BRIEFS.

Bills and notes; transfer after payment 244

Promise to pay forged note. 471

BILLS OF LADING. See CARRIERS, 13, 14.

BISHOP. See CHARITIES, 2, 3; RELIGIOUS SOCIETIES, 2, 3; TRUSTS, 5, 6.

BONDS. See also COUPONS; ESTOPPEL, 4; EXECUTORS AND ADMINISTRATORS, 1.

1. Bondholders of a corporation take their bonds with knowledge that the continuance of the charter rights and other franchises of the company depends upon the faithful performance of its duties to the public. *Palestine Water & P. Co. v. Palestine* (Tex.) 203

Official.

2. The rule which makes a public officer an insurer of the safety of the public funds under his control is not based upon the mere fact that he is a public officer intrusted with public funds, but is based upon the principle that by his bond, considered alone or in connection with the statutes defining his duties, he has contracted to become an insurer; and the rule is limited to cases involving such contracts. *State v. Gramm* (Wyo.) 690

3. Liability for money lost by failure of the bank in which it was deposited with due care by the state treasurer is not imposed by his bond conditioned to account for all money coming into his hands by virtue of his office, and to perform all the duties of his office, when his statutory duty is to receive and keep all moneys of the state not required to be received and kept by some other person. *Id.*

4. The malicious act of a sheriff in aiding a mob to take a prisoner from a jail and kill him does not create any liability of the sureties on his official bond. *State, Cocking, v. Wade* (Md.) 628

NOTES AND BRIEFS.

Bonds; of sheriff, what acts or negligence covered by. 628

Official, liability on, for bank failure. 698

BOUNDARY. See PLAT.

NOTES AND BRIEFS.

Boundaries; by waters. 397

BRIDGE. See EVIDENCE, 18; MUNICIPAL CORPORATIONS, 7; RAILROADS, 1, 2, 4-6.

BRIEF. See APPEAL AND ERROR, 11, 12.

BROKERS. See also LICENSE, 4, 5.

NOTES AND BRIEFS.

Brokers; who are; license of. 611

BUILDINGS.

1. An "apartment house," constructed for residence purposes only, is not a breach of a condition in a deed against using the property except for "residence purposes." *McMurtry v. Phillips Invest. Co.* (Ky.) 489

2. It is not negligence for a master to fasten windows leading to fire escapes, if this does not violate any statute and the windows can be easily broken through to reach the fire escapes

if there is not time to unfasten them. *Huda v. American Glucose Co.* (N. Y.) 411

3. Screwing down the windows of a factory so that there is no access to fire escapes except by breaking the windows, and forbidding employees to open the windows, in order to preserve a high temperature, which is necessary for the business, does not violate a statute requiring the construction and maintenance of fire escapes on such buildings, where the windows are so light in frame as to offer but the slightest difficulty in breaking through, if there is not time to unscrew them. *Id.*

NOTES AND BRIEFS.

Buildings; covenant against. 489

CANALS. See NUISANCES, 4; WATERS, 5-7.

CARRIERS.

I. OF PASSENGERS.

II. OF FREIGHT.

III. GOVERNMENTAL CONTROL.

See also DAMAGES, 2; EVIDENCE, 17; NEGLIGENCE, 2, 3; PROXIMATE CAUSE, 8.

I. OF PASSENGERS.

1. One holding a mileage ticket who, with intent to board a train standing on a siding near the station, without going to the station, is compelled to cross the main line, is not a passenger to whom the railroad company owes extraordinary care or diligence, but is entitled only to ordinary care as one of the general public, as he has done nothing to notify any of the officers or agents of the defendant company that he is a prospective passenger. *Southern R. Co. v. Smith* (C. C. App. 5th C.) 746

2. Recovery for injuries to one struck by a train upon a track which he was obliged to cross to reach the train which he desired to take is barred, under Ga. Code, § 8830, providing that if the plaintiff by ordinary care could have avoided the consequence to himself caused by defendant's negligence he is not entitled to recover, if such person failed to use his senses to ascertain the approach of the train, and could have avoided the consequence of the company's negligence by the exercise of ordinary care. *Id.*

3. The intoxication of a passenger standing on the running board of a street car will not absolve the company from exercising care toward him, or prevent his recovering damages in case he is injured by its negligence. *Kingston v. Fort Wayne & E. R. Co.* (Mich.) 181

4. A railroad company is liable in damages to a female for an assault with intent to commit rape upon her person by one employed as a baggage master upon a train on which she is at the time being conveyed as a passenger. *Savannah, F. & W. R. Co. v. Quo* (Ga.) 493

5. The arrest of a street-car passenger by a policeman called by the conductor of the car to arrest and take him off, on the charge of riding without payment of fare, does not ren-

der the carrier liable for false imprisonment, when the conductor had been authorized only to put delinquent passengers off the car. *Little Rock Traction & E. Co. v. Walker* (Ark.) 478

II. OF FREIGHT.

6. A stipulation against liability except for gross negligence will not relieve a carrier from liability for negligence, although it may not be gross negligence. *Pierce v. Southern P. Co.* (Cal.) 850

7. A contract fixing the measure of damages for the loss of goods at the actual invoice cost at point of shipment, if fairly made in consideration of a lower freightage, is not invalid. *Id.*

8. Absence of an invoice will not prevent the operation of a stipulation in a carriage contract, that the carrier's liability for loss shall be limited to the invoice price at the point of shipment, but the value of the property at that point will be the measure of damage. *Id.*

9. The liability of a carrier for a passenger-train service continues to destination, under a contract to receive and forward fruit by such service to a connecting station on its road, and from there "to forward" the property to destination, but providing that "its responsibility as a common carrier is to cease at the point where the freight leaves its road." *Cofax Mountain Fruit Co. v. Southern Pac. Co.* 78

Freezing.

11. Loss of freight by freezing caused by its being sent, by direction of the carrier, over a route which subjected it to such peril, is not within a clause in the shipping contract exempting the carrier from liability for loss from any "cause arising out of responsibility as master over its agents or servants, incident to said shipment." *Pierce v. Southern P. Co.* (Cal.) 850

12. A carrier which sends a carload of orange trees early in March from New Orleans, Louisiana, to Riverside, California, by the way of Denver, Colorado, and Ogden, Utah, without notifying the consignees or consignor and taking directions from them, is liable for the loss of the trees by freezing, although its own route through Texas, New Mexico, and Arizona was temporarily interrupted by storms and washouts. *Id.*

Delivery.

13. The delivery of goods by a carrier at destination, without requiring the surrender of a bill of lading, as required by a stipulation therein, does not involve any breach of duty to the consignor, if the delivery is made to the consignee, or upon his order, or by his authority. *Chicago Packing & P. Co. v. Savannah, F. & W. R. Co.* (Ga.) 367

14. A written order signed by one of the partners of a firm to which a bill of lading has been indorsed, directing the carrier to make delivery of the goods to another person, is sufficient to justify the carrier in doing so, although the signer privately intended it as his individual act, if this was not known to the carrier and the circumstances justified treating it as an act of the partnership. *Id.*

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III. GOVERNMENTAL CONTROL.

15. A connecting switch may be ordered by the state railroad and warehouse commission at the intersection of two railroads, when this is a necessity, because of the benefit which will accrue to state traffic. *Jacobson v. Wisconsin, M. & P. R. Co.* (Minn.) 399

16. Power to require a connecting switch at the crossing of two railroads, to facilitate the transfer of cars from one road to the other, when this will benefit both state and interstate traffic, is within the concurrent jurisdiction of the state and Federal authorities. *Id.*

17. The transfer and interchange of loaded cars as well as a connecting switch at the intersection of two railroads, required by the railroad and warehouse commission under Minn. Gen. Laws 1887, chap. 10, as amended by Minn. Laws 1895, chap. 91, does not violate the constitutional rights of the railroad companies. *Id.*

18. The making of joint rates for through shipments when part of the haul is on one and part on the other of two connecting railroads, for which power is given by Minn. Laws 1895, p. 214, § 8 (C), is not unconstitutional as an attempt to make the railroad companies partners for such shipment or liable for each other's default, as the statute merely provides that, if the companies fail to fix a reasonable total sum for the total haul, the commission shall do so for them. *Id.*

NOTES AND BRIEFS.

Carriers; liability of forwarder limited to its own route. 72

Intoxication as affecting negligence of passengers. 184

Liability for wrongful arrest. 473

Liability for changing route of goods. 350

Liability of shipper for improper loading of car. 329

Governmental control over. 389

CASE. See also SHERIFF, 1.

1. Inducing one of two parties to a contract to break it, intending thereby to injure the other, or to obtain a benefit for one's self constitutes an actionable wrong. *Gore v. Gordon* (Md.) 322

2. Interference with ownership of land by advertising and selling it under a fraudulent mortgage, and notifying tenants not to pay rent to the owner, constitutes an actionable wrong. 18

3. The disgrace and disrepute into which the owner of property is brought on account of the advertising and sale thereof under a fraudulent mortgage does not constitute a cause of action. *Id.*

CASES CERTIFIED.

The validity of a defense demurred to may be considered notwithstanding defects in the complaint, when the question is certified for review to the court of appeals under N. Y. Code Civ. Proc. § 190, subd. 2, and the de-

fendant has waived the defects in the complaint by omitting to call attention to them or to have any questions with reference thereto certified. *Barter v. McDonnell* (N. Y.) 670

CHARITIES. See also **MASSSES.**

1. A bequest, the income of which is to be used to ornament and keep in repair the burial lot of the testator, is void because it is a gift in perpetuity for a private trust, and not for a charitable trust. *Sherman v. Baker* (R. I.) 717

2. A bequest of property to be used by the Roman Catholic bishop of the diocese of Green Bay "for the benefit and behoof of the Roman Catholic Church," there being several churches in the diocese, is void for uncertainty. *McHugh v. McCole* (Wis.) 724

3. A bequest to the bishop of Fond du Lac, to be used by him for the benefit and behoof of the Protestant Episcopal Church of Fond du Lac, which is not shown to be a body corporate or legal entity capable in law of taking or asserting any right in court to the fund, but which consists of several organizations,—is void for uncertainty. *Id.*

4. The doctrine of *cy pres* is not in force in Wisconsin. *Id.*

CHATTEL. See **LIENS**, 1.

CHATTEL MORTGAGE. See **MORTGAGE**, 11, 12.

CHECKS. See **BANKS**.

CHURCH. See **CHARITIES**, 2, 3; **EVIDENCE**, 2; **MASSSES**, 5; **PLEADING**, 6.

CITIZENS. See **MUNICIPAL CORPORATIONS**, 3.

CLOUD ON TITLE.

1. A cloud on title may be removed in equity, although the defendants have not done or threatened to do anything in opposition to the title of the plaintiffs. *Loring v. Hildreth* (Mass.) 127

2. Defects in the title of a person in possession of land will not defeat his action for quieting the title as against a stranger who claims the land, but has no right or title thereto. *Dettor v. Holland* (Ohio) 266

3. Title may be quieted as against a claim asserted under a grant of the right to produce petroleum and natural gas, when this did not constitute a lease and the right has terminated by its own limitation. *Id.*

4. Expenses incurred in drilling wells after the expiration of a grant of the right to produce oil and gas and after notice not to drill such wells cannot be recovered from the grantor on his enforcement of his right by quieting title. *Id.*

5. The sum paid as a consideration for a grant of the right to produce oil and gas from land need not be returned in order to maintain

an action to quiet title after the grant has expired by its own limitation. *Id.*

COAL HOLE. See **HIGHWAYS**, 5.

COIN. See **MONEY**, 1.

COLD STORAGE. See **CONTRACTS**, 6.

COLLATERAL INHERITANCE TAX. See **TAXES**, 5-7.

COLLEGE. See **STATE INSTITUTIONS**.

COLOR MIXER. See **CUSTOM**, 1.

COMMERCE. See also **HARBORS**, 2.

1. Commerce between an Indian reservation and other places in the same state does not constitute interstate commerce. *Selkirk v. Stevens* (Minn.) 759

2. A state statute making it unlawful to keep a place in which the business of transmitting money to be placed or bet on any horse race, etc., whether within or without the state, is permitted or carried on, or to be concerned in such business, is not an unconstitutional regulation of interstate commerce as applied to an agent of a telegraph company, who keeps such place or is engaged in such business, and transmits the money to another state by telegraph. *State v. Harbourn* (Conn.) 607

NOTES AND BRIEFS.

Commerce; interstate; as to telegrams; as affected by police power. 607

COMMON LAW.

The English common law, which avoided bequests for masses as being for superstitious uses, never became a part of the law of this country because inconsistent with the spirit of religious toleration. *Harrison v. Brophy* (Kan.) 721

COMMUNITY. See **TRUSTS**, 3.

CONFLICT OF LAWS. See also **GARNISHMENT**.

1. The law of a legatee's domicile governs the lapsing of a legacy of bank stock made by a will in another state in which the bank is situated, although a statute of the latter state, if applicable, would prevent the lapsing. *Lowndes v. Cooch* (Md.) 380

2. Shares of stock of a corporation are personal property only, and governed by the law of the owner's domicile. *Id.*

3. The marriage in another state where it is valid, of a divorced person incapable of remarrying by the law of his domicile, will not be held void under the law of his domicile unless the statute expressly so provides, although he went outside the state for the express purpose of evading the law, and immediately returned. *State v. Shattuck* (Vt.) 428

NOTES AND BRIEFS.

- Conflict of laws; as to ownership of property. 880
 As to validity of marriage. 428

CONSIDERATION. See TRUSTS, 4.

CONSPIRACY. See BET.

CONSTITUTIONAL LAW. See also ATTORNEYS' FEES; CARRIERS, 17, 18; LICENSE, 2; WITNESSES, 2.

1. A legislative interpretation of the Constitution, long established and acquiesced in, is of great force in determining the true construction. *People, Mooney, v. Hutchinson* (Ill.) 770

2. A constitutional provision fixing the time and mode of exercising a particular power contains a necessary implication against anything contrary to it. *Id.*

3. Judicial power is not given to a board of managers of a reformatory by authorizing them to shorten the term of service of a convict in case of his reformation, where his sentence is indeterminate between the maximum and minimum prescribed by statute. *Miller v. State* (Ind.) 109

Retrospective law.

4. The estate of a deceased person cannot be subjected to a collateral inheritance tax by statute passed after the death of the owner, where the Constitution prohibits retrospective legislation. *State, Garth, v. Smitzler* (Mo.) 280

Equal protection of laws.

5. An exception of all railroads chartered before a certain date, from the provisions of a statute of limitations, does not deny them the equal protection of the laws. *Narron v. Wilmington & W. R. Co.* (N. C.) 415

Due process of law.

6. Persons yet unascertained and unborn are not deprived of their rights without due process of law by making them defendants in a bill to remove a cloud upon title, and having them represented by a guardian *ad litem* as provided by Mass. Stat. 1897, chap. 522. *Loring v. Hildreth* (Mass.) 127

Restrictions on property and contracts.

7. Regulations for the protection and preservation of game are within the constitutional power of the legislature. *Haggerty v. St. Louis Ice Mfg. & S. Co.* (Mo.) 151

8. The mixing or mingling of articles of food which are wholesome and nutritious and the sale thereof cannot be made criminal by the legislature. *Dorsey v. State* (Tex. Crim. App.) 201

9. A statute limiting the rights of a citizen to contract with reference to his property must tend to promote the public good in some way or it is an unwarranted interference therewith. *Dennis v. Moses* (Wash.) 302

10. A statute limiting the right to enforce a debt secured by mortgage to the property mortgaged, whether realty or chattels, is an undue restraint upon the liberty of a citizen to contract with respect to his property rights. *Id.*

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NOTES AND BRIEFS.

- Constitutional law; as to right of contract. 312
 Delegation of power. 501

CONTAGIOUS DISEASES. See CONTRACTS, 7.

CONTRACTS. See also ASSIGNMENT, 1; BET; CASE, 1; CONSTITUTIONAL LAW, 9; CORPORATIONS, 4, 5; INJUNCTION, 7, 8; 10; MONEY, 1; SALE; SPECIFIC PERFORMANCE; TRUSTS, 4.

1. Acceptance of a contract by assenting to its terms, holding it and acting upon it, may be equivalent to a formal execution by one who did not sign it. *Sellers v. Greer* (Ill.) 519

2. An employer who takes an employee seriously injured to a hospital, promising to pay for his care and treatment, without any mention as to length of time, has no right, while the patient is incapable of removal or discharge from the hospital without great danger to his health or life, to terminate its liability for further care or treatment,—at least without showing that the patient has sufficient means of his own with which to pay therefor. *St. Barnabas Hospital v. Minneapolis International Electric Co.* (Minn.) 388

Validity.

3. Men who associate themselves for the purpose of cheating others cannot ask the courts to distribute their booty by adjudging the demands of one against the other, arising out of their quarrels over the plunder. *Morrison v. Bennett* (Mont.) 153

4. An agreement by the owners of race horses entered at certain stake races, to divide equally all premiums and stake monies offered by the associations on such races, awarded to any of the horses of either, is not void as a wagering contract. *Hankins v. Ottinger* (Cal.) 76

5. A contract by which an employee assumes all liability for injuries by reason of the employer's negligence or otherwise is not against public policy. *Pittsburg, C. C. & St. L. R. Co. v. Mahoney* (Ind.) 101

6. A contract for the "cold storage" of game during the "closed season," to be withdrawn during the open season when the game could be lawfully disposed of, is void under Mo. Rev. Stat. 1889, § 3902, making it a misdemeanor to have such game in possession during the closed season. *Haggerty v. St. Louis Ice Mfg. & S. Co.* (Mo.) 151

7. A contract for the care of a woman in the advanced stages of leprosy, by a laborer and his wife, who are unskilled people and have no authority to restrain her from wandering away, and who have several small children in their family, is an unreasonable one the execution of which may be restrained because of its tendency to cause a dissemination of the disease. *Baltimore v. Fairfield Improv. Co.* (Md.) 491

Impairing obligation.

8. The restriction of the lien or charge of a judgment against the estate or person of the

judgment debtor, to six years from its rendition, by Wash. act March 6, 1897, and the prohibition of the renewal of such judgment for more than one year after the act takes effect, so far as the act applies to preexisting contracts, is an unconstitutional impairment of their obligation. *Bellman v. Cowley* (Wash.) 815

NOTES AND BRIEFS.

Contract; wagers; against public policy.	159
Illegality of; wagers.	76
Against liability for negligence; strict construction.	102
Acceptance of.	589
Mutuality of.	590
Impairment of obligation of.	802
Impairing obligation by change of remedy.	815

CONVICTS. See also PROXIMATE CAUSE, 1.

1. Persons in charge of a state convict are not liable in damages for criminal tort committed by him while at large, whether at large by their permission or because of their negligence, unless they were in some way connected with the perpetration of the tort, or had reasonable grounds for apprehending that it would be committed. *Henderson v. Dade Coal Co.* (Ga.) 95

2. Knowledge that a felony convict about thirty-seven years old, who had been continuously in the penitentiary for about twelve years, and who had five times escaped therefrom, was "a man in robust and vigorous health, immoral, brutish, devilish, of vicious habits, of violent passions," including sexual passion, and a person "not restrained by any convictions of right and wrong or governed by any principles of morality,"—does not constitute ground of apprehension that he will commit the crime of rape when opportunity occurs, so as to render his custodians liable for damages on account of such a crime committed by him while at large through their fault. *Id.*

CORONER.

The verdict of a coroner's jury is not subject to be reviewed, set aside, or quashed in the Georgia superior court, either at the instance of the person accused by it, or any other person, as it is advisory merely to the officers charged with the execution of the public law in case of homicide, binds no one as a judgment, has no probative effect as evidence, and can prejudice the rights of no one. *Smalls v. State* (Ga.) 869

CORPORATIONS. See also ALIENS, 2; BONDS, 1; CONFLICT OF LAWS, 2; ESTOPPEL, 6, 7; FRAUD, 1; GOODWILL, 2; JUDGMENT, 8; PROXIMATE CAUSE, 4; RELIGIOUS SOCIETIES, 1.

1. The articles of incorporation under which a company is organized under general laws have the effect of a charter for the purpose of determining the powers of the corporation. *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* (Utah) 851
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2. Conditions and limitations attaching by law to the exercise of any given corporate purposes cannot be destroyed or subverted by combining such purposes with some other, under one corporation. *International Fraternal Alliance v. State* (Md.) 187

3. Compelling railroad companies to make a connecting switch where railroads intersect does not violate their charter rights merely because there is no reservation of the power to make such requirement. *Jacobson v. Wisconsin M. & P. R. Co.* (Minn.) 389

Contracts.

4. A contract entered into by a wrong name may be binding on a corporation, when it appears that it intended to be bound. *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* (Utah) 851

5. A corporation may ratify a contract which it had power to make, when entered into on its behalf without its authority, or voidable because not reduced to writing. *Id.*

Stock.

6. Certificates of stock, even when indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, are not negotiable securities. *O'Herron v. Gray* (Mass.) 498

Stockholders.

7. Stockholders cannot set up the illegality of the scheme of the corporation, which did not appear on the face of the contract of subscription or the prospectus therein referred to, in order to escape liability to creditors whose debts have been contracted upon the faith of the subscriptions to the stock. *Cardwell v. Kelly* (Va.) 240

8. A contract between persons who are equal owners of all the stock of a corporation except two shares, of which one is controlled by each of them, by which they assume to divide and dispose of the property of the corporation, is not obligatory upon the corporation. *Sellers v. Greer* (Ill.) 589

Promoters.

9. A promoter of a corporation who transferred to it certain land purchased by him before anything was done toward the formation of the corporation cannot be held liable to the corporation for an amount received from it in excess of the amount actually paid by him, in the absence of a misrepresentation or false statement by him, although he did not disclose the amount paid by him to any subscriber, where all the subscribers had the opportunity to ascertain the condition and value of the land and knew the price charged the corporation. *Milwaukee Cold Storage Co. v. Dexter* (Wis.) 887

10. A sale of land to a corporation by one of its promoters who purchased the land before anything was done toward the formation of the corporation for less than the amount for which he transferred it to such corporation will not be held fraudulent as to the corporation or any subscriber in the absence of any false statement or misrepresentation because he personally paid a commission to certain influential persons to induce them to subscribe for the capital stock, nor because he personally paid money to his grantor after the latter's subscription to the capital stock to remove his dissatisfaction at

having sold the land so cheaply,—especially where his contract of purchase precluded him from transferring the land without the approval of such grantor. *Id.*

Forfeiture of franchise.

11. A deliberate attempt by a corporation to evade the insurance law of the state in one of its most important provisions is ground for forfeiting the charter. *International Fraternity Alliance v. State* (Md.) 187

12. An insurance corporation forfeits its franchise by deliberately exceeding the amount for which it is allowed by law to issue policies on any one life. *Id.*

13. Proceedings to forfeit a franchise are not excluded by Md. Code, art. 23, § 263, authorizing proceedings to restrain an assumption or exercise of any franchise, liberty, or privilege, or the transaction of unauthorized business. *Id.*

NOTES AND BRIEFS.

Corporation; forfeiture of franchise of. 203
Pledge of stock of—transfer of stock of infants. 498
Contract by chief stockholders. 589
Secret profit of promoters of. 840

COSTS. See WITNESSES, 3.

COTENANCY. See also NOTICE.

A tenant in common cannot create an easement over the premises without consent of his cotenants. *Baker v. Willard* (Mass.) 754

COUNTIES. See also WITNESSES, 2, 3.

A county is not liable for services rendered by members of a sheriff's *posse comitatus*, in the absence of statutory provisions for their compensation. *Sears v. Gallatin County* (Mont.) 405

COUPONS.

The first coupon, as well as others, is included in a sale of bonds to a syndicate without any exception or reservation of it from the sale, although there is a provision that two thirds of the first payment of interest shall be paid by a trustee as commission, and any interest in that coupon is therefore derived through the syndicate, and subject to the rule which precludes one member from secretly obtaining a commission in which his associates do not share. *Baltimore Trust & G. Co. v. Hambleton* (Md.) 216

COURTS. See also CONSTITUTIONAL LAW, 3; JUSTICE OF THE PEACE; SCHOOLS.

1. The Federal court will not follow the state court decisions as to the admissibility in evidence at common law of extracts from medical books. *Union P. R. Co. v. Yates* (C. C. App. 8th C.) 553

2. It is the duty of the court to examine legislative journals to determine the disputed fact whether or not a statute as published is in fact that which was passed by the legislature, where the Constitution requires that each house shall keep a journal, and that no bill shall become a law unless on its final passage the vote 40 L. R. A.

taken by ayes and noes is entered on the journal. *State, Cheyenne, v. Swan* (Wyo.) 195

NOTES AND BRIEFS.

Disqualification of judge. 317

COVENANT. See ACTION OR SUIT, 1. BUILDINGS, 1.

CRIMINAL LAW. See also APPEAL, 1. 9, 10, 16; CONSTITUTIONAL LAW, 3, 8; MUNICIPAL CORPORATIONS, 5.

1. The intention of a person who commits an act which is made a misdemeanor by statute constitutes no element of the offense. *Haggerty v. St. Louis Ice Mfg. & S. Co.* (Mo.) 151

2. The mere fact that the order holding the accused to answer for a crime was dated October 4, when the arrest was made September 17, does not show that the committing magistrate had lost jurisdiction of the case by delay, for the examination may have been proceeded with immediately after the arrest and continued until the order was made. *People v. Elanks* (Cal.) 269

3. The constitutional right of an accused person to trial by jury is not violated by taking away from the jury the right to fix his punishment. *Miller v. State* (Ind.) 109

4. Cruel and unusual punishment is not made by an indeterminate sentence, not more than the maximum nor less than the minimum prescribed by statute for the specified crime. *Id.*

NOTES AND BRIEFS.

Validity of indeterminate sentence. 109

Effect of hypnotism in criminal cases. 269

CRUEL AND UNUSUAL PUNISHMENT. See CRIMINAL LAW, 4.

CUSTOM.

1. A custom or usage of carpet making which would give the color mixer an exclusive title, as against his employer, to the various combinations and shades of color devised by him for use in the manufacture of carpets in his employer's mill, is unreasonable and cannot be sustained. *Dempsey v. Dobson* (Pa.) 550

2. A usage or custom of real-estate agents in a certain city to get up syndicates to buy property in their hands for sale will not bind members of a syndicate who have no knowledge thereof, especially if they live at other places, so as to sustain a purchase of property for the syndicate made by such agents who are also acting as secret agents of the vendor. *Ferguson v. Gooch* (Va.) 234

NOTES AND BRIEFS.

Custom; in derogation of general law. 551

CY PRES. See CHARITIES, 4.

DAMAGES. See also EVIDENCE, 41, 42. FREIGHT; PLEADING, 3; TRIAL, 8.

1. Punitive damages may be given for injury by a railroad train caused by gross negli-

gence, recklessness, or wanton disregard or malice. *Mack v. South Bound R. Co.* (S. C.) 679

2. Punitive damages cannot be recovered for injuries to one attempting to board a railroad train from being struck by another train upon the main track, which he was obliged to cross, where whistles were sounded and the bell was rung and the fireman called to such person to look out, and there was nothing to prevent him from seeing the train. *Southern R. Co. v. Smith* (C. C. App. 5th C.) 746

3. Mere negligence, unless so gross as to amount to positive bad faith, is not a ground for awarding punitive damages. *Peterson v. Western U. Tele. Co.* (Minn.) 661

4. Damages recoverable by the father of a child killed may include the expenses necessarily and reasonably incurred in the burial, including compensation for the father's loss of time. *Southern R. Co. v. Cotenia* (Ga.) 253

DEAF AND DUMB. See NEGLIGENCE, 6.

DEATH. See also DAMAGES, 4.

1. Parents are not "heirs" within the meaning of 2 Hill's (Wash.) Code, § 138, giving a right of action to the widow and children of a man killed in a duel, and to the heirs or personal representatives of a person whose death is caused by wrongful act or neglect; but the word "heirs" is limited to the widow and children. *Noble v. Seattle* (Wash.) 822

2. The fact that there are no surviving relatives or creditors of a person killed by wrongful act or omission does not preclude a right of action under Hill's (Or.) Ann. Code, §§ 369, 371, making the recovery assets of the estate. *Perham v. Portland General Elec. Co.* (Or.) 799

3. An action for death caused by wrongful act or omission, whether it results instantly or not, is given by Hill's (Or.) Ann. Code, §§ 369, 371, providing that the personal representatives may maintain an action at law if the deceased "might have maintained an action had he lived," and that the recovery shall be administered as other personal property of the deceased. *Id.*

NOTES AND BRIEFS.

Death; right of action for. 253

Right of action by parents for. 822

DEATH WARRANT. See APPEAL AND ERROR, 1.

DEBTOR AND CREDITOR. See PARTNERSHIP, 3.

DEDICATION. See ACTION OR SUIT, 6; HIGHWAYS, 1, 2.

DEEDS. See also EVIDENCE, 24, 25, 30.

1. A conveyance of a certain number of undivided acres out of a tract of land is not void for uncertainty. *Gratz v. Land & R. Improv. Co.* (C. C. App. 7th C.) 893

2. Title to a proportionate share of land under water, depending on title to the upland, will pass by a deed of a certain number of undivided acres out of the tract of upland bordering on the water. *Id.*

divided acres out of the tract of upland bordering on the water. *Id.*

NOTES AND BRIEFS.

Deeds; reservation of minerals in. 268

Conflict between different descriptions of premises. 828

DEFINITIONS. See also DEATH, 1; HARBORS, 2; LICENSE, 4, 5; SYNDICATE, 1; TAXES, 5.

The word "payable," when used in promissory notes and other commercial transactions, means "to be paid," rather than "which may be paid." *Johnson v. Dooley* (Ark.) 74

DEMURRER. See PLEADING, 7-11.

DISBARMENT. See ATTORNEYS.

DISCOVERY.

An examination by instruments to determine the condition of plaintiff's bladder, in an action for injury thereto, cannot be ordered without abusing the discretion of the court, where the purpose of it is to empty the bladder, and the evidence of plaintiff's physicians is that the examination would not be prudent, and that of defendant's physicians is that it would be safe if the bladder was healthy, but would be absolutely dangerous in some conditions. *O'Brien v. La Crosse* (Wis.) 831

NOTES AND BRIEFS.

Discovery; requiring physical examination of party. 832

DISQUALIFICATION. See SCHOOLS.

DITCHES. See WATERS.

DOGS. See also ACTION OR SUIT, 2; ANIMALS, 1, NOTES AND BRIEFS; EVIDENCE, 4, 37; STREET RAILWAYS, 3, 4.

The owner of a dog has such property in him that he may maintain an action for killing or injuring him. *Citizens' Rapid Transit Co. v. Dew* (Tenn.) 518

DOMICIL. See HUSBAND AND WIFE, 9; VOTERS AND ELECTIONS, 1-3.

DRAINS. See WATERS.

DRAWBRIDGE. See MUNICIPAL CORPORATIONS, 7.

DRUNKENNESS. See also CARRIERS, 3; INSURANCE, 27.

NOTES AND BRIEFS.

Drunkenness; as affecting negligence. 131

DUPLICITY. See PLEADING, 1.

EASEMENTS. See also COTENANCY; EATOPPEL, 5; NUISANCES, 2; WATERS, 6.

1. An easement in land can be granted only by those who could convey a fee simple

estate. *Narron v. Wilmington & W. R. Co.* 415
(N. C.)

2. An easement for a railroad right of way cannot be acquired by occupation under color of title, as against an owner who has given no consent thereto, where the occupation is lawfully taken by right of eminent domain. *Id.*

3. The right to have a court kept open is not created by estoppel by bounding land thereon in a deed by an administrator selling land under a license of the probate court. *Baker v. Willard* (Mass.) 754

By necessity.

4. A way of necessity is created on the partition of lands, in the absence of anything in the record to the contrary, if such way would have been created in favor of one of the parcels by its conveyance or devise by the common ancestor. *Ritchey v. Welsh* (Ind.) 105

5. The right to locate a way of necessity belongs to the owner of the land over which it is to pass, provided he exercises it in a reasonable manner, having due regard to the rights and interests of the owner of the dominant estate; but if he fails to select it when requested the party who has the right thereto may select a suitable route, having due regard to the convenience of the owner of the servient estate. *Id.*

Extent.

6. The right of passage on foot over a space not less than 8½ feet in width does not include the right to have the passage kept open to the sky. *Baker v. Willard* (Mass.) 754

7. The easement or right in respect to light and air from an open space annexed to a mansion-house estate, created by will by providing that the establishment shall continue as much as possible unchanged, does not amount to a general right to have the space kept open for the whole extent of the court, but only to an ordinary easement of light and air for the windows and doors of existing buildings, where there was no communication or entrance to the court from the mansion-house estate, and its only use of the court was for light and air and for a drain. *Id.*

Transfer; division.

8. An easement of light or air does not pass by implication on a conveyance of a building with windows looking out over vacant lots the title to which remains in the grantor, although the enjoyment and value of the building will be greatly impaired by erecting a structure in close proximity to it on the vacant lots. *Kennedy v. Burnap* (Cal.) 476

9. The doctrine that an easement appurtenant to a close is appurtenant to every parcel into which that close may be divided is not applicable to an easement of light and air, which ordinarily is limited to windows and doors or other apertures in a building. *Baker v. Willard* (Mass.) 754

Change.

10. A way of necessity once selected cannot be changed by either party without the consent of the other. *Ritchey v. Welsh* (Ind.) 105

11. The offer of a substitute for a right of way by necessity in favor of one over another
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parcel of lands partitioned which would consist of a private way over other lands that constituted no part of the estate held in common need not be accepted by the owner of the right of way. *Id.*

12. A bar-way connecting a right of way by prescription with a highway may be cut down by the owner of the easement to the grade of the highway, when that is lawfully lowered by the public authorities. *Nichols v. Peck* (Conn.) 81

Loss.

13. The right of passage through a bar-way as part of a right of way by prescription is not lost by failure to use it for eleven years after the bar-way has been made impassable by the lowering of a highway with which it is connected, by the public authorities, and the use, as a substitute, under an implied licence, of another bar-way about 70 feet distant. *Id.*

14. The chaining and locking of a gate is a sufficient revocation of an implied license to use it arising from the owner's acquiescence for eleven years in its use by one who had a right of way across the premises, after a bar-way at some distance from it, through which he had a right to enter the highway, had been made impassable by the lowering of the highway by the public authorities. *Id.*

NOTES AND BRIEFS.

Easements; by prescription; right of way; revocation 81

Way of necessity; right to change. 105

Of light and air. 476, 754

EAVES. See EJECTMENT, 1.

ECCLESIASTICAL LAW. See RELIGIOUS SOCIETIES.

EJECTMENT.

1. An action of ejectment cannot be maintained against one the eaves of whose barn overhang his neighbor's land 10 or 11 inches, where the eaves of the latter's barn are lower than those of the former, and the barn is built so close to the line that the water from the eaves falls on the former's land. *Rasch v. Noth* (Wis.) 577

2. To succeed in an action of ejectment plaintiff must connect himself with the government title, or with some grantor who was the common source of title of both parties. *Slawson v. Goodrich Transp. Co.* (Wis.) 825

3. On a new trial in an ejectment suit, taken by the defeated party as matter of right under the terms of a statute allowing it, rulings upon the admissibility of evidence have no binding force. *Id.*

NOTES AND BRIEFS.

Ejectment; for overhanging eaves. 577

Effect of prior decision on statutory new trial in real actions. 825

ELECTION. See VOTERS AND ELECTIONS

ELECTION DISTRICTS.

One exercise of the legislative power to make an apportionment of the state based on

the last Federal census, under Ill. Const. art. 4, § 6, providing that the general assembly shall apportion the state every ten years by dividing the population as ascertained by the Federal census, exhausts the power and precludes a change of the apportionment until the conditions provided for in the Constitution shall again exist. *People, Mooney, v. Hutchinson* (Ill.) 770

NOTES AND BRIEFS.

Election districts; apportionment of. 770

ELECTRICAL USES AND APPLIANCES. See also TRIAL, 3, 4.

1. Placing electric wires known to be dangerous at a place where others are lawfully entitled to be constitutes negligence. *Perham v. Portland General Elec. Co.* (Or.) 799

2. The owner of electric wires carrying a dangerous current is chargeable with negligence in stringing them over a bridge so near the top of it that it is impossible to make repairs on the bridge without coming in contact with them. *Id.*

3. The apparent perfect insulation of electric wires, which is calculated to deceive and to cause one unfamiliar with the facts to suppose them safe, when the wires are placed where persons in the performance of their duties may come in contact with them, amounts to an invitation to them to risk contact therewith. *Id.*

4. The care demanded of electric companies must be commensurate with the danger, and where the wires carry a highly dangerous current of electricity, the law requires the utmost degree of care in the construction, inspection, and repair of the wires so as to keep them harmless at places where persons are liable to come in contact with them. *Id.*

5. A workman engaged in repairing a bridge over which electric wires with an apparently safe insulation are strung, where he must come in contact with them in performing his work, has a right to assume that contact with them will not be dangerous,—especially after the workmen have made an examination of them and ascertained, as they suppose, that the wires are not dangerous. *Id.*

6. The liability of a city for neglect of its duty to exercise care and supervision over electric wires suspended over its streets is not lessened by the fact that individuals or corporations are subjected to a like duty and liability. *Mooney v. Luzerne* (Pa.) 811

NOTES AND BRIEFS.

Electrical uses; negligence as to dangerous wires. 802

ELECTRIC LIGHT. See MUNICIPAL CORPORATIONS, 2.**ELECTRIC RAILROADS.** See STREET RAILWAYS.**ELISOR.**

An elisor may be appointed to take charge of the jury when the sheriff and his deputies are disqualified and the coroner is 40 L. R. A.

disabled by sickness from performing the duty. *People v. Ebanks* (Cal.) 289

EMINENT DOMAIN. See also EASEMENTS, 2.

1. The reasonable use of the streets of a city for the equipment of a telephone system, including poles and wires, is not a new and additional servitude for which the abutting property owner is entitled to compensation. *Magee v. Overshiner* (Ind.) 370

2. The uses of streets prevailing at the time of the taking or dedication of a street are not the limits of the uses to which the public is entitled and which the soil owner is deemed to have contemplated, but such uses are to be enlarged to include all of the additional and improved methods of attaining the same objects and enjoying the same privileges, not, however, to the denial or substantial impairment of the fee owner's use and enjoyment of his abutting property. *Id.*

NOTES AND BRIEFS.

Telephone poles as additional burden on street. 371

ENTERTAINMENTS. See EXHIBITION.**EQUITABLE CONVERSION.** See WILLS, 9.**EQUITY.** See also CLOUD ON TITLE, 1; JUDICIAL SALE, 1, 2.

1. Absence of precedent is not a sufficient reason for denying the existence of equitable jurisdiction. *Gavin v. Curtin* (Ill.) 776

2. Equity will devise a remedy to meet each new emergency, and will enforce a restitution if the ends of justice require it, where a fund claimed by a wrongdoer is under its control. *Baltimore Trust & G. Co. v. Hambleton* (Md.) 216

3. Equity will take jurisdiction in all cases where a right recognized by municipal law exists, and courts of law do not provide an adequate remedy for the enforcement, maintenance, and protection of that right. *Gavin v. Curtin* (Ill.) 776

4. Equity may take jurisdiction to protect an unproductive life estate and remainder of great value which is liable to be lost through inability of the life tenant to pay the taxes. *Id.*

ESTOPPEL. See also EASEMENTS, 3.

1. Promises do not lay a foundation for an estoppel, if the promisee is not in any way prejudiced by them, or induced thereby to do or omit to do anything to his disadvantage, or in any way to change his status. *Barry v. Kirkland* (Ariz.) 471

2. Negligence which will work an estoppel against reclaiming property must be a proximate cause of the purchase or advancement of money by the holder of the property, and must enter into the transaction itself. *O'Herron v. Gray* (Mass.) 498

3. No estoppel can arise from an act of a municipal corporation or officer, done in violation of or without authority of law. *Hibbard v. Chicago* (Ill.) 621

4. Estoppel against the state from pursuing a treasurer's bond is not effected by its proceeding against the insolvency assignee of one with whom the treasurer had deposited the money, and accepting a dividend from him. *State v. Gramm* (Wyo.) 690

5. One answering in the negative when asked if he had "a regular right of way" over a farm, without being informed of the purpose of the inquiry and with no intention of misleading, is not estopped to claim that he has a way by prescription as against a purchaser of the premises who does not appear to have relied upon the statement. *Nichols v. Peck* (Conn.) 81

6. A signature to a blank transfer of certificates of stock plainly showing that it is made by a guardian of infant owners will not pass a good title to one who takes them before any transfer on the books of the corporation without inquiry and merely as a pledge for a debt from the cashier of a bank in which they were placed for safe keeping but from which they were feloniously taken by the cashier. *O'Herron v. Gray* (Mass.) 498

7. A subscriber is estopped, as against creditors, to set up the invalidity of a subscription to capital stock as to which, if invalid, he was *in pari delicto*. *Cardwell v. Kelly* (Va.) 240

NOTES AND BRIEFS.

Estoppel; to set up illegality of one's own act. 240

Of tenant to dispute landlord's title. 267

EVIDENCE. See also COURTS, 1; DISCOVERY; TRIAL, 12, 13.

Judicial notice.

1. California courts will take judicial notice that the county of San Diego is in that state. *People v. Elbanks* (Cal.) 269

2. Judicial notice of the nature and powers of the Holy Roman Catholic Church, so far as its civil rights and duties are concerned, will not be taken without any averment or proof upon the subject. *Baxter v. McDonnell* (N. Y.) 670

3. It is of common knowledge that in a city crowds assemble in the streets and on the sidewalks on the Fourth of July, and explode firecrackers and cannon crackers and other combustible materials. *Aron v. Wausau* (Wis.) 738

4. It is a matter of common knowledge that pedigree enters into the consideration of the value of dogs, including such as are kept for sporting purposes. *Citizens' Rapid Transit Co. v. Deo* (Tenn.) 518

5. It is a matter of common knowledge that young men who are intelligent, industrious, and frugal, although absolutely penniless, obtain money upon the credit of their future earnings and accumulations. *Bettman v. Cowley* (Wash.) 815

6. The fact that a child less than two years of age cannot perform any services of value to its parents is a matter of common knowledge. *Southern R. Co. v. Covenia* (Ga.) 258

7. A jury may consider common knowledge and observation about the habits and qualities of dogs. *Citizens' Rapid Transit Co. v. Deo* (Tenn.) 518

Presumptions and burden of proof.

8. The burden of proving restrictions in another state upon the remarriage of a divorced person is upon the person alleging them. *State v. Shattuck* (Vt.) 425

9. Insurance of property "while contained in brick buildings" does not cast upon the insured the burden of showing the integrity of the building at the time of the fire, if a clause is inserted in the policy to cover the case of its fall. *Western Assur. Co. v. J. H. Mohrman & Co.* (C. C. App. 2d C.) 561

10. The burden of showing that the building did not fall before a fire is not thrown upon the insured by his allegation that the fire did not happen by reason of any of the excepted causes, where liability for loss following the fall of the building is removed by a condition subsequent in the policy. *Id.*

11. An accident insurance company has the burden in an action upon a policy of proving that an injury to plaintiff shown to be the result of an accident was within some exception named in the policy. *Hess v. Preferred Masonic Mut. Acci. Assn.* (Mich.) 444

12. Negligence cannot be a mere matter of conjecture, but must be fairly inferable from the evidence. *Omaha v. Bowman* (Neb.) 531

14. A presumption of negligence arises from the blowing of a locomotive whistle loudly and repeatedly under a bridge constantly used by all kinds of vehicles. *Mitchell v. Nashville, C. & St. L. R. Co.* (Tenn.) 431

15. The killing of a mule by a train raises a presumption of negligence on the part of the railroad company. *Mack v. South Bound R. Co.* (S. C.) 675

16. The presumption that a railroad company was negligent if a person was killed by a train is overcome where it is shown that the person must have been sitting or lying on the track, between midnight and daylight. *Parish v. Western & A. R. Co.* (Ga.) 584

17. The burden is on the railroad companies on appeal from an order of the railroad and warehouse commission for a connecting switch at their intersection, to show a want of its necessity. *Jacobson v. Wisconsin, M. & P. R. Co.* (Minn.) 829

18. A railroad company defending a suit to enjoin it from placing abutments in a high way on the ground that it is acting under order of the state railroad commission, has the burden of proving the existence of the order and the identity of the structure which it has threatened to build with that designated in the order. *Bristol v. New England R. Co.* (Conn.) 475

19. The board of railroad commissioners, one of whom is required by law to be a civil engineer, will be presumed to have made no order for the construction of a public work which cannot be precisely executed. *Id.*

20. Receipt and confirmation of the report of a jury finding lunacy, as required by statute, will be presumed if the clerk acts on it by

appointing a guardian. *Sims v. Sims* (N. C.) 737

Best and secondary.

21. A true copy of a lost note is not inadmissible because it shows less credits than are admitted by the declaration. *Haug v. Riley* (Ga.) 244

22. The right to prove a lost note by a copy is not taken away by Ga. Code, § 3986 (Ga. Civ. Code, § 4750), which authorizes suit on such lost note without establishing the copy, as that provision is merely permissive or cumulative. *Id.*

Documentary.

23. Legislative journals constitute a record which is competent to overthrow the presumption that an act properly signed by the presiding officers of the legislature, approved by the governor, and deposited in the secretary's office, was regularly passed. *State, Cheyenne, v. Swan* (Wyo.) 195

24. Claimants under a deed prior in time, but subsequent in record, in order to defeat after a great lapse of time a subsequent deed first recorded, have the burden of showing notice or fraud on the part of the subsequent grantees. *Gratz v. Land & R. Improv. Co.* (C. C. App. 7th C.) 393

25. Recorded, but unacknowledged, agreements regarding land, may be considered in an action to quiet title, under a statute making them evidence in cases brought after its passage, although a portion of the relief asked is injunction against an ejectment suit begun before the passage of the act. *Id.*

26. Medical books cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. *Union P. R. Co. v. Yates* (C. C. App. 8th C.) 553

27. A statute making books of science or art presumptive evidence of facts of general notoriety or interest does not include medical works so as to make them evidence of the opinions or theories therein expressed. *Id.*

28. A treatise on concussion of the spine, about the extent and character of which there is some difference of opinion among the medical profession, is not admissible in evidence to establish the fact that an ailment from which a person appears to be suffering is a result of nervous shock sustained some years previously in a railway collision. *Id.*

29. Correspondence and affidavits are not admissible to prove the fact of accident or cause of death, in an action on an insurance policy, although admissible to show compliance with or waiver of a condition as to furnishing proofs of death. *Foster v. Fidelity & C. Co.* (Wis.) 883

Parol, as to writings.

30. A deed calling for land in a certain block in a plat on file in a certain office, cannot be extended by parol evidence to embrace land not in that block as shown by the plat. *Shuison v. Goodrich Transportation Co.* (Wis.) 825

Opinions.

31. Answers should not be permitted to hypothetical questions from which an element

"probably the most important" has been left out. *Western Assur. Co. v. J. H. Mohlman Co.* (C. C. App. 2d C.) 561

32. Expert witnesses may, in support of their professional opinions, read in evidence statistics of mechanical experiments and tabulations of the results thereof, where the scientific work containing them is concededly recognized as a standard authority by the profession, and when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanic arts with which such statistics and tabulations are concerned. *Id.*

33. Lapse of time after the fall of a building before persons who testify as experts as to whether it fell before or after a fire saw it will not wholly exclude their opinions, if timbers, upon the condition of which the opinions were largely formed, were still lying in the ruins when their inspection was made. *Id.*

34. An opinion of a physician that death was occasioned by injuries, based on evidence before him, cannot be allowed when the action does not show the facts upon which the opinion was based. *Foster v. Fidelity & C. Co.* (Wis.) 883

35. What a party would do under a given state of facts which call upon him or her to perform a duty to some other person is a fact to which such person can testify, and not a matter of opinion merely. *Western U. Tele. Co. v. Mitchell* (Tex.) 209

Declarations; hearsay.

36. Hypnotism of a person accused of crime will not render evidence of statements made by him while under the influence admissible in his favor at his trial. *People v. Ebanks* (Cal.) 269

37. Evidence of the pedigree of a dog is not inadmissible on the ground that it is hearsay. *Citizens' Rapid Transit Co. v. Dew* (Tenn.) 519

Relevancy.

38. Whenever proof of one crime tends to prove a fact material in the trial of another, such proof is admissible; and the fact that it may tend to prejudice defendant in the eyes of the jury is immaterial. *People v. Ebanks* (Cal.) 269

39. Evidence is admissible in a prosecution for murder, that two days before the murder the accused was found under the bed in a stranger's house, having with him a bag which was afterwards found near the place of the crime, and which he had denied ever having in his possession, as tending to throw light upon his actions, appearance, and belongings at a period not remote from the day of the crime. *Id.*

40. Evidence as to the failure to give statutory signals at road crossings is admissible in an action for injuries not received at a crossing, where reckless negligence in running a train is alleged. *Mack v. South Bound R. Co.* (S. C.) 679

41. Testimony as to the value of property is relevant on the question of damages, under an agreement that these shall not exceed the actual cash value or the cost of repairing or re-

placing the property. *Erb v. German-American Ins. Co. (Iowa)* 845

42. In defense of a claim for loss of wages and future earnings in an action for personal injuries, defendant may show any facts concerning plaintiff's habits and conduct which may throw light upon the probability of his securing employment, and the character and continuity of the same. *Kingston v. Fort Wayne & E. R. Co. (Mich.)* 181

43. Waiver need not be specially pleaded in order to admit evidence thereof, but can be shown under an allegation of performance. *Foster v. Fidelity & C. Co. (Wis.)* 883

Weight.

44. Possession by an insured of the policy is, upon demurrer by the insurer to the evidence in a suit upon the policy, conclusive evidence that the premium was paid. *Fidelity & C. Co. v. Chambers (Va.)* 432

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Burden of proof of negligence of insured. 446

Presumptions as to sanity at time of marriage. 742

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Scientific books and treatises as evidence:—
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Intoxication as evidence of negligence. 148

EXECUTORS AND ADMINISTRATORS. See also ACTION OR SUIT, 1.

1. Money belonging to an estate, received by one who is subsequently appointed administrator, becomes cash assets of the estate for which his bond is a security. *Hodge v. Hodge (Me.)* 33

2. An administrator *de bonis non* cannot maintain an action against the estate of his predecessor for money belonging to the estate, wrongfully received by him prior to his appointment as administrator and for which he failed to account, if it is not distinguishable as part of the intestate's property. *Id.*

3. A widow's election of dower and refusal to accept the gift of the income of certain property for life in lieu thereof, under a will which contemplates the conversion of the real estate into money and then a division, will entitle the administrator to divide the balance of the estate after setting off dower, without waiting for the death of the widow. *Sherman v. Baker (R. I.)* 717

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What assets pass to the administrator *de bonis non*:—(I.) Generally; (II.) the rule in the 40 L. R. A.

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Right to rents on lease of intestate's property:—(I.) Classification by states; (II.) English cases: (a) form of lease; (b) apportionment; (c) summary of English cases; (III.) summary as to rents accruing during owner's life; (IV.) summary as to rents accruing after owner's death: (a) rights of heir; (b) rights of administrator: (1) by statute; (2) in a foreign state; (c) liability of administrator: (1) generally; (2) for use and occupation; (3) accounting and surties; (d) rights of creditors; (e) apportionment. 321

EXEMPTION. See also MORTGAGE, 12.

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Exemption; from chattel mortgage. 150

EXHIBITIONS. See also MASTER AND SERVANT, 8.

1. The risk of injury from careless handling of the implements used by the performers is not, as matter of law, assumed by a street-car patron who attends a free exhibition given by the company upon its grounds. *Thompson v. Lowell, L. & H. Street R. Co. (Mass.)* 345

2. A street car patron attending a free entertainment given by the company to its patrons may hold the company liable for an accident which happens from a cause which might have been prevented and ought to have been foreseen and guarded against, if due care was not taken by the company with reference to possible accidents of the kind. *Id.*

EXPERTS. See EVIDENCE, 32-34.

EXPLOSIONS. See NUISANCES, 6.

EXPRESS COMPANY. See MASTER AND SERVANT, 1, 2, 4.

FACTORY. See BUILDINGS, 3.

FALSE IMPRISONMENT. See CARRIERS, 5.

FENCE. See also RAILROADS, 7.

1. One may lawfully build a high fence on his own land which shuts off light and air from the windows of his neighbor's house, although he makes the fence for no useful or ornamental purpose but from motives of un-mixed malice toward the neighbor. *Letts v. Kessler (Ohio)* 177

2. One who plants a hedge fence on his part of the dividing line between him and the adjoining owner is not required to trim the

same to prevent its growing out over the land of such adjoining owner, under the Iowa statute authorizing the growth of a hedge on the division line, without specifying its height or how it shall be trimmed. *Kinney v. Kinney* (Iowa) 626

3. Neglect of an adjoining owner to trim a hedge fence standing on part of the division line is not within Iowa Code 1873, § 1490, providing that if any party neglect to "repair or rebuild" a partition fence the aggrieved party may appeal to the fence viewers, and if they determine the fence is "insufficient" they shall signify it in writing to the delinquent owner, and direct him to repair or rebuild. *Id.*

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FINES. See MUNICIPAL CORPORATIONS, 5.

FIRECRACKERS. See MUNICIPAL CORPORATIONS, 8.

FIRE ESCAPE. See BUILDINGS, 2, 3.

FIRES.

1. One whose negligence caused a fire is not liable for property burned after the fire had met another fire for which no known responsible agency can be fixed, and either fire would have been alone sufficient to do the damage. *Cook v. Minneapolis, St. P. & S. Ste. M. R. Co.* (Wis.) 457

2. The rule of liability in case of joint wrongdoers does not apply to injuries from a fire into which two independent fires from different directions have merged, each of which would have been separately sufficient to cause the loss, but only one of which can be traced to a responsible agency. *Id.*

FISHERIES. See also HARBORS, 2.

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Fisheries; right of, separated from upland. 898

FOOD. See also CONSTITUTIONAL LAW, 8.

A statute making the mixture of any articles of food without labeling the product an offense is too general, but the act to be enforced should name the particular article of food the adulteration of which is prohibited and which is required to be labeled. *Dorsey v. State* (Tex. Crim. App.) 203

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FORFEITURE. See CORPORATIONS, 11-13; HOMESTEAD; WATERS, 2, 13-15.

FORGERY. See also BILLS AND NOTES, 1. 40 L. R. A.

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Forgery; ratification of. 471

FRANCHISE. See CORPORATIONS, 11-13; TELEPHONE; WATERS, 13-15.

FRAUD AND FRAUDULENT CONVEYANCES. See also ASSUMPSIT; BET; CORPORATIONS, 10.

1. A statement in the prospectus of a corporation prepared by a promoter of the corporation who organized it with the intention of transferring to it certain real estate previously purchased by him as follows: "Cost of ground \$40,000."—is not fraudulent although the land cost him less than that amount, as it is not a representation that the land actually cost the promoter such amount, but that it is to be estimated at that amount in the transfer to the corporation. *Milwaukee Cold Storage Co. v. Dexter* (Wis.) 837

2. Fraud in an assignment of wages by a debtor is not shown by the fact that the assignee never drew the wages, but they were drawn on his orders by the assignor and immediately paid over to him. *Dolan v. Hughes* (R. I.) 735

3. A conveyance for the security of several claims, some of which are fraudulent, will be sustained in favor of those which are valid. *Victor v. Glover* (Wash.) 297

4. Creditors who act in good faith in taking a conveyance of their debtor's property in satisfaction of their claims, and who surrender notes to a larger amount than is covered by the assets assigned, may retain what they receive although the grantors may act in bad faith. *Id.*

NOTES AND BRIEFS.

Fraud; setting aside series of acts to defraud. 382

FREE SCHOLARSHIP. See PUBLIC MONEY, 2; STATUTES, 3.

FRIGHT.

Recovery for injuries occasioned by fright, which was caused by the negligence of a railroad company, can be had, although no physical injury was sustained except that caused by the fright. *Maack v. South Bound R. Co.* (S. C.) 879

NOTES AND BRIEFS.

Fright; liability for damages caused by. 680

GAMBLING. See COMMERCE, 2.

GAME LAWS. See also CONSTITUTIONAL LAW, 7; CONTRACTS, 6.

Game purchased on an Indian reservation by an Indian from Indians who killed it on the reservation is not exempt from the game laws of the state prohibiting shipment of game out of the state, after it is transported beyond the reservation for the purpose of shipment to another state. *Selkirk v. Stevens* (Minn.) 759

certain sum for the maintenance of the child and a certain allowance of alimony to the wife, with a provision that a divorce or second marriage of either party shall terminate the agreement,—is terminated and mutually abandoned when the husband obtains judgment for absolute divorce in one state, and the wife obtains a limited divorce in another state. *Ather-ton v. Atherton* (N. Y.) 291

Marriage of person when insane:—(I.) Invalidity of; (II.) degree of incapacity which will affect; (III.) test of capacity to contract; (IV.) test of capacity to know the nature of the act; (V.) incapacity combined with fraud; (VI.) incapacity as a ground for divorce; (VII.) ratification and waiver of right to attack; (VIII.) evidence of incapacity: (a) presumption and burden of proof; (b) sufficiency, weight, and admissibility; (c) effect of inquisition; (IX.) annulment: (a) necessity of decree for; (b) jurisdiction; procedure; (c) effect. 787

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INCOMPETENT PERSONS. See also BANKS, 1; EVIDENCE, 20; HUSBAND AND WIFE, 1-5; WILLS, 1-3.

A guardian of a lunatic cannot be removed in an *ex parte* proceeding in which no notice is served on him. *Sims v. Sims* (N. C.) 787

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See also HUSBAND AND WIFE; HYPNOTISM.

Incompetent persons; insane delusions. 256

INDEPENDENT CONTRACTOR. See MASTER AND SERVANT, 8, 9.

INDIAN RESERVATION. See COMMERCE, 1; GAME LAWS.

INDICTMENT AND INFORMATION.

Addition of the state to the name of the district attorney who signs an information charging one with crime is not necessary. *People v. Ebanks* (Cal.) 269

INFANTS. See also HUSBAND AND WIFE, 10-14; JUDGMENT, 3; NEGLIGENCE, 6.

1. The direction by will that a child shall 40 L. R. A.

be reared by the sisters of the testatrix and trained as their own is not limited by a subsequent provision for the appointment of her husband as guardian and to manage the business and property of the testatrix. *Stringfellow v. Somerville* (Va.) 623

2. A man who permits the custody of his infant child to pass, in accordance with his wife's will, to her sisters, and allows the child to remain with and be reared and trained by them for five or six years, will not be allowed to reassert his right to the custody of the child if this is not for the welfare of the child. *Id.*

3. As between two claimants of the custody of an infant, the question is not which can surround the child with greater luxury, or give him the greater amount of money or property, but with which the child is likely to be reared and trained so as to make the better man and the better citizen. *Id.*

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Infants; effect of agreement as to custody of.	293
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INHERITANCE TAX. See CONSTITUTIONAL LAW, 4; TAXES, 5-7.

INJUNCTION. See also WATERS, 8.

1. An injunction against the use of a name may be granted in favor of one who has the exclusive right thereto, although no damage is alleged. *Bagby & R. Co. v. Rivers* (Md.) 632

2. A mandatory injunction to compel the secret password of the grand lodge of a benevolent society to be given to a delegate of a subordinate lodge, and to permit him to participate in the deliberations, is not within the province of a court of equity, where it is not shown that any right of property is endangered, although an irreparable injury may be done to the delegate and to his lodge by excluding him. *Wellencross v. Grand Lodge K. of P.* (Ky.) 488

3. Charter power to make general police regulations for the benefit of trade and commerce, and to provide for the abatement and removal of nuisances, will not authorize a city to maintain a suit to enjoin the filling up of a lake shore along, but outside, the limits of a public street. *Madison v. Mayers* (Wis.) 625

4. A city may maintain an action to enjoin abutting owners from removing materials from the unused part at the side of a street, which will make the opening of the street to its entire width more difficult. *Id.*

5. A town cannot enjoin the erection of abutments in one of its highways in pursuance of an order by the railroad commission to abolish a grade crossing; but if it regards its rights encroached upon, it must appeal from the order. *Bristol v. New England R. Co.* (Conn.) 479

6. An injunction against devoting property dedicated for an ornamental park to any other use can be granted in favor of the original donors of the property. *Rouze v. Perry* (Miss.) 402

7. An injunction against the proprietor of a theatre will not be granted to prevent his breach of a contract to furnish the theatre and its equipment, including light, heat, music, ushers, etc., to the manager of a company for a certain time, and to prevent him from furnishing the theatre to a rival company during that period, nor can the contract be partly enforced by injunction limited to the use of the building and furnishings. *Welly v. Jacobs* (Ill.) 98

8. The mere possibility of injury by an unconstitutional statute which may prevent insurance companies from making such contracts as persons might otherwise procure them to make will not authorize injunctive relief in behalf of those who wish such contracts. *Business Men's League v. Waddill* (Mo.) 501

9. An injunction against the approval by the superintendent of the insurance department of a uniform policy of insurance, under a statute which is alleged to be unconstitutional as an attempt to delegate to him legislative powers, cannot be granted on behalf of individuals in order to protect them in the right to make contracts of insurance to suit their varying needs and circumstances, as the statute, if unconstitutional, cannot stand in the way of any contracts that may be made. *Id.*

10. A perpetual injunction may be granted against the execution of a contract for the care of a person having leprosy, when its tendency is not to protect the community but to cause a dissemination of the disease. *Baltimore v. Fairfield Improv. Co.* (Md.) 494

11. Serious injury to the value of the property of the residents of a locality by the establishment of a pest house in the vicinity will warrant an injunction against it. *Id.*

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Injunction; by municipalities against nuisances in waters and watercourses:—(I.) In general; (II.) pollution and other matters affecting health. 465

Against nuisance. 494

To enforce negative covenant. 98

INNKEEPERS. See also ANIMALS, 6.

1. The liability of an innkeeper for goods stolen from a peddler's cart while in the innkeeper's custody is not avoided by the fact that the peddler had no license to peddle, as he did not lodge at the inn as a peddler. *Cohen v. Manuel* (Me.) 491

2. A cart of a peddler who becomes a guest at an inn is delivered to the innkeeper for safe custody, within the meaning of Me. Rev. Stat. chap. 27, § 7, when by his directions it is placed in a livery stable belonging to him, although it is not connected with the inn. *Id.*

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Innkeepers; liability for goods of guest; illegal business of guest. 491

INQUEST; See CORONER.

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INSOLVENCY. See also ESTOPPEL, 4; PARTNERSHIP, 3; SET-OFF.

A claim accruing after an assignment for creditors on a contract previously made by the assignor is assets in the hands of the assignee only to the extent of the balance due after deducting a claim against the assignor which was a valid existing set-off at the time of the assignment. *Re Hatch* (N. Y.) 664

INSPECTION. See DISCOVERY.

INSURANCE. See also CORPORATIONS, 11, 12; EVIDENCE, 9-11, 44; INJUNCTION, 8, 9.

1. The power of the superintendent of insurance to revoke or decline to renew a license of a life insurance company created under the laws of another state, under Ohio Rev. Stat. § 2745, because of its refusal to pay taxes, is not suspended by the pendency of an action brought by him against the company for such taxes. *State, National Life Assn., v. Matthews* (Ohio) 418

2. What constitutes life insurance on the assessment plan within the meaning of Ohio Rev. Stat. § 3630e, must be determined by the laws of that state; and these contemplate that such insurance must be for the sole benefit of the policy holders, and the principal source of revenue must arise from post mortem assessments intended to liquidate specific losses. *Id.*

3. A corporation having a capital stock in which many members do not share, and conducting business for the pecuniary benefit of the stockholders, is not acting "for the sole benefit of its members and their beneficiaries, and not for profit," within the meaning of Md. Code, § 143e, so as to be entitled to issue fraternal beneficiary certificates. *International Fraternal Alliance v. State* (Md.) 187

4. Policies for more than \$1,000 on one life, when they are policies of insurance such as co-operative assessment associations issue, and not certificates such as fraternal beneficiary associations issue, cannot be lawfully issued by a corporation subject to Md. Code, art. 28, § 128, although its charter provides, not only for insurance, but "for social or fraternal beneficial purposes, or both." *Id.*

5. An insurance company having capital stock and stockholders for whose benefit it was created may be admitted to transact business on the assessment plan in Ohio, under Ohio Rev. Stat. § 3630e, if authorized to transact such business under the laws of the state which created it, although there is no statutory authority given to Ohio stock corporations to do such business. *State, National Life Assn., v. Matthews* (Ohio) 418

Cancellation.

6. A return or tender of unearned premiums is necessary in order to affect a cancellation of an insurance policy providing that it may be canceled "by giving five days' notice," and also that "the unearned premium shall be returned on surrender of this policy." *Tisdell v. New Hampshire F. Ins. Co.* (N. Y.) 765

7. Notice that an unearned premium will be returned, and holding the amount subject to the call of the insured, does not satisfy the

obligation of an insured to return the premium as a condition of canceling the policy. *Id.*

Illegal business.

8. Insurance on merchandise kept for an illegal business, such as a stock of drugs and liquors kept by a dealer who does not have the permit required by law to sell them, is not void as against public policy. *Erb v. German-American Ins. Co.* (Iowa) 845

Conditions.

9. Insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy or statutory provisions. *Dumas v. Northwestern Nat. Ins. Co.* (D. C.) 358

As to title and encumbrances.

10. A condition that an insurance policy shall not be valid if the property is mortgaged does not contravene any public policy. *Id.*

11. The purchaser of property on the instalment plan, of which the title is reserved in the seller, has not a sole and unconditional ownership of it, within the meaning of an insurance policy. *Id.*

12. The indivisibility of an insurance policy upon a certain amount of furniture as a whole renders it entirely void, when it is avoided as to part by breach of conditions as to title and encumbrances on the property and false swearing respecting them, under a provision that "this entire policy shall be void" in various contingencies, including those of encumbrances on the property, or lack of sole ownership, or false swearing by the insured. *Id.*

13. An express condition that a policy shall be void if the insured is not the sole and unconditional owner of the property, or if it is mortgaged, will render it void if the conditions are broken, even if the insured made no representations as to the property or any fraudulent concealment of the facts. *Id.*

14. An insurer will be conclusively presumed to have waived a provision of a policy, rendering it void, if there is a mortgage or other encumbrance on the property, whether inquired about or not, unless it is so notified to the company and so expressed in the policy, if the value of the property exceeded the encumbrance so that insured had an insurable interest therein, although the agent had no actual knowledge of the encumbrance, where no inquiries were made of the insured respecting the character or condition of his title, and he made no false representations respecting the same, and did not intentionally conceal the existence of the encumbrance, and the insurer accepted and retained the premium. *Phenix Ins. Co. v. Fuller* (Neb.) 408

15. A mere executory agreement to sell insured goods does not constitute any change of interest within the meaning of an insurance policy. *Erb v. German-American Ins. Co.* (Iowa) 845

Preferred occupation.

16. A bank cashier does not as matter of law lose his right to recover upon an accident insurance policy providing that it shall be wholly void as to all accidents occurring while he is engaged in any profession, employment, 40 L. R. A.

or exposure not rated as a preferred occupation, by sawing off blocks from a board for his own use. *Hess v. Preferred Masonic Mut. Acci. Asso.* (Mich.) 444

17. The use of a buzz saw by a bank cashier insured against accidents by a policy providing that it shall be void as to all accidents occurring while he is engaged in any profession, employment or exposure not rated as a preferred occupation, will not prevent recovery for an accident caused by his slipping and falling against the saw after he has ceased to use it. *Id.*

18. One insured as a grocer's secretary and treasurer in an accident insurance company, whose policy provides that if he is injured while engaged in work or duty classified as more hazardous than the occupation for which he is insured, he shall recover at the rate fixed for the increased hazard,—does not, as matter of law, change his occupation to farming by returning to a farm owned by him less than a week after his employment as such secretary and treasurer ceases. *Johnson v. London Guarantee & A. Co.* (Mich.) 440

Exposure to danger.

19. One must act with gross or wanton negligence to make his act a voluntary exposure to unnecessary danger, within the provision in an accident insurance policy. *Id.*

20. The words "voluntary exposure to unnecessary danger" do not embrace every exposure that an insured person might have avoided by the exercise of due care, but relate to dangers of a substantial character, which he knew and to which he purposely and consciously exposed himself, intending at the time to assume all the risks. *United States Mut. Acci. Asso. v. Hubbell* (Ohio) 450

21. Voluntary exposure to unnecessary danger, within the meaning of an accident insurance policy, is not shown by the facts that the insured, without knowing that a train was due, sat on a bag on the railroad track at a night-way crossing, and upon being warned of the approach of a train, started away, but turned back for the bag, and was struck before he could get away. *Fidelity & C. Co. v. Chambers* (Va.) 442

22. Hunting for game with a loaded gun is not a voluntary exposure to unnecessary danger within the meaning of an accident insurance policy excluding injuries sustained by reason of such exposure. *Cornwell v. Fraternal Acci. Asso.* (N. D.) 47

23. Attempting to scale a bank with a loaded gun in hand is not a voluntary exposure to unnecessary danger within the meaning of an accident insurance policy.

24. The owner of a farm does not voluntarily expose himself to unnecessary danger within the provisions of an accident insurance policy, by attempting to drive a bull from a calf pasture into which it has broken, if he does not believe, and has no reason to believe, that there is any danger to himself in so doing. *Johnson v. London Guarantee & A. Co.* (Mich.) 440

25. An attempt to cross a slough in a public road, made by a traveling salesman who has regularly crossed it twice a year for thirteen years

and who, acting on his own judgment based on his previous knowledge and appearance of the place, together with the opinions of others, concludes that there is no danger to his life in making the attempt,—is not a voluntary exposure to unnecessary danger within the meaning of an accident insurance policy. *United States Mut. Acci. Asso. v. Hubbell* (Ohio) 453

Violation of law.

26. One who has started to hunt prairie chickens with a loaded gun at a season when it is unlawful to kill them, and who is injured by an accidental discharge of his gun as he is climbing a bank, is not engaged in violation of law within the exception of an accident insurance policy. *Cornwell v. Fraternal Acci. Asso.* (N. D.) 487

Intoxication.

27. That an insured person had taken drinks just before he received an injury will not, if he was not drunk, bring him within the clause of the policy that it shall not "cover any accidental injury which may happen to me while under the influence of intoxicating drinks." *Fidelity & C. Co. v. Chambers* (Va.) 482

Fall of building.

28. A stipulation that "in case of the fall of the building all insurance by this policy shall immediately cease" is a condition subsequent, and not an exception, and the burden of showing that it became operative before loss is upon the insurer,—especially where it is not in the descriptive part of the policy, but is among the provisos; and it is immaterial that the clause "except as hereinafter provided" is inserted in the descriptive part of the policy. *Western Assur. Co. v. J. H. Mohlman Co.* (C. C. App. 2d C.) 561

Accidental injury.

29. Death caused by accidental drowning is death from "external, violent and accidental means," within the meaning of an accident policy. *United States Mut. Acci. Asso. v. Hubbell* (Ohio) 453

30. Blood poisoning caused by an accident, and which is a mere link in the chain of causation between the accident and the death which it produces, is not an intervening and independent cause of death which will prevent liability on insurance against accident. *Western Commercial Travelers' Asso. v. Smith* (C. C. App. 8th C.) 653

31. An abrasion of the skin of a toe, unexpectedly caused, without design, by unforeseen, unusual, and unexpected friction in the act of wearing a new shoe, is an accidental injury within the meaning of an insurance policy. *Id.*

32. Blood poisoning by germs in cotton placed in a person's mouth with her consent, by a dentist, to stop the flow of blood after extracting a tooth, creates no liability on an accident policy which has a condition against liability for injuries "from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," notwithstanding the fact that the germs were not known to exist in the cotton, since they were voluntarily, though accidentally, introduced into the system. *Kasten v. Interstate Casualty Co.* (Wis.) 651

Notice of injury.

33. Notice of an accident causing death, given to an insurance company twenty-nine days after knowledge of the facts was obtained, is not "immediate" within the meaning of the policy. *Foster v. Fidelity & C. Co.* (Wis.) 888

34. No notice of an accident or injury causing death need be given by the beneficiary of the death loss until the death occurs, where the policy provides for immediate notice "in the event of any accident or injury for which claim shall be made, . . . or in case of death resulting therefrom," as this provides for two notices for different claims, one of injury not resulting in death, and the other of death. *Western Commercial Travelers' Asso. v. Smith* (C. C. App. 8th C.) 653

Proofs of loss; fraud.

35. An estimate of the value of insured property by the insured in his proofs of loss will not constitute fraud if he places the amount too high merely through inadvertence or mistake. *Erb v. German-American Ins. Co.* (Iowa) 845

36. Failure to read an affidavit which is short, plain, and simple will not relieve the affiant from the effect of false swearing as to the title and lack of encumbrances on property, to avoid insurance thereon, although the affidavit was prepared by the insurance agent. *Dumas v. Northwestern Nat. Ins. Co.* (D. C.) 358

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Insurance; forfeiture of charter of company for abuse. 188

Right to contract for. 501

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Validity of fire insurance on property illegally used:—(I.) General principles; (II.) violation of excise laws; (III.) offenses against public order and decency; (IV.) violation of law taxing occupations. 845

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INTEREST.

Interest on the whole amount of a trust fund deposited in a bank is chargeable to the bank from the time of a demand by the true owner and a refusal to pay. *American Trust & B. Co. v. Boone* (Ga.) 250

INTOXICATING LIQUORS. See also TRIAL, 11.

An ordinance may vest discretionary power in the council as to issuing licenses for the sale of intoxicating liquors within certain limits, where there is charter authority to enact ordinances to tax and regulate that business, but such discretion must be reasonably exercised. *State, Noble, v. Cheyenne* (Wyo.) 710

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Intoxicating liquors; discretion as to license to sell. 710

INTOXICATION. See DRUNKENNESS, NOTES AND BRIEFS.**IRRIGATION.** See NUISANCES, 4.**JOINT CREDITOR AND DEBTOR.** See BILLS AND NOTES, 5; FIRES, 2.**JOINT OWNERS.** See NOTICE.**JOINT RATES.** See CARRIERS, 18.**JUDGMENT.** See also CONTRACTS, 8; RELIGIOUS SOCIETIES, 1.

1. The right of action on a judgment exists at common law, in the absence of a statute to the contrary. *Bettman v. Cowley* (Wash.) 815

2. A judgment is not rendered so as to constitute a lien from the "time of such rendition," within the meaning of Iowa Code, § 8801, until it is entered on the record of the court, as required by § 8784, although a form of judgment has been signed by the judge and indorsed "filed" by the clerk. *Callanan v. Votruba* (Iowa) 875

3. The decree of a probate court ordering the sale by a guardian of shares of stock owned by infants is void, when it was made without any notice to them or to the guardian upon a petition signed in the guardian's name without any authority. *O'Herron v. Gray* (Mass.) 498

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Judgment; validity of divorce in other state. 291

When becomes lien. 875

Validity of statute restricting lien on. 815

JUDICIAL NOTICE. See PLEADING, 8.**JUDICIAL SALE.** See also MORTGAGE, 6-9.

1. The testator's intention that real estate should not be alienated will not prevent a court of equity from ordering its sale if necessary to preserve the benefit of it to the beneficiary. *Gavin v. Curtin* (Ill.) 778

2. Land left to a life tenant and remainderman may be sold by a court of equity if it is necessary to prevent its loss through inability of the life tenant to pay the taxes. *Id.*

3. Possible afterborn children will be bound by a decree directing its sale to preserve the interest of remaindermen under a devise of land from loss for nonpayment of taxes, where 40 L. R. A.

the parties in being and before the court have the same incentive to accomplish the same purpose as would move and possess the parties not in esse if they were in being. 47

4. An undisclosed gold clause in a mortgage subject to which real estate is bought at auction is not a defect in title which will enable the purchaser to withdraw from his contract; nor will a contract be implied on the part of the vendor that no such clause existed, a breach of which will entitle the purchaser to rescind the contract and recover his deposit where the government has pledged its faith to keep all its funds at par, and the terms of the mortgage are such that there is no probability that the policy of the government will be changed before the mortgage becomes due. *Blanch v. Sadlier* (N. Y.) 666

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Judicial sales; enforcement of. 67

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JURY. See APPEAL AND ERROR, 20; EVIDENCE, 7; TRIAL, 1, 2; WITNESSES, 1.**JUSTICE OF THE PEACE.**

The Nebraska district court has no jurisdiction of the person of the surety on an undertaking on appeal from a justice's judgment that it may on rendering a judgment against appellant render the same against the surety. *Drummond Carriage Co. v. Mills* (Neb.) 761

LANDLORD AND TENANT. See also ACTION OR SUIT, 1.

The lessor of a pulp mill does not owe to the servants of the lessee the duty of making the requisite examination, or of possessing the requisite technical learning, and communicating the results as to the safe condition of a digester in the mill, before turning the plant over to the lessee. *Whitmore v. Oronau Pulp & P. Co.* (Me.) 377

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LEPROSY. See CONTRACT, 7; INJUNCTION, 10.

LIBEL AND SLANDER. See also CASE, 3.

1. The transmission by sound over telegraph wires by the telegraph operator at one place to an operator at another, of a libelous message to be by the latter reduced to writing and delivered to the person referred to therein, is a publication of the libel. *Peterson v. Western U. Teleg. Co.* (Minn.) 661

2. A telegraph company is liable, whether negligent or not, for the act of one of its operators in transmitting a libelous message over its wires if such act was wrongful, but is not liable, however negligent it may have been in employing the operator, or in not adopting proper rules, if such act was lawful. *Id.*

NOTES AND BRIEFS.

Libel; publication of. 661

LICENSE. See also AWNINGS, 2; INNKEEPERS, 1.

1. A tax upon occupations or employments, whether for revenue or as an exaction for the privilege of pursuing a calling, may be imposed and collected in the form of a license fee. *Banta v. Chicago* (Ill.) 611

2. A delegation of the power to impose license taxes on occupations may be made by the legislature to municipal corporations. *Id.*

3. The uniformity of a license tax on occupations is required by Ill. Const. art. 9, § 1, only as to the class upon which it operates. *Id.*

4. "Goods, wares, and merchandise" for the sale or negotiation of which a broker is required to pay a license tax, include shares in the capital stock of incorporated companies and other securities which are the subject of common barter and sale and which are given visible and palpable form by means of certificates, bonds, or other evidences of indebtedness. *Id.*

5. A license tax on brokers extends to a member of a stock exchange who buys and sells stocks, bonds, or securities on the floor of the exchange in his own name, and makes or receives delivery and payment in the execution of orders for his customers. *Id.*

6. Either regulation or revenue may be the purpose of a license tax imposed on the occupation of a broker and other trades or occupations mentioned in Ill. Const. 1870, art. 9, § 1, and it is not material to determine which may be the purpose of the license. *Id.*

NOTES AND BRIEFS.

License; of brokers. 611

LIENS. See also JUDGMENT, 2.

1. Every person who has bestowed labor and skill on a chattel bailed to him for the purpose, thereby increasing its value, has a lien on such chattel under the common law, and may retain the same until paid his reasonable charges for his services. *Drummond Carriage Co. v. Mills* (Neb.) 761

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2. One who makes needed repairs on a mortgaged buggy left with him for the purpose by the mortgagor without the knowledge of the mortgagee is entitled to a lien thereon for his services superior to that of the mortgagee where the latter has given the mortgagor at least implied authority to have repairs made by a clause in the mortgage that the mortgagor should not so negligently or improperly use or care for the buggy as to subject it to probable loss or material depreciation in value. *Id.*

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Liens; priority as to chattel mortgage. 762

LIFE TENANTS. See EQUITY, 4.

LIGHT. See EASEMENTS, 7-9.

LIMITATION OF ACTIONS. See also CONSTITUTIONAL LAW, 5.

1. The right of a foreign corporation to plead the statute of limitations under Cal. act April 1, 1872, depends upon its compliance with the statute in respect to the designation of a person upon whom process may be served. *Pierce v. Southern P. Co.* (Cal.) 850

2. The failure of a foreign corporation to file and register its charter in compliance with the statute when doing business in the state until after action is brought against it will not prevent it from pleading the statute of limitations. *Turcott v. Yazoo & M. V. R. Co.* (Tenn.) 768

3. A foreign corporation is not "out of the state" within the meaning of Shannon's (Tenn.) Code, § 4455, so as to preclude the defense of the statute of limitations, when the corporation has officers and agents in the state on whom service can be made at any time. *Id.*

LODGE. See INJUNCTION, 2; PLEADING, 2.

LOST INSTRUMENTS. See EVIDENCE, 21, 22.

LUNATICS. See INSANE PERSONS.

MALICE. See FENCE, 1; NOTES AND BRIEFS.

MANDATORY INJUNCTION. See INJUNCTION, 2.

MAP. See PLAT; RAILROADS, 4-6.

MARRIAGE. See CONFLICT OF LAWS, 3.

MASSES. See also COMMON LAW.

1. A bequest of a certain sum to a bishop to be used and applied for masses for the repose of the souls of certain persons specified is void for the reason that there is no beneficiary who may enforce performance of the trust. *McHugh v. McCole* (Wis.) 724

2. A trust, and not an absolute gift to the individual named as recipient of the gift, is effected by a bequest to a certain person "to be used and applied as follows: for masses for the repose of" the souls of certain persons named, etc. *Id.*

But see cases following.

3. A gift by will of a certain sum to a priest to say masses for the testator, being an outright gift to take effect at once, is valid. *Sherman v. Baker* (R. I.) 717

4. A bequest for the celebration of mass for the souls of the testator and another, made to a priest, is valid as a gift direct to the donee with an injunction to the performance of the ceremonial named; and the fact that there is no living beneficiary is immaterial because no trust is created. *Harrison v. Brophy* (Kan.) 721

5. A devise and bequest to a church in trust to expend the proceeds in saying masses for the repose of the souls of certain persons is not void as a mere private trust, but is a valid charitable gift, aiding to support the clergy and public worship, as it is presumed that the masses will be said in public. *Hoeffer v. Clo* (Ill.) 730

6. A bequest to the parish priest of a certain church to say masses for the testator goes to the priest who is in office when the will takes effect. *Sherman v. Baker* (R. I.) 717

NOTES AND BRIEFS.

Masses; validity of bequests for. 717

MASTER AND SERVANT. See also BUILDINGS, 2, 3; CONTRACTS, 5; CUSTOM, 1; LIBEL AND SLANDER, 2.

1. Notice of a contract between an express company and a railroad company, to the effect that the former will hold the latter harmless against claims by the express company's employees for negligence of the railroad company or otherwise, is chargeable to one of such employees who goes upon the tracks of the railroad company in the course of his employment under the license given to the express company by the contract. *Pittsburgh C. C. & St. L. R. Co. v. Mahoney* (Ind.) 101

2. A release by an employee of an express company, of all liability for injuries sustained by negligence of the employer "or otherwise," includes the liability of the express company to hold a railroad with which it does business harmless against claims by the express company's employees for injuries, and precludes an action against the railroad company for causing his death by suddenly closing the opening between parts of a train while he was passing between them. *Id.*

Assumption of risks.

3. An employee assumes the risk of his employer's methods which are known to and acquiesced in by him, if they do not violate any statute. *Huda v. American Glucose Co.* (N. Y.) 411

4. An assumption of risks, by express contract of a local employee of an express company, includes the risk of injuries by cars of a railroad company with which the express company does business. *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney* (Ind.) 101

5. A servant may rely on the promise of his master to repair defects in the place where the labor is to be performed, only so long as is reasonably necessary to make the repairs; and if he continues in his employment after the 40 L. R. A.

lapse of such time he will be considered to have waived the defects and to have assumed the additional risk. *Illinois Steel Co. v. M...* (Ill.) 781

Mine boss.

6. A mine boss employed according to the provisions of W. Va. Code 1891, Append. p. 995, § 11, is such a fellow-servant of workmen in the mine that in case of injury to them through his negligence the master is not responsible. *Williams v. Thacker Coal & C. Co.* (W. Va.) 813

7. The employment of a competent mine boss, as required by W. Va. Code 1891, Append. p. 995, § 11, discharges the duty prescribed by statute, and the employer is not liable for the negligence of such mine boss. *Id.*

Independent contractor.

8. That an independent contractor is in charge of an entertainment at grounds provided by a street-car company for free entertainment of patrons will not entirely relieve the company from liability for injuries to patrons, if the entertainment is of such a character that it will probably cause injury to spectators unless due precautions are taken to guard against them. *Thompson v. Lowell I. & H. Street R. Co.* (Mass.) 345

9. The arrangement of the stage and target at which an exhibition of marksmanship is given by an independent contractor to street-car patrons upon grounds of the street-car company is not, as matter of law, so much a matter of detail that the company will not be liable in case it is so negligently arranged that a patron is injured by a shattered bullet. *Id.*

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Master and servant; liability for employing drunkard. 146

Liability for servant's act. 453

Liability for acts of contractor. 346

Duty to keep premises safe for servant. 813

Negligence as to place of work; as to fire escapes. 411

The rights of a servant who continues work on the faith of his master's promise to remove a specific cause of danger:—(I.) Introductory. (II.) general rule stated; (III.) *rationale* of the relation between the parties after the giving of the promise; (IV.) continuance of work after promise not contributory negligence as matter of law: (a) generally; (b) contributory negligence predicated from the gravity of the risk incurred; (c) contributory negligence predicated from the length of time the servant has worked after the promise was given; (d) illustrative cases; (V.) servant's action not maintainable unless his continuance of work was actually induced by the master's promise to protect him from some danger, etc.; (VI.) whose promise is binding on an employer; (VII.) rule where the promise relates to simple appliances; (VIII.) obligations of the servant pending the fulfillment of the promise. 78

MAXIMS.

1. *Damnum absque injuria.* *Kinney v. Kinney* (Iowa) 68

2. Equity always regards as done what

ought to have been done. *Re Hatch* (N. Y.) 664

8. Expressio unius est exclusio alterius. *People, Mooney, v. Hutchinson* (Ill.) 770

4. Ex turpi causa non oritur actio. *Morrison v. Bennett* (Mont.) 158

5. Mobilia sequuntur personam. *Loundes v. Cooch* (Md.) 880

6. Nemo allegans turpitudinem suam est audiendus. *Cardwell v. Kelly* (Va.) 240

7. Omnia præsumentur contra spoliato rem. *Western & A. R. Co. v. Morrison* (Ga.) 84

8. Potior est conditio possidentis. *Morrison v. Bennett* (Mont.) 158

9. Res ipsa loquitur. *Nichols v. Peck* (Conn.) 81; *Perham v. Portland General Elec. Co.* (Or.) 799

NOTES AND BRIEFS.

Nemo allegans turpitudinem suam est audiendus. 240

Which of two innocent persons must suffer loss. 82

MEDICAL BOOKS. See also COURTS, 1; EVIDENCE, 26-28.

NOTES AND BRIEFS.

Medical books; as evidence. 558

MINES. See also CLOUD ON TITLE, 3-5; MASTER AND SERVANT, 6.

1. A grant of "the sole right to produce petroleum and natural gas" from certain land for ninety days from date, and as much longer as oil or gas is found and produced in paying quantities, containing a covenant for the completion of an additional well within ninety days, is not a lease, but a grant of a right, which expires by its own limitation at the end of ninety days if the conditions of its extension are not complied with. *Dettor v. Holland* (Ohio) 266

2. Petroleum oil and natural gas are not included in a deed of "all the iron ore, fire clay, and other valuable minerals" in certain premises, with the right to use so much of the surface of the land as may be necessary "for pits, shafts, platforms, drains, railroads, switches, side-tracks, etc., to facilitate the mining and removal of such coal, ore, or other minerals, and no more, as the words 'other minerals,' although broad enough to include oil and gas, were not apparently intended to include them. *Id.*

MOB. See also BONDS, 4; SHERIFF.

NOTES AND BRIEFS.

Mob; liability of sheriff for acts of. 628

MONEY. See also JUDICIAL SALE, 4.

1. The right to contract for payment in gold coin of the United States cannot be taken away by a state statute which attempts to make any debt payable in any kind of lawful money. *Dennis v. Moses* (Wash.) 802

2. The rules of the Treasury Department 40 L. R. A.

of the United States in regard to the redemption of mutilated notes relate simply to redemption, and do not make a mutilated bill legal tender. *North Hudson County R. Co. v. Anderson* (N. J. Err. & App.) 410

3. A dollar bill from the upper left-hand corner of which a piece an inch and a half by an inch and a quarter has been torn is not a legal tender for car fare, since the conductor is not bound to accept a bill substantially mutilated, or from which any part which might aid in determining its genuineness is absent. *Id.*

MORTGAGE. See also CASE, 2; CONSTITUTIONAL LAW, 10; LIENS, 2; TRUSTS, 8.

1. Each of several notes secured by a deed of trust is to be considered as a separate and complete contract within itself, uncontrolled in its terms by anything contained in the deed of trust. *Oving v. McKenzie* (Mo.) 154

2. The mere nonpayment of the first of two notes, secured by deed of trust, without any action on the part of holders, will not render the other note due, although the deed of trust provided that upon default in payment of the first note both should become immediately due and payable. *Id.*

Assumption of debt.

3. A mortgagee who sues a purchaser from the mortgagor for a portion of the mortgage debt, which such purchaser has assumed to pay, does not thereby adopt the covenants of warranty in the mortgagor's deed except as against the part of the indebtedness assumed and sued for, so as to prevent foreclosure of the mortgage against such purchaser for the balance of the debt. *Knapp v. Connecticut Mut. L. Ins. Co.* (C. C. App. 8th C.) 861

4. The right of a mortgagee to enforce the payment of a mortgage debt as against the grantee of the mortgagor, who has assumed its payment, does not rest upon any contract between the mortgagee and grantee which is enforceable by the mortgagee by a suit at law, but is founded upon the fact that the grantee has become primarily liable to pay the debt while the mortgagor is surety for its payment, so that the mortgagee may be subrogated to the rights of the mortgagor, and may, by a suit in equity, compel the grantee to keep his engagement. *Id.*

Foreclosure.

5. Sales on mortgage foreclosures are within the provisions of Wash. Laws 1897, p. 98, respecting appraisement before sale. *Dennis v. Moses* (Wash.) 802

6. The appraisement required before sale on foreclosure by Wash. Laws 1897, p. 70, cannot be waived in the mortgage itself, although it may be waived after default. *Id.*

7. Not more than the amount of a debt of a mortgagee or lienor need be bid upon all the parcels of property when several are included in the security, under Wash. Laws, 1897, p. 70, and he may segregate his debt and bid a part on each parcel sold. *Id.*

8. A mortgagee or lienor may have a sale

for the amount of his debt, under Wash. Laws 1897, p. 70, § 10, even if that is less than 80 per cent of the value of the property or portion of the property sold. *Id.*

9. Waiver of the right of a mortgagor to remain in possession of property during the period of redemption given by Wash. Laws 1897, p. 227, cannot be made in the instrument itself, although it may be made after default. *Id.*

10. Objection to the application of the proceeds of a sale under a deed of trust securing two notes, in satisfaction of the first, cannot be made by mesne conveyancers who by purchase and sale of the property acquire the position of sureties on the note, because their liability had been released by an extension of the time of payment without their consent. *Owings v. McKenzie (Mo.)* 154

On chattels.

11. The title to mortgaged chattels remains in the mortgagor under the Nebraska statute until foreclosure of the mortgage. *Drummond Carriage Co. v. Mills (Neb.)* 781

12. A married man may without his wife's consent select the cows which he will claim as exempt in giving a chattel mortgage on certain cows, under 2 How. (Mich.) Ann. Stat. § 7686, providing that two cows shall be exempt to each householder from any final process and that any chattel mortgage created on any part of such exempt property shall be void unless the mortgage is signed by the wife of the mortgagor. *Harley v. Procuier (Mich.)* 150

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Mortgage; on chattels; exemption for benefit of family. 150

Assumption of, by vendee. 863

MUNICIPAL CORPORATIONS. See also AWNINGS, 2; ELECTRICAL USES AND APPLIANCES; ESTOPPEL, 3; INJUNCTION, 3, 4; INTOXICATING LIQUORS; LICENSE, 2; NEGLIGENCE, 1; TRIAL, 4.

1. A city cannot accept a grant from another state to operate a toll road beyond its limits and the limits of its own state or be held liable for defects in such road if operated by it, when it is not authorized to do so by the laws of its own state, although the toll road is made to connect with a city toll bridge that the city has constructed under lawful authority. *Becker v. La Crosse (Wis.)* 829

2. A debt for the purchase of an electric-light plant for a municipal corporation is not one of the "necessary expenses" of the town, within the meaning of N. C. Const. art. 7, § 7, so that it can be created without a vote of the majority of the qualified voters and legislative authority. *Mayo v. Washington (N. C.)* 163

3. Discrimination between citizens can not be made by a city with respect to the erection of awnings as permanent structures. *Hibbard v. Chicago (Ill.)* 621

4. A mere resolution or order by the city council, not passed and published as an ordinance of the city, will not constitute a repeal of an ordinance. *Id.*

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5. A proceeding by a municipal corporation to enforce such fines and penalties as are ordinarily and by usage enforced by municipalities is not a prosecution or criminal in its nature, but only quasi criminal, whatever may be the form of the procedure. *Ex parte Page (Tex. Crim. App.)* 212

6. It cannot be made by ordinance an offense against a city to do what a statute makes an offense against the state, triable only in a court of record (e. g., the keeping or exhibiting of a gaming table or bank), where the constitution of the state provides that all prosecutions shall be conducted in the name and by the authority of the state and shall conclude against the peace and dignity of the state. *Id.*

Liabilities.

7. A city is not liable, in the absence of any statutory provision, for an injury to a private barge caused by the failure of a bridge tender seasonably to open a draw in the bridge in response to proper signals, because of the bridge becoming caught, where the city does not derive any benefit from the bridge, but simply maintains it for the public good. *Corning v. Saginaw (Mich.)* 526

8. A person injured by the explosion of a cannon cracker on a city street on the Fourth of July in violation of an ordinance, while persons assembled there are exploding fire-crackers without any common purpose to injure anyone, cannot recover from the city for the damages, under Sanb. & B. (Wis.) Ann. Stat. § 938, making a city liable for injury done by a mob or a riot, and under Wis. Rev. Stat. § 4511, providing that three or more persons shall be guilty of a riot if they assemble in a violent or tumultuous manner to do an unlawful act, or, being together, attempt to act in a violent, unlawful, or tumultuous manner. *Aron v. Wausau (Wis.)* 733

9. The liability of a city for a pond of water on private property and not in dangerous proximity to a public street or alley is no greater than that of a private owner of property similarly situated, even though the city may have created the pond. *Omaha v. Bowman (Neb.)* 331

NOTES AND BRIEFS.

See also INJUNCTION.

Municipal corporations; necessary expenses of, what are. 163

Liability for bridges. 526

Liability for dangerous premises. 531

Liability for riot. 733

Duty as to electric wires in streets. 811

Liability of, for negligence. 829

MUTES. See NEGLIGENCE, 6.

NAME. See ASSIGNMENT, 1; CORPORATIONS, 4; GOODWILL, 2; INJUNCTION, 1.

NATURAL GAS. See MINES.

NEGLIGENCE. See also ANIMALS, 5; CARRIERS, 1-3, 6; CONVICTS, 1; DAMAGES, 8; ELECTRICAL USES AND APPLIANCES; ESTOPPEL, 2; EVIDENCE, 12, 14, 16; EXHIBITIONS, 2; FIRE; HIGHWAYS, 5; LANDLORD AND TENANT: PROXIMATE CAUSE; RAILROADS, 8, 9; TRIAL, 3, 4, 6, 9, 10; TRUSTS, 7.

1. The liability of a city to the owner of premises for causing the overflow of water and the formation of a pond thereon does not make the city liable to third persons for the drowning of a child in the pond, where it was not in dangerous proximity to a street, and especially when the child did not go to the pond from a street. *Omaha v. Bowman* (Neb.) 581

2. Leaving a platform car with no machinery about it or any brake on a side track of a street railway in such condition that it may be moved by the united strength of several children, is not negligence which will render the company liable for an injury to a child playing with it. *Kaumeier v. City Elec. R. Co.* (Mich.) 385

3. A shipper of lumber is not liable for injury to a railroad brakeman while coupling cars, by the shunting of the lumber, because it was negligently loaded, where the accident happened after it had become the duty of the railroad company to provide for inspection of the car. *Fowles v. Briggs* (Mich.) 528

Contributory.

4. When both parties are negligent the true rule is that the one who last had a clear opportunity to avoid the accident notwithstanding the negligence of the other is solely responsible for it. *Thompson v. Salt Lake Rapid Transit Co.* (Utah) 172

5. Contributory negligence will not defeat a right of action if the injury was proximately caused by the omission of the other party to use ordinary care for avoiding the injury after becoming aware of the plaintiff's danger. *Id.*

6. A deaf and dumb boy fourteen years old, with average intelligence and good eyesight, is chargeable with contributory negligence in failing to look for an electric car when crossing its track. *Id.*

NOTES AND BRIEFS.

Negligence; intoxication as affecting:—(I.) Intoxication no excuse; (II.) when it amounts to contributory negligence; (a) generally; (b) with relation to trespassers; (c) with relation to persons injured at crossings; (d) with relation to passengers; (e) with relation to persons injured on highways, streets, etc.; (f) with relation to miscellaneous matters; (III.) effect when there is negligence on both sides; (IV.) question for the jury; (V.) presumption and burden of proof; (VI.) intoxication as evidence of negligence; (a) admissibility; (b) weight and sufficiency; (VII.) employment of persons having habits of intoxication. 181

Of deaf and dumb person or infant. 174

Leaving street car where children may be injured by it. 885

Concurrent, of third person. 804

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NEW TRIAL. See EJECTMENT, 8, NOTES AND BRIEFS.

NOTICE. See also MASTER AND SERVANT, 1.

A notice addressed to four joint owners of a grant of the right to produce oil and gas, to the effect that the grant has expired and they must keep off the premises, is binding on them all when served upon one of them. *Detlor v. Holland* (Ohio) 266

NUISANCES. See also AWNINGS, 1; HOSPITALS, 2.

1. The right to maintain a public nuisance cannot be gained by prescription. *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* (Utah) 851

2. A prescriptive right to maintain a private nuisance must be adverse, under a claim of right, uninterrupted, and continuous for twenty years, with the knowledge and acquiescence of the party whose right is invaded. *Id.*

3. The mixing of impure water with water used for irrigation and domestic purposes, rendering it unfit for such use, creates a nuisance under Utah Comp. Laws, § 3463. *Id.*

4. The befouling of the waters of a canal from which a number of persons (more than three) obtain water for irrigation, culinary, and other domestic purposes, so that it is unfit for use, creates a public nuisance under Utah Comp. Laws 1888, § 4566. *Id.*

5. Persons who locate near a pest house which was not a nuisance when established because it was a secluded locality are not deprived of redress if they are injured by it, merely because they have voluntarily chosen to reside in close proximity to it, unless the right to maintain it has ripened by prescription into an indefeasible right. *Baltimore v. Fairfield Improv. Co.* (Md.) 494

6. A digester in a pulp mill, which is not dangerous unless it is used, does not constitute a nuisance which will render the owner liable for injuries resulting to employees of a lessee by its explosion. *Whitmore v. Orono Pulp & P. Co.* (Me.) 877

OCCUPATION TAX. See LICENSE.

OFFICERS. See ASSUMPSIT; BONDS, 3, 4; REWARD.

OIL. See CLOUD ON TITLE, 3-5; MINES.

OPTION. See SYNDICATE, 4.

ORANGE TREES. See CARRIERS, 12.

ORDINANCE. See MUNICIPAL CORPORATIONS, 4, 6.

PARENT AND CHILD. See HUSBAND AND WIFE, 10-14.

PARKS. See also INJUNCTION, 6.

The erection of a schoolhouse upon a lot dedicated "only for public use as an ornamental park" is a wrongful use of the property. *Rowzee v. Pierce* (Miss.) 402

PARTIES. See ACTION OR SUIT, 5, 6; APPEAL AND ERROR, 2.

PARTNERSHIP. See also BILLS AND NOTES, 8; CARRIERS, 14; GOODWILL, 1; SYNDICATES, 2.

1. Partnership property may be conveyed to pay notes signed by the individual partners, and not in the firm name. *Victor v. Glover* (Wash.) 297

2. Subsequent creditors of an insolvent firm cannot complain that a note was given by the continuing partners to a withdrawing member for his alleged share in the assets of the firm. *Id.*

3. The only ground on which unpreferred creditors of a partnership can complain of a deed of trust made by it for benefit of creditors is that the claims of preferred creditors are not bona fide and real. *Id.*

4. A syndicate agreement which merely provides for raising money to purchase certain lands at a given price, without any provisions for selling the lands and dividing the profits, does not constitute a partnership agreement. *Ferguson v. Gooch* (Va.) 234

NOTES AND BRIEFS.

See also SYNDICATES.

Partnership; transfer of property to pay debts; relative rights of creditors. 298

PASSWORD. See INJUNCTION, 2.

PAYABLE. See DEFINITIONS.

PAYMENT. Medium of, see BILLS AND NOTES, 6.

NOTES AND BRIEFS.

Payment; option as to medium of; in something other than money. 74

PEDDLERS. See INNKEEPERS, 2.

PEDIGREE. See EVIDENCE, 37.

PENALTIES. See MUNICIPAL CORPORATIONS, 5.

PERPETUITIES. See CHARITIES, 1.

PEST HOUSE. See HOSPITALS; INJUNCTION, 11; NUISANCES, 5.

PETROLEUM. See MINES.

PHYSICAL EXAMINATION. See DISCOVERY.

PIERS. See WHARVES, NOTES AND BRIEFS.

PLAT.

The indication of a block upon a plat between a highway and a lake must give way if, when the highway is located, no land is left between it and the lake shore. *Madison v. Mayers* (Wis.) 635

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PLEADING. See also CASES CERTIFIED: EVIDENCE, 43.

1. A declaration is bad for duplicity when it states in one count a good cause of action for interference with real property and one for injury to reputation, as to which it is demurrable. *Gore v. Condon* (Md.) 332

2. An allegation that a person pays dues to a lodge, and that lodge pays to a grand lodge, and that both bodies are chartered benevolent societies, does not sufficiently allege that they have any rights of property in the grand lodge. *Wellenross v. Grand Lodge E. of P.* (Ky.) 43

3. Future pain and anguish cannot be considered in assessing damages under a pleading which alleges pain and injury in the past tense only. *Shultz v. Griffith* (Iowa) 117

4. Other allegations in a petition for divorce may be treated as surplusage and the action sustained as one for the maintenance of a child, when the parties have been previously divorced. *Gibson v. Gibson* (Wash.) 567

5. An allegation that the plaintiff could have made arrangements to get water for his cattle if a telegram had been delivered to him promptly, without alleging where and in what manner he could have done so, is insufficient as against a special exception in an action for damages because of failure to deliver a telegram. *Western U. Teleg. Co. v. Mitchell* (Tex.) 26

6. A complaint alleging an implied liability of a bishop of the Roman Catholic Church to a priest under the rules and regulations of the church, without alleging any express agreement to that effect, or anything to show the nature of the church or its civil rights, power, or capacity, or whether it is a corporation, a voluntary association, or a mere name adopted by the pleader for some purpose undisclosed, —does not state a cause of action. *Baxter v. McDonnell* (N. Y.) 679

Demurrer.

7. A demurrer admits issuable facts alleged in the complaint, and not mere conclusions of law from such facts. *Aron v. Wausau* (Wis.) 733

8. A demurrer to a declaration does not admit impossible or improbable allegations of fact, so as to prevent the court from passing upon the allegations, which in their nature are contrary to human experience and common knowledge, as matter of law, and to compel the submission thereof to a jury. *Southern R. Co. v. Covenia* (Ga.) 253

9. Allegations that a child one year, eight months, and ten days of age was capable of rendering services, and did render certain specified services of the value of \$2 per month, are not admitted by demurrer. *Id.*

10. An answer is not demurrable when the complaint is defective. *Baxter v. McDonnell* (N. Y.) 679

11. A complaint giving the whole history of a shipment of goods, deviation from the proper route, and the damage resulting thereby, is not insufficient to state a cause of action as against a general demurrer, even if it might be subject to a demurrer on the ground of

ambiguity or uncertainty. *Pierce v. Southern P. R. Co.* (Cal.) 850

NOTES AND BRIEFS.

Pleading of negligence. 102
Statement of facts or evidence thereof. 209
Complaint in action for death. 808

POLICE. See ARREST.

PONDS. See MUNICIPAL CORPORATIONS, 9; NEGLIGENCE, 1.

POSSE COMITATUS. See also COUNTIES.

NOTES AND BRIEFS.

Posse comitatus; compensation to. 406

POWER OF ATTORNEY. See PRINCIPAL AND AGENT, 2, 8.

PRESCRIPTION. See NUISANCES, 1, 2.

PRIESTS. See RELIGIOUS SOCIETIES.

PRINCIPAL AND AGENT. See also BILLS AND NOTES, 7; SYNDICATES, 8, 5.

1. A principal is bound by and responsible for the representations and concealments made by an agent in the line and within the scope of his employment. *Baltimore Trust & C. Co. v. Hambleton* (Md.) 216

2. A strict construction will not be placed upon a power of attorney to convey an interest in land after the lapse of many years, the effect of which would be to oppose the clear intent of the parties and divest titles acquired in good faith under it. *Gratz v. Land & R. Improv. Co.* (C. C. App. 7th C.) 898

3. A recorded power of attorney to convey land is not revoked by an unrecorded conveyance of the land by the principal, so as to defeat titles subsequently acquired in good faith from the attorney. *Id.*

NOTES AND BRIEFS.

Agent acting for both parties. 824

PRINCIPAL AND SURETY.

Extension for a valuable consideration, without consent of the sureties, of the first of two promissory notes secured by deed of trust, will not release the liability of the sureties upon the other note, which is not then due by its terms, although the deed of trust provided that upon default in payment of the first note at maturity the other should immediately become due and payable. *Owings v. McKenzie* (Mo.) 154

NOTES AND BRIEFS.

Release of surety by extension of time. 154

PRIVILEGE. See HUSBAND AND WIFE, 7.

PROHIBITION.

Prohibition may be issued to prevent a board of school directors from trying charges against a school superintendent, when one of 40 L. R. A.

the directors is disqualified by enmity and prejudgment of the case, while there is no appeal from the decision of the board. *State, Barnard, v. Seattle Bd. of Edu.* (Wash.) 317

PROMOTERS. See CORPORATIONS, 9, 10; SYNDICATES, 2.

PROXIMATE CAUSE.

1. Failure to keep a convict properly confined is not the efficient or proximate cause of damages caused by his committing the crime of rape, unless that could have been reasonably apprehended. *Henderson v. Dade Coal Co.* (Ga.) 95

2. Negligence in using an electric car with defective brakes and appliances which prevented stopping it in time to avoid the effect of the contributory negligence of a person injured is the proximate cause of the injury. *Thompson v. Salt Lake Rapid Transit Co.* (Utah) 172

3. The duty of a railroad company to provide for the inspection of a car of lumber negligently loaded constitutes the intervention of an independent human agency between the negligence of the shipper and an injury to a railroad brakeman caused thereby. *Fowles v. Briggs* (Mich.) 528

4. The negligence of a guardian in leaving certificates of stock indorsed with her signature in a bank for safe keeping is not the proximate cause of the advance of money upon them to a cashier of the bank who feloniously takes them, since this criminal conduct could not reasonably be anticipated. *O'Herron v. Gray* (Mass.) 498

NOTES AND BRIEFS.

Proximate cause, what constitutes. 95

As to damage by fire. 459

PUBLICATION.

1. The English language must be used in all legal and official notifications or proceedings, in the absence of any statute authority to the contrary. *State, Goebel, v. Chamberlain* (Wis.) 843

2. Publication of a delinquent tax list in the English language, but in a newspaper which is otherwise printed in the German language, is not a legal publication, when no authority therefor has been given, in accordance with Wis. Rev. Stat. § 875, by the county board. *Id.*

PUBLIC CORPORATION. See STATE INSTITUTIONS.

PUBLIC MONEY. See also BONDS, 8.

1. The maintenance of a state university established by the state Constitution is a public purpose. *State, Garth, v. Swoitzer* (Mo.) 280

2. The maintenance of free scholarships in a state university, for the support of those students who are dependent upon their own exertions for their education and financially unable to obtain it otherwise, who shall pass the most meritorious examinations, is the use of

funds for a private purpose, and a statute appropriating public moneys therefor is in violation of Mo. Const. art. 4, § 46, prohibiting grants in aid of any individual. *Id.*

PUBLIC POLICY. See ATTORNEYS' FEES; CONTRACTS, 5.

PULP MILL. See NUISANCES, 6.

PURPRESTURE. See AWNINGS, 1.

QUARANTINE. See HOSPITALS, 2.

RAILROAD COMMISSIONERS. See CARRIERS, 15; EVIDENCE, 17-19; RAILROADS.

RAILROADS. See also CORPORATIONS, 8; EASEMENTS, 2; EVIDENCE, 14-16, 40; MASTER AND SERVANT, 1, 2, 4; TRIAL, 9, 10.

1. Land covered by a highway may be occupied by the railroad commissioners for the construction of a bridge to abolish a grade crossing, if necessary to abate a nuisance. *Bristol v. New England R. Co. (Conn.)* 479.

2. Directing abutments to be placed on street lines, in an order of the state railroad commission for the abolition of a grade crossing, does not preclude the placing of other abutments in the street by reference to a map showing them so located. *Id.*

3. An order by the state railroad commission requiring the abolition of a grade crossing, which refers to a plan of the work showing abutments in the highway, is a defense to a suit by the municipality to enjoin the railroad company from placing the abutments in the highway. *Id.*

4. A map of a proposed abutment in a highway to support an overhead railroad is sufficient if it contains such reference to monuments in the vicinity of its site that a competent surveyor can ascertain the points at which to set stakes. *Id.*

5. An order of the railroad commission directing the abolition of a grade crossing sufficiently describes the abutments to be erected in the highway, if it refers to a map upon which they are delineated. *Id.*

6. A sufficient appropriation of a portion of a highway for the abutment of a bridge for the abolition of a grade crossing is made by an order of the railroad commissioners directing it to be made and referring to a map showing the abutment in the highway, without formally condemning or discontinuing the portion of the highway covered. *Id.*

Injury by trains.

7. Failure to fence a railroad does not render the railroad company liable for horses killed by a train just after a fire had swept everything combustible on both sides of the railroad, so that the fence, if built, would have been burned, when the statute makes the company liable for all damage to animals "occasioned in any manner, in whole or in part, by the want of such fence." *Cook v. Minneapolis, St. Paul & S. Ste. M. R. Co. (Wis.)* 457

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8. Sitting or lying on a railroad track when struck by a train at night between 12 o'clock and daylight constitutes contributory negligence, as matter of law. *Parish v. Western & A. R. Co. (Ga.)* 364

9. Blowing a locomotive whistle loudly several times under a bridge which is a much traveled public thoroughfare, over which vehicles of all kinds are constantly passing, is, in the absence of some special necessity therefor, an unnatural and reckless act creating a liability for resulting damages. *Mitchell v. Nashville, C. & St. L. R. Co. (Tenn.)* 426

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Railroads; negligence of person on track. 364

Duty as to trespasser on track. 680

Negligence of person struck by train. 747

RAPE. See CONVICTS; PROXIMATE CAUSE, 1.

REAL ACTIONS. See EJECTMENT. NOTES AND BRIEFS.

REAL PROPERTY. See ALIENS; PRINCIPAL AND AGENT, 3; WATERS, 1.

RECEIVERS. See ACTION OR SUIT, 4.

RECORDS. See EVIDENCE, 23.

REFORMATORY. See CONSTITUTIONAL LAW, 3.

RELEASE. See MASTER AND SERVANT, 2.

RELIGIOUS SOCIETIES. See also EVIDENCE, 2; PLEADING, 6; TRUSTS, 5, 6.

1. The decision of an ecclesiastical tribunal concerning the rights, duties, and obligations of a priest or minister of the church who has submitted the controversy to it for decision, is a bar to a subsequent action by him in a civil court. *Baxter v. McDonnell (N. Y.)* 670

2. A bishop is not the employer of a priest of the Roman Catholic Church, although he has power to assign priests to duty, and is not personally liable under the laws of the church, in the absence of any express promise, to pay the priest for his services to the church. *Id.*

3. A bishop of the Roman Catholic Church cannot be held liable on the contracts of his predecessor, in the absence of an express agreement. *Id.*

NOTES AND BRIEFS.

Religious societies; conclusiveness of decisions of tribunals of. 670

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For dogs. 507

REPUTATION. See CASE, 3.

RESOLUTION. See MUNICIPAL CORPORATIONS, 4.

RESUME.

For *Resumé* of Contents of Book see 865

REWARD. See also **ARREST.**

1. It is against sound public policy to allow an officer to receive a reward for the performance of his duty. *Lees v. Colgan* (Cal.) 355

2. The offer of a reward for the arrest of a murderer, by Cal. Pen. Code, § 1547, does not extend to an arrest by an officer whose duty it is to make it. *Id.*

RIOT. See **MUNICIPAL CORPORATIONS, 8.**

RIPARIAN RIGHTS. See **WATERS, NOTES AND BRIEFS.**

SALE.

1. The delivery of property by a vendor, under a contract which is silent as to the place of delivery, to a carrier for transportation, consigned to the vendee, divests the vendor's title, and the title of the purchaser attaches from the moment of such delivery, the carrier being in contemplation of law the bailee of the consignee. *A. J. Neimeyer Lumber Co. v. Burlington & M. R. Co.* (Neb.) 534

2. The vendor's title to property under a contract expressly providing that delivery shall be made at a certain place is not divested until delivery is so made. *Id.*

NOTES AND BRIEFS.

Sale; transfer of title by delivery to carrier. 535

SCHOLARSHIP. See **PUBLIC MONEY, 2; STATUTES, 3.**

SCHOOLS. See also **PARKS; PROHIBITION; TAXES, 3, 4.**

A school director is disqualified to sit as a member of the board to try charges of misconduct of a school superintendent, when he has a personal enmity toward him, and has been a prime mover in the prosecution of the charges, and has declared that he should vote for his conviction, while there is no appeal from the decision of the board. *State, Barnard, v. Seattle Bd. of Edu.* (Wash.) 317

SCIENTIFIC BOOKS.

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As evidence. 553

SERVICE. See **NOTICE.**

SET-OFF.

1. Only one of mutual debts or claims need be due at the time of an assignment for creditors by one of the parties, in order to give the right of set-off in equity. *Re Hatch* (N. Y.) 664

2. A claim which was due when the debtor made an assignment for creditors can be set off against a claim in favor of the assignee against the creditor for a share of the 40 L. R. A.

proceeds of collections made after the assignment on judgments which the assignor, before the assignment, had transferred to the creditor under a contract for a division of the proceeds. *Id.*

NOTES AND BRIEFS.

Set-off; of claim by or against insolvent. 664

SHERIFF. See also **BONDS, 4.**

1. The negligent failure of a sheriff to protect a prisoner from a mob will not make him liable to a civil action on account of the injuries done to the prisoner by the mob. *State, Cocking, v. Wade* (Md.) 623

2. The failure of a sheriff to resist a mob that takes a prisoner from a jail, if caused bona fide by the fact that he was physically unable to cope with the force confronting him, does not make him liable for the consequences, in a civil action. *Id.*

SHERIFF'S POSSE. See **COUNTIES.**

SHOWS. See **EXHIBITIONS.**

SPECIFIC PERFORMANCE.

1. A contract will not be specifically enforced unless it has such mutuality that it may be enforced by either party. *Welty v. Jacobs* (Ill.) 98

2. Particular stipulations of a contract will not be specifically enforced apart from the rest of the contract, where they do not clearly stand by themselves, unaffected by other provisions. *Id.*

3. Specific performance will not be granted in favor of a person who knew when the contract was made that the other party had no authority to dispose of the property which it assumed to dispose of. *Sellers v. Greer* (Ill.) 589

NOTES AND BRIEFS.

Specific performance; of contract known to be unauthorized. 589

STATE. See **ACTION OR SUIT, 5; ESTOPPEL, 4.**

STATE INSTITUTIONS.

An agricultural and mechanical college, which is strictly a public or quasi corporation, created and existing under and by virtue of a statute, cannot be sued in the absence of express statutory authority therefor. *Oklahoma Agricultural & M. College v. Willis* (Okla.) 677

STATE UNIVERSITY. See **PUBLIC MONEY; STATUTES, 3.**

STATUTE OF LIMITATION. See **LIMITATION OF ACTIONS, 1.**

STATUTES. See also **COURTS, 2; EVIDENCE, 23, 25; FOOD.**

1. The invalidity of one section of a statute which is in material relation to other portions of the act so as to modify, restrict, or extend its application, will cause the failure of

the other portions also. *State, Cheyenne, v. Swan* (Wyo.) 195

2. If the amendments proposed by the conference committee and adopted by both houses of a legislature were copied in full upon the journals, an enrolled bill which does not contain them cannot be presumed to have been the one actually passed, although the amendments were not required by law to be spread at length upon the journal. *Id.*

3. Provisions for the creation of a "free scholarship fund," in a statute which provides for using three fourths of the annual income for the support of students who get the scholarships, cannot be sustained when the provision for such use of the income is unconstitutional. *State, Garth, v. Switzer* (Mo.) 280

NOTES AND BRIEFS.

Statutes; strict construction. 611

Impeaching by legislative journals. 195

STENOGRAPHER. See APPEAL AND ERROR, 9, 10.

STREET RAILWAYS. See also ANIMALS, 2; EXHIBITIONS; MASTER AND SERVANT, 9; NEGLIGENCE, 2, 6; PROXIMATE CAUSE, 2; TRIAL, 5.

1. The use of an electric car with brakes so defective that they do not work well, and with a motor so defective that the motorman receives a shock which delays him while trying to stop the car to avoid an accident, constitutes negligence. *Thompson v. Salt Lake Rapid Transit Co.* (Utah) 172

2. The degree of care to be used in operating an electric car in a public street is proportionate to the increased danger arising from the use of electricity. *Id.*

3. A dog is not a trespasser on a street car track which is laid in the highway on the same level with it. *Citizens' Rapid Transit Co. v. Dew* (Tenn.) 518

4. A motorman cannot rely upon the quickness and celerity of a dog to absolve himself from all duty and care to prevent running over him with an electric car. *Id.*

NOTES AND BRIEFS.

Negligence of person killed by street car; of infant. 174

SUCCESSION TAX. See CONSTITUTIONAL LAW, 4; TAXES, 5-7.

SUPERSEDEAS. See APPEAL AND ERROR, 4.

SWITCH. See CARRIERS, 15-17; CORPORATIONS, 3.

SYNDICATES. See also CUSTOM, 2; PARTNERSHIP, 4.

1. A syndicate is an association of individuals formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested. *Baltimore Trust & G. Co. v. Hambleton* (Md.) 216

2. It is the plain and imperative duty of promoters of a syndicate towards persons who are invited to co-operate in the enterprise, not only to abstain from stating as a fact that which is not a fact, but not to omit to state any circumstances within their knowledge the existence of which might in any way affect the extent or quality of the advantages held out as inducements to the others. *Id.*

3. One who pays commissions to a member of a syndicate who acted as his agent in forming it, under a secret agreement giving him an advantage over the other members, is liable to the syndicate as for misapplication of its funds, especially when it was part of a fund held in trust for syndicate expenses, in which such member declared to his associates that he had no interest. *Id.*

4. An additional subscription for a block of bonds by a second syndicate composed in part of members of the first syndicate, which bought bonds with an option for an additional purchase with "the same rights and privileges" provided with reference to the former, is subject to the same provision as to a commission provided for in the original agreement. *Id.*

5. A purchase of lands by real-estate agents on behalf of a syndicate of which they are members, when the agents are also secretly acting as agents of the vendor, cannot be enforced against the other members of the syndicate. *Ferguson v. Gooch* (Va.) 234

6. A selection of a trustee to take title to property purchased for a syndicate and to give a deed of trust thereon for a part of the purchase price is not within the implied authority of real-estate agents who are members of and who formed the syndicate. *Id.*

NOTES AND BRIEFS.

Syndicates: relations and rights of syndicate members:—(I.) Scope and nature of the subject; (II.) rights and powers of members; (III.) rights, duties, and liabilities in transactions between themselves: (a) general rule as to good faith required; (b) sales by member to association; (c) purchases with secret advantages; (d) dealings between associations having common members; (e) contribution to capital; expenses, and losses; (f) interest in property of association; (g) compensation for services; (IV.) remedies. 216

TAXES. See also CONSTITUTIONAL LAW, 4; PUBLICATION, 2.

1. The requirement of uniformity in respect to both persons and property, in Ill. Const. 1870, art. 9, § 9, applies only to taxes collected by assessments upon assessable property. *Banta v. Chicago* (Ill.) 611

2. Taxes for the benefit of private individuals are within the direct prohibition of Mo. Const. art. 10, § 3. *State, Garth, v. Switzer* (Mo.) 280

Exemptions.

3. An exemption of an educational institution from taxation will include property held by it for rent, the income of which is used for the work of the institution, unless there are qualifying words which show or tend to show that only property used by the institution or

connected with it is to be exempted. *Kentucky Female Orphan School v. Louisville* (Ky.) 119

4. A school for the free education of female orphan children is a charitable institution and an educational institution not used or employed for gain, within the meaning of a constitutional provision exempting such institutions from taxation, although it is under the control of a particular religious denomination and receives day pupils who are required to pay for their tuition if able to do so, the money received being used in carrying on the work of the institution. *Id.*

On inheritances.

5. A succession tax is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of the state. *State, Garth, v. Switzler* (Mo.) 280

6. A succession tax which is levied at different rates on legacies of different amounts, although made to persons of the same class, is in violation of the rule of uniformity prescribed by Mo. Const. art. 10, § 8. *Id.*

7. The tax to be levied upon the appraised value of the whole estate left by a deceased person, except such part as is exempt under the Missouri act of 1897, amending the act of 1895, by adding § "1a," is a tax upon the property of the deceased, and not upon the devisees and legatees, and is therefore unconstitutional because it is not levied in proportion to the value of the property, as required by Mo. Const. art. 10, § 4. *Id.*

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Taxes; exemption of educational institutions. 119

On successions; constitutionality of. 280

TELEGRAPHS. See also LIBEL AND SLANDER, 2; PLEADING, 5; TRIAL, 6.

The delivery of a telegram to the wife of the addressee, when he is absent from the town, is not, as matter of law, necessary or sufficient to satisfy the obligation of the telegraph company, but its duty in this respect is a question of fact under the circumstances of the case. *Western U. Teleg. Co. v. Mitchell* (Tex.) 209

TELEPHONES. See also EMINENT DOMAIN, 1; TRIAL, 4.

A telephone system may be owned and conducted by an individual without legislative assent, unless there have been some legislative restrictions upon such right. *Magee v. Overshiner* (Ind.) 370

TENANTS IN COMMON. See COTENANCY.

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TOLLS. See MUNICIPAL CORPORATIONS, 1. 40 L. R. A.

TORT. See CONVICTS, 1.

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TRADE NAME.

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Transfer of right to; protection of. 632

TREASURER. See BONDS, §.

TREES. See CARRIERS, 12.

TRESPASS. See also ANIMALS, 6.

NOTES AND BRIEFS.

Trespass; for injury to dogs. 507

For taking bees. 688

TRIAL. See also CRIMINAL LAW, 8; ELISOR.

1. Separation of the jurors during the trial of a murder case may be permitted by the trial court in its discretion. *People v. Ebanks* (Cal.) 269

2. A member of a grand jury impaneled before the trial of a murder case, but which had adjourned to meet in the future, is not incompetent to act as a juror in the trial, which is upon an information and has never been brought to the attention of the grand jury. *Id.*

Questions for jury.

3. The exercise of due care and prudence to prevent injury by dangerous electric wires is a question for the jury. *Perham v. Portland General Elec. Co.* (Or.) 799

4. Negligence of a city, causing the death of a person by contact with an abandoned telephone wire, is a question for the jury, where the wire had been unused for several months, crossing a charged electric light wire in close proximity thereto, and, after sagging so as to interfere with public travel, was cut by a member of the borough council, and wrapped around a post within easy distance of pedestrians, and with one end resting on the ground or in the water. *Mooney v. Luzerne* (Pa.) 811

5. Negligence of a street-railway company in operating an electric car with only one employee who does duty both as motorman and conductor on a line laid on a turnpike at grade where persons, horses, and vehicles are constantly passing, is a question for the jury. *Citizens' Rapid Transit Co. v. Dev* (Tenn.) 518

6. Whether a telegraph messenger who fails to deliver the message at the residence or place of business of the addressee has used ordinary diligence such as the law requires is a question of fact for the jury. *Western U. Teleg. Co. v. Mitchell* (Tex.) 209

Instructions.

7. Requested instructions which have been fully covered by the general charge need not be given. *Western Assur. Co. v. J. H. Mohlman Co.* (C. C. App. 2d C.) 561

8. An instruction against allowing exemplary damages, or damages as a solatium, for grief or anguish, need not be given, where the complaint and the proof are confined to the earning capacity, habits, and probable

length of life of a person killed. *Perham v. Portland General Elec. Co.* (Or.) 799

9. It is erroneous to give a charge in an action for personal injuries to one struck by a train while attempting to board another train, assuming that the train was running at 8 or 10 miles an hour, and suggesting that it usually ran into the station among the passengers at that rate of speed. *Southern R. Co. v. Smith* (C. C. App. 5th C.) 748

10. A charge that the duty of a railroad company is greater to a minor than to an adult when on the track is not erroneous as a statement that mere minority exempts from the obligation to look and listen for a train. *Mack v. South Bound R. Co.* (S. C.) 679

11. An instruction as to the illegality of keeping liquors for sale in the state is not made erroneous as touching a matter not in issue, by adding that keeping them with intent to sell them out of the state would not be unlawful, although there may be no evidence of an intent to sell out of the state. *Erb v. German-American Ins. Co.* (Iowa) 845

12. A request to charge that the production by the defendant of its employee in court to be examined as a witness by plaintiff, if he desired, is sufficient to overcome any presumption or inference against the defendant for failure to introduce him, is properly refused, although such presumption or inference was urged by the plaintiff. *Western & A. R. Co. v. Morrison* (Ga.) 84

13. The failure of a defendant to introduce as a witness its own employee, who was present in court and who had excellent opportunities for knowing the truth of the matter as to which the evidence was conflicting, may be properly commented on by plaintiff's counsel as a circumstance from which an inference can be drawn that, if such employee had been examined, he would have testified to facts prejudicial to the defendant. *Id.*

Verdict.

14. A general verdict of invalidity of a will is not inconsistent with a special verdict finding capacity to transact general business, and to understand the business in which testatrix was engaged when making the will, but also finding undue influence over her at the time. *Orchardson v. Cofield* (Ill.) 256

15. A verdict should be directed in an action against a railroad company for personal injuries to one struck by a train, where the accident occurred in the daytime, and the injured person was in possession of sight and hearing, and the undisputed testimony is that the train could have been seen from 20 yards to $\frac{1}{2}$ of a mile before it reached the place of the accident, notwithstanding his testimony that he looked for the train and did not see it. *Southern R. Co. v. Smith* (C. C. A. 5th C.) 746

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TRUSTS. See also BANKS, 2; CHARITIES, 1; MASSES; SYNDICATES, 6; WILLS, 8.

1. A deed of trust which was never delivered does not amount to a declaration of trust merely because it was recorded by the grantor, when there is nothing to show that he intended to create any trust, except as the deed provided. *Loring v. Hildreth* (Mass.) 127

2. A trust will result to the donor, his heirs or legal representatives, in case of a gift upon trusts that are void in whole or in part for illegality, if the property is not otherwise disposed of. *McHugh v. McCole* (Wis.) 724

3. A mortgage for one half the trust estate, obtained for himself alone by one of the *cestui que trust* from the trustee in a joint trust to pay one half of the income to such *cestui que trust* and the other half to his sister will inure to the benefit of his sister as well as himself, where he obtained the mortgage by pressure when the trustee was financially embarrassed, but concealed these facts from his sister, although it is not shown that any of the trust funds went into the mortgaged property. *De Du Paine's Estate* (Pa.) 552

4. A receipt of trust property as trustee constitutes no consideration for an individual promise to pay an obligation of a predecessor as trustee. *Baxter v. McDonnell* (N. Y.) 670

5. A receipt of trust property by a bishop of the Roman Catholic Church as trustee does not make him liable on the contracts of his predecessor. *Id.*

6. The same evidence is required to constitute a "church trust" and to bind a bishop as trustee thereof as would be required in the case of a layman alleged to be a trustee under like circumstances. *Id.*

7. A trustee's depositing money in a private bank is not negligence as matter of law. *State v. Gramm* (Wyo.) 690

8. A trustee or trustees will be appointed by the court to take gifts and apply them to the purposes of the trust, when necessary to prevent the failure thereof. *Hoeffer v. Clegg* (Ill.) 730

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VENDOR AND PURCHASER. See also MORTGAGE, 3, 4.

The place where property sold is to be delivered is to be determined by the contract between the vendor and vendee. *A. J. Ne Meyer Lumber Co. v. Burlington & M. R. Co.* (Neb.) 534

VERDICT. See COBONER; TRIAL, 14, 15.

VOTERS AND ELECTIONS.

1. The right to vote in the district in which a steamer is tied up while at her home port is not acquired by the purser, who lives on the steamer but who had previously acquired a voting residence in another district of the city. *Jones v. Skinner* (Md.) 752

2. A voting residence at the home port of a steamer is not acquired by a clerk who sleeps in a room on the boat and who has no other room or place to live in and is unmarried. *Howard v. Skinner* (Md.) 753

3. The fact that a person is improperly and illegally permitted to vote at another place will not alone disqualify him from continuing to vote at his actual residence. *Jones v. Skinner* (Md.) 752

4. Pasting or sticking another ticket on an official ballot is not a lawful mode of voting, under Ill. act of 1891, requiring the names of all candidates to be printed on one ballot, except names written thereon by the voter, and requiring the voter to prepare his ballot by marking a cross opposite the name of each candidate voted for. *Fletcher v. Wall* (Ill.) 617

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Sufficiency of residence of voter. 752

WAGES. See ASSIGNMENT, 2; BET; CONTRACTS, 4.

WATERS. See also DEEDS, 2; HARBORS; NUISANCES, 3, 4.

1. Ditches and water rights are real estate under Id. Rev. Stat. § 2825. *Ada County F. Irrig. Co. v. Farmers' Canal Co.* (Id.) 485

2. Mere nonuser does not forfeit a ditch on public lands of the United States. *Id.*

3. A ditch may be conveyed reserving the water right, or the water right may be conveyed reserving the ditch. *Id.*

4. Possessory rights and rights of way for irrigating ditches and the right to the use of water may each have an existence independent of the other. *Id.*

5. A canal constructed by a corporation for the purpose of drainage and also of irrigation cannot be used for the drainage of waters that are unfit for irrigation because they are so strongly mineralized as to be destructive to vegetable growth. *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* (Utah) 851

6. The period of prescription for the use of a canal to carry off water unfit for irrigation or domestic purposes, although the canal was intended for drainage purposes also, begins to run when the drainage is such as to render the water unfit for irrigation or domestic use. *Id.*

7. The fact that a lake, the water of which was mineralized and saline so as to be unfit for irrigation or culinary use, might overflow during freshets and a portion of the water find its way into a canal from which water was taken for irrigation, does not give any right to cut a drain through the rim of the lake so as to conduct more of its waters into such canal. *Id.*

Surface water and seepage.

8. A city which in accordance with Iowa acts 19th Gen. Assem. chap. 89, § 8, and Iowa 40 L. R. A.

Code, 1878, § 527, has made substantial and expensive improvements of a permanent character to keep open the natural outlet for surface water flowing through a watercourse, may maintain an action to enjoin the obstruction of such watercourse by the owners of the land through which it runs, although it is dry at all times except in case of melting snow or unusually heavy rain fall, at which times water flows into it only a few days at a time. *Waverly v. Page* (Iowa) 465

9. Seepage and surplus water from lands irrigated must be controlled by those who irrigate their lands, so as not injuriously to affect the rights of others. *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 851

10. The natural flow of seepage waters from irrigated land to the land of lower proprietors is not a privilege of the owners of the higher land, who bring the water for irrigation by artificial means. *Id.*

11. Water cannot be lawfully gathered in artificial drains and discharged onto the lands of other proprietors. *Id.*

Public supply.

12. The right of a water company to occupy the streets of a city, under Tex. Rev. Stat. 1895, art. 705, is derived from the consent of the city, and not from the state, so that the city can revoke it for sufficient cause. *Palestine Water & P. Co. v. Palestine* (Tex.) 203

13. Specifying as a ground for forfeiting the franchise of a water company its suspension of the supply for a certain period is not a waiver of the right, independently of the terms of the contract, to forfeit the franchise for gross misuse. *Id.*

14. Flagrant disregard by a water company of its obligation to furnish clear and wholesome water, and the furnishing of water which endangers the health and lives of the people, ignoring remonstrances, are sufficient grounds for forfeiting its franchise. *Id.*

15. An offer to perform its contract to furnish wholesome water, made by a water company after suit has been brought to forfeit its franchise, does not entitle it to relief from the forfeiture and an extension of time for the performance. *Id.*

Water rates.

16. A regulation of a water company by which it refuses to turn on water for a building until unpaid rates of previous owners or tenants are paid is unreasonable and invalid, unless authorized by statute. *Turner v. Revere Water Co.* (Mass.) 657

Meter.

17. The fact that a man was using a water meter when he put in fixtures in his building does not affect his rights with respect to the removal of the meter, when he had no contract for its continuance. *Ladd v. Boston* (Mass.) 171

18. The removal of a water meter by a commissioner who is empowered "to furnish and attach meters where he deems it necessary," whereby the consumer is required to pay according to the number of fixtures used, does not infringe the rights of a water consumer

who had so arranged his fixtures when he had the meter that, on its removal, he would have to pay more than twenty times as much as other water takers pay for the same quantity of water, where it does not appear that the rates charged for fixtures were unreasonable or unjustly discriminating. *Id.*

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Forfeiture of franchise of water company. 203

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Separation of riparian rights from upland:—In general; right of fishing; right of wharfage; mere riparian rights; cases merely recognizing the doctrine; adverse possession; partition; method of separation. 393

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Land under, as appurtenant to shore. 397

Interest in water ditch. 485

Appropriation of; collecting and discharging surface water; prescriptive right in ditch. 855

WHARVES. See also HARBORS.

Owners of land abutting on a lake, the title to which is in the state, have the right to construct in the shoal water proper wharves and piers in aid of navigation, but not obstructing it, far enough to reach water navigable for such boats as are in use. *Madison v. Mayers* (Wis.) 685

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Wharfage; right of, separated from upland. 898

Wharves; right to erect:—The rule in England; the rule in this country; cases recognizing the right of the riparian owner; rule where title extends to thread of stream; effect of custom; statutory right; rights as against individuals; right under grant or license; to low-water mark; prescriptive right; the Federal cases; cases denying the right; statutory restrictions; wharves beneficial; regulation of right; harbor lines; right of municipal corporation to build; right of city to regulate; right of New York city; abatement of wharf; effect of street along shore; private contracts; direction of wharf; rights of state and general government; effect of constructing in front of private property; right in wharf which has been erected; log pier; ejection for pier. 685

WILLS. See also CONFLICT OF LAWS, 1; INFANTS, 1; MASSES.
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1. A will is void if procured by a stranger to be executed in his own favor by an aged and feeble woman laboring under the influences of an insane delusion brought upon her through his machinations. *Orchardson v. Co field* (Ill.) 256

2. A will prompted by the testatrix's delusion induced by her belief in spiritualism that the chief beneficiary who was not the natural object of her bounty was gifted with supernatural powers, is invalid for want of testamentary capacity of the testatrix although a mere belief in spiritualism is not proof of insanity. *Id.*

3. A morbid delusion relating to the very matter of the testamentary disposition of one's property deprives her of testamentary capacity notwithstanding that she has capacity to transact ordinary business and knows and understands the business in which she is engaged at the time of making the will. *Id.*

Revocation.

4. A will made before Mass. Stat. 1892, chap. 118, took effect is within its provisions as to revocation by marriage, when the testator married after the act took effect. *Ingersoll v. Hopkins* (Mass.) 191

5. The fact that a will was made in contemplation of marriage does not "appear from the will itself" so as to prevent its revocation by the testator's subsequent marriage, under Mass. Stat. 1892, chap. 118, merely because he wills all his property to a woman whom he appoints as one of the executors and afterwards marries. *Id.*

Construction.

6. The children of certain persons to whom a bequest is made, to take effect after the determination of a life estate, are those living at the death of the testator, and their interests vest upon his death, rather than at the death of the life tenant. *Sherman v. Baker* (R. I.) 717

7. Clauses of a will giving specified portions of the residue are construed to refer to the residue mentioned near the beginning of the will after deducting the burial expenses, and not to the residue after deducting the legacies made in the intervening clauses, where the terms of the will are such that this construction makes a disposition of substantially all the estate, while the other construction would leave a considerable portion undisposed of, except by a final residuary clause tacked on to the will on a separate slip as an evident afterthought, to provide for a possible contingency. *Id.*

8. Language of a will which is plain and unambiguous will not be wrested from its natural import, as creating an unenforceable trust, for the purpose of saving the provisions from condemnation. *McHugh v. McCole* (Wis.) 724

9. Conversion of realty into personality will not be affected by a will if the provisions which require it are void, but the property will descend to the heir at law as realty. *Id.*

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See also MASSES.

Wills; revocation by marriage.

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Undue influence to avoid; effect of insane delusions. 256

Trust in bequest; lapsed and void gifts. 726

WIRES. See ELECTRICAL USES AND APPLIANCES.

WITNESSES.

1. A member of a jury impaneled to try a case is not by this fact debarred from testifying in such case as a witness, if otherwise competent. *Savannah, F. & W. R. Co. v. Quo* (Ga.) 483

2. A constitutional right of an accused 40 L. R. A.

person to compulsory process for his witnesses does not carry a right of the witnesses to claim fees from the county. *Henderson v. Evans* (S. C.) 426

3. The costs and fees of the witnesses of a defendant tried for a misdemeanor are not chargeable to the county under a statute charging the county with such expenses in felony cases. *Id.*

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E. J. M.

